No. 10-699

In The
Supreme Court of the United States

MENACHEM BINYAMIN ZIVOTOFSKY,
by his parents and guardians, ARI Z. and
NAOMI SIEGMAN ZIVOTOFSKY,

Petitioner,

v.

HILLARY RODHAM CLINTON, Secretary of State,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

1. Whether the "political question doctrine" deprives a federal court of jurisdiction to enforce a federal statute that explicitly directs the Secretary of State how to record the birthplace of an American citizen on a Consular Report of Birth Abroad and on a passport.

2. Whether Section 214 of the Foreign Relations Authorization Act, Fiscal Year 2003, impermissibly infringes the President's power to recognize foreign sovereigns.

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OPINIONS BELOW

The opinions of the three-judge panel of the Court of Appeals for the District of Columbia Circuit (Pet. App. A, pp. 1a-43a) are reported at *Zivotofsky v. Secretary of State,* 571 F.3d 1227 (D.C. Cir. 2009). The denial of rehearing *en banc* and Senior Circuit Judge Edwards' Statement (Pet. App. B, pp. 44a-55a) are reported at 610 F.3d 84 (D.C. Cir. 2010). The opinion of the District Court (Pet. App. C, pp.55a-77a) is reported at 511 F. Supp. 2d 97. An earlier opinion of the Court of Appeals (Pet. App. D, pp. 77a-90a) is reported at 444 F.3d 614 (D.C. Cir. 2006). The District Court's first opinion is unreported but is available electronically at 2004 WL 5835212 (D.D.C. Sept. 7, 2004).

JURISDICTION

The Court of Appeals for the District of Columbia Circuit issued its panel opinion on July 10, 2009. (Pet. App. 1a). A timely petition for rehearing en banc was denied on June 29, 2010. On August 31, 2010, the Chief Justice extended the time for filing a petition for a writ of certiorari to November 26, 2010 (Pet. App. E, p. 91a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 214(d) of Public Law No. 107-228 provides as follows:

SEC. 214. UNITED STATES POLICY WITH RESPECT TO JERUSALEM AS THE CAPITAL OF ISRAEL

* * *

(d) RECORD OF PLACE OF BIRTH AS ISRAEL FOR PASSPORT PURPOSES. For purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel.

STATEMENT OF FACTS

1. Petitioner and His Documentation

Petitioner was born at Shaare Zedek Hospital in West Jerusalem on October 17, 2002. His parents, Ari Z. Zivotofsky and Naomi Siegman Zivotofsky, were born in the United States in September 1963 and June 1965, respectively. Pursuant to 8 U.S.C. § 1401(c), petitioner was a United States citizen at birth, having been born to parents who were both United States citizens at the time of his birth.

Petitioner's mother visited the United States Embassy in Tel Aviv on December 24, 2002. She applied for a passport and Consular Report of Birth Abroad ("CRBA") for her newborn son and requested that the place of birth on both documents be

designated as "Israel."[1] Her requests were denied. Petitioner's passport and CRBA list only "Jerusalem" as his place of birth. JA 19-20. They do not include *any* country of birth.

2. State Department Policy

Rules regarding "Passport Preparation" appear in the State Department's Foreign Affairs Manual ("FAM") at 7 FAM 1380-1383. Section 1381 prescribes the format in which entries are to be aligned on a passport. Rules governing "name transcription" appear in 7 FAM 1382. Following that section are the rules regarding "place of birth transcription" in 7 FAM 1383. JA 106-12.

The FAM notes that applicants "who were born in the area formerly known as Palestine and who give their birthplace as Palestine in their application have occasionally vehemently protested the policy of showing Israel, Jerusalem, or Jordan on the passport as their place of birth." 7 FAM 1383.5-4, JA 108-9. After telling consular officers to "explain" to the applicant "the general policy of showing the birthplace as the country having present sovereignty," the FAM authorizes consular officers to "make exceptions to show Palestine as the birthplace in individual cases upon consideration of all the circumstances" for applicants born before 1948.

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[1] Her initial request was that the passport and CRBA read, "Jerusalem, Israel." During the litigation, the request was modified to be consistent with the statute and read only "Israel." The court of appeals accepted this modification. Pet. App. 80a, n. 1.

Applicants with similar objections who were born after 1948 need not show "Israel" as their birthplace because Section 1383.5-4 declares that "the city or town of birth may be listed if the applicant objects to showing the country having present sovereignty." JA 109.

Section 1383.5-6 of the FAM relates specifically to Jerusalem. It reads as follows (JA 110):

> **7 FAM 1383.5-6 Jerusalem**
>
> For applicants born before May 14, 1948 in a place that was within the municipal borders of Jerusalem, enter JERUSALEM as their place of birth. For persons born before May 14, 1948 in a location that was outside Jerusalem's municipal limits and later was annexed by the city, enter either PALESTINE or the name of the location (area/city) as it was known prior to annexation. For persons born after May 14, 1948 in a location that was outside Jerusalem's municipal limits and later was annexed by the city, it is acceptable to enter the name of the location (area/city) as it was known prior to annexation (see subsections 7 FAM 1383.5-4 and 7 FAM 1383.5-5).

A "birthplace transcription guide" appears as "Part II" of 7 FAM 1383, Exhibit 1383.1 (JA 106). With the listing of "JERUSALEM" the "guide" directs: "[Do not write Israel or Jordan. See sections 7 FAM 1383.5-5, 7 FAM 1383.5-6.]" Following "ISRAEL," the "guide" states: "[Does not include

Jerusalem or areas under military occupation. See section 7 FAM 1383.5-5.]" It is undisputed that the State Department has followed the policy, applied in petitioner's case, of rejecting applicants' requests to designate "Israel" as the birthplace of United States citizens born in Jerusalem, even within Jerusalem's pre-1967 "municipal limits."

3. The Statute

Congress enacted H.R. 1646, the Foreign Relations Authorization Act for Fiscal Year 2003, Pub. L. No. 107-228, 116 Stat. 1350 (2002). President Bush signed the law on September 30, 2002. Section 214 of the Act relates, in the first three of its four subsections, to the location of the United States Embassy in Israel. Subsection (a) "urges" the President "to immediately begin the process of relocating the United States Embassy in Israel to Jerusalem." [2]

Subsection (d) is the only provision of Section 214 that is at issue in this case. It concerns whether a United States citizen's official documentation may indicate, on his request, that he is born in "Israel" if he is born anywhere in Jerusalem (including West

[2]This litigation does not concern enforcement of subsections (a), (b), or (c) of Section 214 – all of which pertain to the location of the United States Embassy. The constitutionality of subsection (d) must be determined separately from, and is unaffected by, the constitutionality of the other subsections of the law. *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 130 S. Ct. 3138, 3161 (2010); *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 329 (2006); *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987).

Jerusalem). The law directs the Secretary of State "upon the request of the citizen or the citizen's legal guardian, [to] record the place of birth as Israel."

On signing the Act, the President made the following statement regarding Section 214 in its entirety (without distinguishing between subsection (d) and the first three subsections) ("Ct. Apps. JA" 15-16.)[3]

> Section 214, concerning Jerusalem, impermissibly interferes with the President's constitutional authority to conduct the Nation's foreign affairs and to supervise the unitary executive branch. Moreover, the purported direction in section 214 would, if construed as mandatory rather than advisory, impermissibly interfere with the President's constitutional authority to formulate the position of the United States, speak for the Nation in international affairs, and determine the terms on which recognition is given to foreign states. U.S. policy regarding Jerusalem has not changed.

4. The First Dismissal Is Reversed

Petitioner filed his complaint seeking an injunction, mandamus, and declaratory relief on September 16, 2003. JA 15-18. The government moved to dismiss the complaint and petitioner cross-

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[3] "Ct. Apps. JA" refers to the Joint Appendix filed in the Court of Appeals in No. 07-5347.

moved for summary judgment. JA 1 (Doc. Nos. 6 and 14).

On September 7, 2004, the District Court issued a Memorandum Opinion granting the government's motion to dismiss on the grounds that (1) petitioner lacked constitutional standing because he suffered no "injury in fact" and (2) his complaint presented nonjusticiable political questions because it challenged the Executive Branch's exclusive authority to recognize foreign sovereigns. JA 25-36.

The court of appeals reversed the dismissal of the complaint. *Zivotofsky v. Secretary of State*, 444 F.3d 614 (D.C. Cir. 2006); Pet. App. 77a-90a. The court held that petitioner did have standing to maintain the action and remanded the case for discovery and the development of "a more complete record." 444 F.3d at 620; Pet. App. 90a.

5. Facts Established in Discovery

(a) The purpose of the "place-of-birth" designation – The government admitted, in response to petitioner's Request for Admissions No. 1, that "United States citizens traveling in foreign countries are routinely identified in messages sent to and from the Department of State by (1) name, (2) date of birth, and (3) place of birth." JA 38.

In response to petitioner's Request for Admissions No. 2, the government acknowledged that "identification is the principal reason" that U.S. passports require "place of birth." JA 39.

The government responded to petitioner's Interrogatories Nos. 15 and 16 as follows (JA 66-67):

United States citizens encountering emergencies in foreign countries are identified in cables sent to U.S. posts abroad by the Directorate for Overseas Citizens Services by their name, date, and place of birth.

* * *

The "place of birth" information contained in a passport of a U.S. citizen is included for identification purposes, among other reasons, in messages sent to and from U.S. embassies, consulates, and other posts.

* * *

The "place of birth" specification assists in identifying the individual, distinguishing that individual from other persons with similar names and/or dates of birth, and identifying fraudulent claimants attempting to use another person's identity. The information also facilitates retrieval of passport records to assist the Department in determining citizenship or notifying next of kin or other person designed by the individual to be notified in case of an emergency on the U.S. passport application. The date and place of birth fields are also used in the Department of State American Citizens Services (ACS Plus) electronic case filing system.

Catherine Mary Barry, the Deputy Assistant Secretary of State for Overseas Citizens Services, testified as the State Department's designated representative in a Rule 30(b)(6) deposition. She participated in the drafting of the defendant's response to Request for Admissions and concurred with them. JA 75. She then testified as follows (JA 75-76):

> Q. What other reasons are there for having a place of birth on a passport besides the identification of the passport bearer?
>
> A. For the U.S. government the place of birth is an element that helps us identify someone and that is the principal reason we use place of birth.
>
> Q. Is there any other reason why place of birth is stated or requested from the applicant to be information so it would appear on a passport? Is there any other reason?
>
> A. That is why it is included in the passport.
>
> Q. As a means of identification?
>
> A. As a means of identification.
>
> Q. Again, not to belabor the point, there is no other reason that you can think of as to why it's included?

> A. As to why it is included it is an element of identification.

(b) The number of U.S. passports affected – In response to Interrogatory No. 3, the government stated that it had issued 99,177 passports in a ten-year period that listed "Israel" as the holder's place of birth and 52,569 passports that listed "Jerusalem" as the holder's place of birth. JA 48. In response to Interrogatories 11 and 12, the government stated that from 1998 to June 2006 seven Consular Reports of Birth Abroad had, in error, listed the place of birth as "Jerusalem, Israel." JA 60-61. In the same period of time, five Consular Certificates of Death Abroad had, in error, listed the place of death as "Jerusalem, Israel." JA 62.

(c) The history of the "place-of-birth" designation – An internal Passport Office Memorandum dated May 20, 1963, stated (JA 197; emphasis added):

> The passport used during World War I was the first in which the place of birth of the passport holder was included mandatorily *as a part of the identification of the bearer*. A search of the precedent files in the Passport Office Library did not bring to light any information as to why this was done, but it probably was a wartime travel control measure. The item was included in all subsequent revisions of the passport format, down to and including the present issuances.

A comprehensive publication titled "The United States Passport: Past, Present, Future" was issued

by the Department of State on July 4, 1976. Ct. Apps. JA 221-349. It reported that a new passport designed in 1917 contained "[t]he bearer's description" directly opposite his or her photograph. "The bearer's place and date of birth, and his occupation were included on the passport page as required by foreign governments." Ct. Apps. JA 259. A sample of a 1921 passport is reproduced in the publication, and it shows "Place of birth" as one of several items under "Personal Description." The other specifications are "Age," "Height," "Forehead," "Eyes," "Nose," "Mouth," "Chin," "Hair," "Complexion," "Face," and "Distinguishing marks." Ct. Apps. JA 261. In a 1926 passport, "Place of birth" appears under "Description of bearer" along with "Height," "Hair," "Eyes," "Distinguishing marks or features," "Date of birth," and "Occupation." Ct. Apps. Ct. Apps. JA 262. The Passport Office's 1976 publication reports (Ct. Apps. JA 260-62):

> The names of the city and state for persons born in the United States, and the city and country for persons born abroad, were included in passports issued on and after April 26, 1928.

(d) The international insignificance of the "place-of-birth" designation – In a 1976-1977 survey, 89 foreign countries responded to the United States' inquiry regarding possible deletion of birthplace from United States passports. Many said they would accept United States passports without any indication of a passport-holder's birthplace. The 27 countries that opposed deletion of the birthplace reference gave the following reasons: "(1) the

requirements of their domestic laws, (2) the essential items for an individual's identification, and (3) security considerations." JA 192. None apparently expressed any foreign-policy concern.

In a 1987 General Accounting Office Report to Congress on "Implications of Deleting the Birthplace in U.S. Passports" (Ct. Apps. JA 185-204), the 1977 State Department survey was summarized. The GAO Report concluded that the 1977 survey led the State Department to advise that, "as a practical necessity, passports should continue to include the bearer's birthplace." Ct. Apps. JA 196. The GAO Report did not suggest that there was any foreign-policy significance to the place-of-birth designation on a United States passport.

The GAO Report also summarized a 1986 study done by the State Department. Of 25 countries initially surveyed in 1986, 18 indicated that they would accept United States passports without a specification of birthplace. Ct. Apps. JA 198. Austria reported that it had deleted birthplace on its passports "and no objections have been received through diplomatic channels." Ct. Apps. JA 200. Canada reported that it gave passport-holders the option of omitting a birthplace designation. *Id.*

(e) Accommodation to individual requests – In June 1970, the Passport Office of the State Department instructed consular officers to list "Jordan" as the birthplace of American citizens born "in the Israeli-occupied West Bank" and to permit use of a city or district such as "Hebron" or "Jericho District" only in cases "when the applicant raises

strenuous objections to the use of 'Jordan.'" Ct. Apps. JA 350.

In March 1979 the Department announced that it had "changed its policy regarding the place of birth entry in U.S. passports" because "some persons have objected to showing the foreign country of birth." On this account, the Department directed that "U.S. citizens born abroad who object to showing the foreign country as place of birth may have only the city or town of birth written in their passports." JA 213-14.

Instructions issued by the Office of Passport Services in May 1987 noted that "[f]or persons born outside the United States, the country of birth as it is known at the time of passport issuance is generally written. However, certain exceptions to this policy, as indicated in this Instruction, may be made *when there are objections to the country listing as established by the Department of State*." JA 216; emphasis added. Authorizations to vary from the prescribed designation "if the applicant objects" are specified for "Palestine" (JA 220) and for the "former Canal Zone" (JA 221). Substitution of the city of birth was also permitted by the 1987 Instructions "when there are objections to the country listing as set forth in the Birthplace Guide." JA 222.

With respect to "Palestine," the 1987 Instructions stated that passport applicants "have occasionally objected to showing Israel or Jerusalem as their birthplace in the passport." Consular officers were instructed to "explain" the "general policy of showing the birthplace as the country having present

sovereignty." If the applicant persisted in his or her objection, an applicant born before 1948 could be shown as born in "Palestine" and someone born in 1948 or thereafter may be listed by the city or town of birth "if the applicant objects to showing the country having present sovereignty." JA 220.

Israel is the only country "having present sovereignty" to which this accommodation to the wishes of a person born in "Palestine" could apply. Hence the 1987 Instruction explicitly authorized persons born in Israel who did not want that country's name to be shown in their U.S. passports to avoid the "country having present sovereignty" even if, on the date of their birth, there was no question whatever that they were born within the State of Israel as internationally recognized.

Instructions issued in February 1993 authorized similar departures from the standard country listings of birthplaces whenever the applicant objected to the country listing. JA 170-72. ("Israel, Jerusalem, and Israeli-Occupied Areas"), 3D(8) ("Former Canal Zone"), 3D(9) ("City of Birth Listing"). The following new language was added to the Instruction (JA 170):

> Write ISRAEL as the place of birth in the passport if and only if the applicant was born in Israel itself (this does <u>not</u> include the Gaza Strip, the Golan Heights, Jerusalem, the West Bank or the No Man's Lands between the West Bank and Israel).

(f) Alleged adverse foreign-policy consequences – The only protests ever received by the United States to designation of a birthplace on a United States passport were to titles that offended a foreign government. The Communist government in East Germany wanted to be described in United States passports by its preferred title ("German Democratic Republic"), and the United States refused, for foreign-policy reasons, to accord it that recognition. JA 84-86.

In Answers to Interrogatories and during the deposition of the State Department's designated witness, the government acknowledged that passports indicating "Israel" as a place of birth were issued, assertedly in error, to American citizens born in Jerusalem and that CRBAs have been issued with "Jerusalem, Israel" as the place of birth, as have death certificates. JA 60-63, 92. There is no evidence whatever that these alleged "errors" caused any harm to the foreign-policy interests of the United States.

Thirteen "electronic documents" were discovered in State Department records that contained the words "Jerusalem, Israel." The government's Response to Interrogatories asserted that "[s]ome of these entries have already been corrected and the Department is pursuing the correction of the remainder to the extent feasible to assure conformity with official U.S. government policy." JA 58-60.

(g) The Taiwan precedent – On October 25, 1994, President Clinton signed Pub. L. No. 103-415 (108 Stat. 4299) ("The State Department Authorization Technical Corrections Act of 1994"), which amended

Pub. L. No. 103-236 and directed the Secretary of State to "permit" U.S. citizens born in Taiwan to list "Taiwan" as the place of birth on their U.S. passports or Consular Reports of Birth Abroad. Before and after enactment of that law it was official United States foreign policy not to recognize Taiwan as a foreign state. State Department Cable 299832, sent on November 5, 1994, to all foreign posts stated that the change was to be "effective immediately." It added: "The U.S. recognizes the Government of the People's Republic of China as the sole legal government of China, and it acknowledges the Chinese position that there is only one China and Taiwan is part of China." JA 151. Other contemporaneous documents expressed the Department of State's immediate acquiescence in the Congressional legislation. JA 153-56, 156-63, and 164-65. Prior to enactment of the 1994 legislation, the instruction issued on February 25, 1993, by the Passport Office with regard to "Birthplaces to be Written in Passports" specified that American citizens born in Taiwan were to be identified as born in "CHINA." Ct. Apps. JA 169.

Before enactment of the law, the State Department had taken the position that inscribing "Taiwan" on a United States passport was inconsistent with "the United States' one-China policy" and "would have a negative effect on our relations with the PRC and Taiwan." JA 175-76. The Chinese government had refused to issue visas on American passports showing "Taiwan" as the place of birth. JA 177-78, 180-81, 182-83. Nonetheless, the consulate in Taipei reported in November 1995 that, after the law was passed in 1994, approximately one-

third of U.S. passport applicants chose to specify Taiwan as their place of birth and "some AmCits have indicated they are pleased to be able to list Taiwan." JA 188.

6. The District Court's Second Decision

On October 3, 2006, following discovery, petitioner filed a motion for summary judgment. JA 4 (Doc. No. 39). The government renewed its motion to dismiss and moved alternatively for summary judgment. JA 6 (Doc. No. 44). The district court did not hold a hearing on the motions but issued an order on September 19, 2007, granting the government's motion to dismiss on the ground that the court lacked subject-matter jurisdiction because the complaint "raises a quintessential political question which is not justiciable by the courts." Pet. App. 64a. In its decision remanding the case to the district court the court of appeals had said that whether a "political question" is present in this case "depends on the meaning of § 214(d) – is it mandatory or, as the government argues, merely advisory?" 444 F.3d at 619; Pet. App. 89a. The district court decided that particular question by saying that "it is difficult to construe Section 214(d) as anything but mandatory." 511 F. Supp. 2d at 105; Pet. App. 71a. The district court also dismissed the summary judgment motions as moot. JA 8 (Doc. No. 52).

7. The Court of Appeals' Affirmance

A majority of the court of appeals' panel affirmed the district court's dismissal on the ground that the complaint "raises a nonjusticiable political question" so that the district court and the court of appeals

were "[l]acking authority to consider the case." Pet. App. 15a. Senior Circuit Judge Edwards wrote a 13-page opinion in which he asserted that "the political question doctrine has no application in this case." Pet. App. 18a.

The court of appeals denied a timely petition for rehearing en banc by a 6-to-3 vote, with Judges Ginsburg, Rogers, and Kavanaugh voting for rehearing. Judge Edwards, whose senior status precluded his participation in the rehearing vote, filed a statement in which he said that the case "raises an extraordinarily important question that should have been reheard *en banc* by this court." Pet. App. 47a.

INTRODUCTION

In our complex modern world, when the national interest often requires instantaneous response to dangers from abroad, Congress routinely assigns the lead in foreign relations to the President. Statutes give him great flexibility in dealing with international relations so that American interests in the world arena can be quickly and effectively implemented.

This is the unusual case in which, on a subject that calls for no emergency treatment, Congress decided that an Executive Branch policy implemented by Department of State bureaucrats for several decades was unjust and discriminatory. Congress overwhelmingly enacted a narrow law that gives approximately 50,000 American citizens born in Jerusalem the right to have their passports bear the same "place of birth" as American citizens born

in Tel Aviv or Haifa. To these Americans, personal dignity and conscientious conviction calls on them to identify themselves as born in "Israel."

The Department of State policy prohibiting such an entry in the passports of Jerusalem-born American citizens is singularly arbitrary and discriminatory. The Foreign Affairs Manual repeatedly takes account of the "strenuous objection" expressed by Palestinian Americans born within the borders of Israel to having "Israel" recorded on their passports. To accommodate these "objections," State Department policy permits substitution of a city of birth so that "Israel" may be eradicated. The State Department policy also authorizes entries such as "West Bank" or "Gaza Strip," which are not recognized foreign nations. It bars only supporters of Israel – overwhelmingly Jews who have a religious attachment to the land – from identifying their birthplace in a manner that conforms with their convictions.

The government has chosen to litigate this case by ignoring the narrow and limited impact of the statute Congress enacted. Courts below and this Court have been intimidatingly told that the judiciary is being asked in this case to determine the "status of Jerusalem" – "one of the most sensitive and long-standing disputes in the Arab-Israeli conflict." Gov't Br. In Opp. 2. But the government will surely acknowledge that Jerusalem's "status" for American foreign-policy purposes is not affected by whether Jerusalem-born citizens are allowed to record "Israel" as their place of birth. The "status" of Taiwan, which the United States officially

determined in 1979 to be part of the People's Republic of China, was not affected in 1994 when Congress, with a law paralleling Section 214(d), directed that American citizens born in Taiwan should be permitted to record "Taiwan" as their place of birth.

The government does not claim that the practical implementation of Section 214(d) will have any perceptible impact on American foreign policy. There are now approximately 100,000 U.S. passports that record their holders as having been born in Israel because they were born in cities like Tel Aviv and Haifa. If the 50,000 additional American citizens whose passports now read "Jerusalem" travel internationally with passports that say they are born in "Israel," America's foreign policy will not be impaired.

The government's only claim is that the publicity that accompanies the *change* in practice will be misperceived by Palestinians and the Arab world as an official change in America's position on the status of Jerusalem. The government cites public statements made when Congress enacted Section 214(d) as proof of this purported adverse foreign policy impact. This fear of unjustified and erroneous foreign misperception – apparently transitory when Congress enacted Section 214(d) – cannot be sufficient to nullify the considered judgment of Congress.

The government acknowledged in discovery that the designation of "place of birth" in a passport has no intrinsic foreign-policy significance. A citizen's place of birth is recorded in his or her passport only

to facilitate identification. It is, like the passport-holder's name, date of birth, and photograph, a means of identifying the individual. Although the passport is issued under the direction of the Secretary of State, there are portions of the document – such as the individual identifying entries – that have absolutely no foreign-policy significance.

SUMMARY OF ARGUMENT

1. Senior Circuit Judge Edwards correctly dismissed as "specious" the contention that this case presents a "political question" that is nonjusticiable and that requires dismissal of the complaint. The "political question doctrine" is a prudential rule that removes the judiciary (a) from controversies that are "beyond judicial competence" because they turn on "policy choices and value determinations" that judges are not empowered to make and (b) from matters (such as impeachment) that are exclusively committed for decision to other branches of government. The central issue in this case is a constitutional separation-of-powers question that is well within the competence and expertise of federal courts: Does Congress have the constitutional authority to enact a law that entitles Jerusalem-born citizens to record "Israel" as their place of birth on passports and CRBAs?

2. The six criteria enumerated in the Court's opinion in *Baker v. Carr* as illustrative of a "political question" apply only when a court is asked to resolve a case in which Congress has failed to set legislative standards. The relevant precedent for this case – in which the lower courts were asked to enforce a

clearly enunciated legislative mandate – is the *Japan Whaling Association* case. In that case, no member of this Court had any difficulty in deciding the controversy (which turned on statutory construction) even though the possible consequence of a decision adverse to the Japanese petitioners was a serious blow to United States' relations with Japan.

3. On the merits of the constitutional issue, we begin with the most-broad constitutional argument. Recent historical research has established that the President's "power to recognize foreign sovereigns" was not intended, by the original understanding of the Founding Fathers, to be a "power" at all. It was a ceremonial duty, assigned to the President as a practical measure. A Congressional statute cannot be invalidated as interfering with this ceremonial function.

4. If a Presidential "power to recognize foreign sovereigns" does exist, it does not extend to determining whether a particular city or territory is within the foreign sovereign's boundaries. In two cases in which this Court had to determine jurisdiction over foreign territories, the Court assigned equal importance to legislative, as to executive, judgments. And in neither case did the Court indicate that the determination of which jurisdiction governed the foreign territory was ancillary to the "power to recognize foreign sovereigns."

5. Although much-criticized dicta in the *Curtiss-Wright* opinion appears to give the President extra-constitutional exclusive control over America's

foreign policy, this Court's decisions have adopted Justice Jackson's concurring opinion in the *Steel Seizure* case (*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634-55 (1952)) as the governing guideline. Under that standard, the President's power to make foreign-policy determinations is at "its lowest ebb" when those determinations are neither authorized by Congress nor reached following Congress' silence but actually conflict with Congress' enacted laws. Only Presidential actions that can survive cautious scrutiny may nullify Congress' expressed will in the foreign-policy arena.

6. The State Department's refusal to allow Jerusalem-born American citizens to record "Israel" as their place of birth cannot withstand such scrutiny. This prohibition has no rational basis other than a purported fear that Israel's enemies will criticize American policy because they will misperceive the significance of allowing "Israel" to be recorded on passports. The State Department's prohibition against recording "Israel" was, from its inception, erroneous and misguided. The government is now urging that it must be maintained permanently because changing it would be misconstrued. This reasoning justifies the maintenance of every poor and erroneous judgment that may be criticized by a foreign interest if corrected.

7. The folly of the State Department policy is also demonstrated by the fact that State Department personnel have occasionally failed to understand and apply the policy uniformly. Both before this lawsuit

was brought and to this very day, individual citizens born in Jerusalem have reported that passports issued in Washington and New York to citizens born in Jerusalem record "Israel" as the place of birth. Moreover, other departments within the Executive Branch continue to issue official documents reading "Jerusalem, Israel." These documents have apparently not resulted in protests from Palestinians and the Arab world that the government has predicted in this case.

8. The Taiwan experience in 1994 demonstrates that the stated fear of harm to foreign policy is greatly exaggerated. In that case, the People's Republic of China had taken such great offense to passports recording "Taiwan" as a place of birth that it had refused to endorse visas on these passports. The recognition of a separate nation named "Taiwan" was, in and of itself, an affront to China. The same cannot be said of "Israel," which is a recognized nation that Palestinians and the Arab world have learned to accept. Nonetheless, the State Department acquiesced in Congress' directive in 1994 and there was no harm to American foreign policy.

9. The State Department practice effectively repealed by Section 214(d) was discriminatory. It accommodated American citizens who, for personal ideological reasons, are "vehemently" opposed to carrying passports that show "Israel" as a place of birth, but it did not accommodate American citizens – largely Jewish – who feel, with equal vehemence, that they want their passports to show "Israel."

10. Finally, the method chosen by the President to challenge Section 214(d) was an unconstitutional one. If the President believed that the law violated the Constitution, it was his obligation to follow the course described in Article I, Section 7, Clause 2, and issue a veto that would be subject to further consideration by the Congress. Not having vetoed the law and having chosen instead to sign it, the President is obliged to execute the directive of Section 214(d).

ARGUMENT

I.

THE COURTS BELOW WERE ASKED TO ENFORCE A STRAIGHTFORWARD CONGRESSIONAL STATUTE, NOT TO DECIDE A "POLITICAL QUESTION"

Two judges on the court of appeals and the district judge erred in holding that this lawsuit presented a "political question" and was, therefore, beyond the jurisdiction of a federal court. Senior Circuit Judge Edwards described that conclusion as "specious" in his concurring opinion. Pet. App. 18a.

The petitioner's complaint seeks only the enforcement of the very straightforward command of Section 214(d) – a duly enacted law that the President signed. Neither the district court nor the court of appeals was required or requested to consider and evaluate the kinds of unmanageable standards that prudentially remove "political questions" from the jurisdiction of federal courts.

The only legally debatable substantive issue presented in this case is whether Congress' instruction to the Secretary of State in Section 214(d) is within Congress' constitutional authority. That is the kind of question that courts routinely resolve and that the courts below have a constitutional duty to evaluate and decide.

A. The "Political Question Doctrine" Is a Prudential Rule of Justiciability That Bars Courts From Deciding Issues That Are Beyond Judicial Competence and Authority.

The "political question doctrine" is a well-established principle of justiciability and separation-of-powers that is frequently invoked to dismiss claims raising questions that are "beyond judicial competence." 13C Charles A. Wright et al., *Federal Practice and Procedure* § 3534 (3d ed. 2004). The doctrine was the basis for this Court's dismissal of a challenge to the procedure followed by the Senate in impeaching a federal judge (*Nixon v. United States*, 506 U.S. 224 (1993)), and of a complaint seeking "judicial power to assume continuing regulatory jurisdiction over the activities of the Ohio National Guard" (*Gilligan v. Morgan*, 413 U.S. 1, 5 (1973)).

(a) The *Nixon* case – Article I, Section 3, Clause 6 of the Constitution vested "sole power" to try impeachments in the Senate, and it specified the format of the impeachment proceedings. Hence this Court held that review of the Senate's procedure was beyond the judiciary's constitutional authority. There is no comparable provision giving the Executive or the Legislature "sole" authority over all matters that could affect foreign policy, and surely

no constitutional language barring involvement by the Legislative Branch in the personal description of a passport-holder.

(b) The *Gilligan* case – The plaintiffs asked the court to undertake "a judicial evaluation of a wide range of possibly dissimilar procedures and policies approved by different law enforcement agencies or other authorities" – a task that might even be beyond the "technical competence" of a district judge. 413 U.S. at 8. This Court observed that "it is difficult to conceive of an area of governmental activity in which the courts have less competence." 413 U.S. at 10. The Court concluded that it is the "type of governmental action that was intended by the Constitution to be left to the political branches directly responsible – as the Judicial Branch is not – to the electoral process." *Id.* These considerations are not applicable to this case, in which the lower courts have been asked only to issue an order directing the Secretary of State to comply with a statute that permits certain United States citizens to identify themselves on their personal documents as born in "Israel."

Lower federal courts have invoked the "political question doctrine" to dismiss complaints where courts have been asked to make rulings that extend beyond the competence of judges and rest on "policy choices and value determinations" and "matters not legal in nature." *Japan Whaling Ass'n v. American Cetacean Society*, 478 U.S. 221, 230 (1986), citing and quoting from *United States ex rel. Joseph v. Cannon*, 642 F.2d 1373, 1379 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 999 (1982); *Arar v. Ashcroft*, 585

F.3d 559, 575 (2d Cir. 2009); *Lin v. United States*, 561 F.3d 502 (D.C. Cir. 2009); *Eveland v. Director of Central Intelligence Agency*, 843 F.2d 46, 49 (1st Cir. 1988).

Civil lawsuits brought against federal government officials who were arguably executing American foreign policy are illustrative of cases dismissed because the underlying foreign-policy or military determinations are beyond the competence of federal judges. *See*, *e.g.*, *Gonzalez-Vera v. Kissinger*, 449 F.3d 1260 (D.C. Cir. 2006); *New v. Rumsfeld*, 448 F.3d 403 (D.C. Cir. 2006); *Bancoult v. McNamara*, 445 F.3d 427 (D.C. Cir. 2006); *Joo v. Japan*, 413 F.3d 45 (D.C. Cir. 2005); *Schneider v. Kissinger*, 412 F.3d 190 (D.C. Cir. 2005); *see also Pauling v. McNamara*, 331 F.2d 796 (D.C. Cir. 1963), *cert. denied,* 377 U.S. 933 (1964).

In none of these cases had Congress enacted a relevant dispositive law that was claimed by a party to the litigation to be beyond Congress' constitutional power. When a district court's role is to interpret and apply a federal statute, the "political question doctrine" does not bar the court's exercise of jurisdiction. *E.g., Gross v. German Foundation Industrial Initiative*, 456 F.3d 363, 377 (3d Cir. 2006); *Ungar v. Palestine Liberation Organization*, 402 F.3d 274, 280-81 (1st Cir. 2005); *Canadian Lumber Trade Alliance v. United States*, 425 F. Supp. 2d 1321, 1354-57 (Ct. Int. Trade 2006), *aff'd in part, vacated in part, and remanded,* 517 F.3d 1319 (Fed. Cir. 2008); *Gregoire v. Rumsfeld*, 463 F. Supp. 2d 1209 (W.D. Wash. 2006). The ordinary judicial function of construing a federal law and determining

its constitutionality does not present a "political question."

B. The Six *Baker v. Carr* "Elements" Are Not Relevant When the Court Must Decide the Constitutionality of a Statute That Assertedly Conflicts With an Exclusive Presidential Power.

Before *Baker v. Carr*, 369 U.S. 186 (1962), was decided, the "political question doctrine" prevented federal courts from entering the "political thicket" of legislative reapportionment. In his opinion for a Court majority in *Baker v. Carr*, Justice Brennan reviewed this Court's justiciability rulings in various contexts and summarized his conclusions by identifying six "elements" that might be invoked as a ground for denying, on "political question" grounds, the jurisdiction of a district court to consider a particular complaint.

These "elements" apply when a court is asked to make "policy choices and value determinations" on a subject that Congress has failed to address. Before embarking on such uncharted waters, the court should consider the *Baker v. Carr* "elements" to determine whether it is being asked to decide an impermissible "political question." But when – as is true in this case – Congress has considered and decided a "political question" and incorporated that decision in a duly enacted Presidentially-validated federal statute, the court is no longer confronted with an issue that it must test by the *Baker v. Carr* standards. At that juncture, the *only* issue for the court is an issue that is traditionally left to the judiciary and that is routinely decided by judges in

the application and interpretation of constitutional language.

The issue for the court in this case is only whether Congress has the constitutional authority to enact Section 214(d). That issue is not a "political question" but is "interpretation and determination [that] is the essence of judicial duty." *National Treasury Employees Union v. Nixon*, 492 F.2d 587, 603 (D.C. Cir. 1974). This Court has frequently decided comparable constitutional separation-of-powers issues and has not viewed them as nonjusticiable "political questions." *E.g.*, *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 130 S. Ct. 3138, 3149-61 (2010); *Mistretta v. United States*, 488 U.S. 361, 371-79 (1989); *Morrison v. Olson*, 487 U.S. 654, 685-96 (1988); *Bowsher v. Synar*, 478 U.S. 714, 721-32 (1986); *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 942-43 (1983).

C. The Relevant Precedent in This Court Is *Japan Whaling Association v. American Cetacean Society*.

All Justices of this Court agreed in *Japan Whaling Ass'n v. American Cetacean Society*, 478 U.S. 221 (1986), that the interpretation and application of a federal statute that affected United States' relations with Japan was not a "political question" beyond the jurisdiction of federal courts. In an opinion by Justice White, the Court majority repeated the observation in *Baker v. Carr* that "not every matter touching on politics is a political question" and that "it is 'error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.'" 478 U.S. at 229-

230, citing and quoting from 369 U.S. at 209, 211. The *Japan Whaling* decision did not turn on the *Baker v. Carr* "elements" because the central issue depended on construction of a federal statute. This Court noted that "it goes without saying that interpreting congressional legislation is a recurring and accepted task for the federal courts." 478 U.S. at 230. That "recurring and accepted task" is what the lower courts have been asked to do in this case.

In *Japan Whaling* the Court had to interpret 22 U.S.C. § 1978(a)(3), known as the "Packwood Amendment" to the Magnuson Fishery Conservation and Management Act, and determine whether the statute permitted the Secretary of Commerce to exercise his discretion to avoid imposing sanctions on Japan for violating harvest limits for whale species. The Court acknowledged "the interplay between [the Packwood Amendment] . . . and the conduct of this Nation's foreign relations" and recognized "the premier role which *both Congress and the Executive* play in this field." 478 U.S. at 230 (emphasis added). Nonetheless, the entire Court rejected the assertion made by the Japanese petitioners that the claim was not justiciable as a "political question."[4]

Additional observations in the *Japan Whaling* majority opinion are relevant to this case. The Court

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[4] Justice Marshall did not explicitly address the issue of justiciability in the dissenting opinion he wrote for four Justices, but his conclusion that the plaintiffs should prevail in their mandamus action necessarily held that the lawsuit was justiciable notwithstanding the "political question doctrine." 478 U.S. at 241-250.

said in the majority *Japan Whaling* opinion: "The Secretary, of course, may not act contrary to the will of Congress when exercised within the bounds of the Constitution. If Congress has directly spoken to the precise issue in question, if the intent of Congress is clear, that is the end of the matter." 478 U.S. at 233.

In the present case, Congress has "directly spoken" to the issue of how a Jerusalem-born citizen may have his or her place of birth recorded in a United States passport. Congress' intent in this regard could not be more "clear."

If the plaintiffs had prevailed in their *Japan Whaling* lawsuit, the disruption in foreign relations with Japan would have been severe. The same cannot truly be said of the alleged interference with foreign relations described by the government in this case. No foreign government is directly affected, as Japan would have been in the *Japan Whaling* case, by how an American citizen is identified in a U.S. passport. The alleged interference in this case is, at best, secondary, based on how "Palestinians would view" a change in policy. See JA 53 and pp. 47-48, *infra*. In the *Japan Whaling* case, where the potential harm to relations with Japan was much more concrete, this Court considered the merits. Four Justices would have denied the Executive Branch discretion to avoid sanctions authorized – and arguably mandated – that would have disrupted America's relations with Japan. In their view the Packwood Amendment imposed such sanctions unconditionally, and they would have ordered the Secretary of Commerce to enforce them regardless of the "political" consequences to foreign relations.

D. Claims of Individual Personal Rights Are Justiciable Even If They Affect Foreign Affairs.

Petitioner's claim cannot be dismissed on "political question" grounds because it is an assertion of an individual's personal right. Personal rights granted by the Constitution or by statute cannot be denied by closing the courts to them on the ground that they are "political questions" that are not justiciable.

In *Regan v. Wald*, 468 U.S. 222 (1984), this Court considered and decided whether a governmental restriction on travel to Cuba was permissible even though the issue unquestionably affected the foreign policy of the United States. The "political question doctrine" was not thought to be an obstacle to a decision on the merits. The same was true of *Dames & Moore v. Regan*, 453 U.S. 654 (1981), which concerned individual rights to compensation for property taken by Iran.

The District of Columbia Circuit has said that claims based on personal rights "are justiciable, even if they implicate foreign policy decisions." *Committee of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 935 (D.C. Cir. 1988); see *Ramirez del Arellano v. Weinberger*, 745 F.2d 1500, 1515 (D.C. Cir. 1984) (en banc), *cert. granted, judgment vacated,* 471 U.S. 1113 (1985). In this case, Congress granted petitioner a personal individual right to have his passport read "Israel." That right may be enforced judicially regardless of the "political question doctrine."

II.

SECTION 214(d) DOES NOT INFRINGE UPON ANY EXCLUSIVE PRESIDENTIAL POWER

Contrary to the conclusion of the court below, Section 214(d) does not infringe on the President's power to recognize foreign sovereigns for several alternative and independent reasons ranging from broad constitutional doctrine to a particularized appraisal of the specific right conferred by Section 214(d):

First, historical research establishes that the Recognition Clause of the Constitution does not confer any exclusive recognition authority on the President. It merely assigns to him the ceremonial duty to receive foreign ambassadors.

Second, even if, *arguendo*, the Recognition Clause conferred exclusive power in the President to determine which foreign governments should be given official recognition by the United States, that power does not extend to deciding whether a particular city is within or outside the borders of a recognized nation. Nothing in the text of the Constitution or in its policy justifies excluding Congress from such a determination and giving that power only to the Executive Branch.

Third, the State Department policy regarding the identification of a "place of birth" in a United States passport or in a birth certificate is not an exercise of an Executive Branch power to recognize foreign sovereigns. Designations that are not recognized "foreign sovereigns" like "Gaza Strip," "West Bank,"

and "Palestine" are permitted under the State Department policy.

Fourth, the President's authority to conduct the Nation's foreign policy is not exclusive. It may be limited or restricted by Congress. In the absence of legislation, the President has broad discretion to conduct America's foreign affairs. But if Congress enacts legislation that restricts or conflicts with a President's foreign policy decision, Congress' statute controls.

Fifth, the impact of Section 214(d) on the President's conduct of foreign policy is trivial. Official United States recognition of the status of Jerusalem is unquestionably an important component of today's foreign policy. But whether the State Department honors a Jerusalem-born citizen's request that his or her passport or birth certificate record him as born in Israel will have negligible effect on events in the Middle East and on America's role in that region. Only because the Department of State has magnified the issue and issued a self-fulfilling prophecy that if its past policy is altered there will be protests in the Arab world is it at all likely that compliance with Section 214(d) will generate any foreign criticism whatever.

Sixth, there is compelling evidence that little or no harm is done to American foreign-policy interests by official action recognizing that Jerusalem is within Israel and describing Jerusalem-born citizens as born in Israel. There has been no international reaction whatever to the many times that "Jerusalem, Israel" appears in official documents of United States agencies, including Executive Branch

Departments (and even the Department of State) and to the assertedly "erroneous" issuance of official documents that identify individuals born in Jerusalem as born in "Israel."

Seventh, a persuasive precedent is the enactment of a virtually identical statute in 1994 directing that "Taiwan" be accepted as a permissible place of birth on a passport even though United States foreign policy recognized the People's Republic of China as the sovereign over that territory. China's strong objection to recording "Taiwan" in a passport was demonstrated by the Chinese government's refusal to endorse visas in passports listing Taiwan as the place of birth. Nonetheless, when Congress enacted a law comparable to Section 214(d), the Department of State altered its earlier rule to comply with the statute and there was no perceptible effect on United States' foreign relations.

A. The "Receive Ambassadors Clause" Does Not Give the President Exclusive Authority To Recognize Foreign Sovereigns.

Article II, Section 3 of the Constitution declares that the President "shall receive Ambassadors and other public Ministers." The late Professor Louis Henkin noted that unlike the authority to appoint ambassadors, which is included among "Presidential powers," the authority to receive foreign ambassadors "seems to be couched rather as a duty, an 'assignment.'" Louis Henkin, *Foreign Affairs and the United States Constitution* 37-38 (2d ed., Oxford Univ. Press 1996) (1972).

In *THE FEDERALIST NO. 69*, Alexander Hamilton characterized this Presidential prerogative as "more a matter of dignity than of authority," and called it "a circumstance which will be without consequence in the administration of the government." He explained that the President was assigned this task so that it would not be necessary to convene a house of Congress "upon every arrival of a foreign minister, though it were merely to take the place of a departed predecessor." [5]

Recent exhaustive studies of the original understanding of the Founding Fathers have reached the conclusion that the "Receive Ambassadors Clause" was not intended to confer on the President the authority to recognize foreign sovereigns – and surely not the *exclusive* authority to do so. *See* David Gray Adler, *The President's Recognition Power*, *in* THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY 133-157 (Univ. of Kansas Press 1996); Robert J. Reinstein, *Recognition: A Case Study on the Original Understanding of Executive Power*, 45 UNIV. RICH. L. REV. 801 (2011). The Clause was designed to give the President the ceremonial task of greeting foreign emissaries. It was not intended to be the source for any substantive power.

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[5]Hamilton modified his views in 1793. David Gray Adler, *The President's Recognition Power*, *in* THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY 133, 144-146 (Univ. of Kansas Press 1996). The *Federalist* discussion is, however, the best evidence of the original understanding of the draftsmen of the Constitution.

Professor Reinstein described his analysis of the "Receive Ambassadors Clause" and the "Executive Vesting Clause" (Article II, Section 1) as focused "on a question never before examined in the literature." As a result of his study he reached the following conclusions: "[T]here is no originalist basis for the proposition that a plenary recognition power was vested in the President." 45 UNIV. RICH. L. REV. at 820. "There is no recorded evidence that any of the participants in the drafting and ratifying of the Constitution – Federalists and Anti-Federalists alike – understood that any provision in the Constitution *vested* such a power in the presidency, and certainly not a power that is plenary in nature." *Id.* at 862 (emphasis original).

The judges of the district court and the court of appeals in this case said that it is "well established" that the "Receive Ambassadors Clause" gave the President "exclusive and unreviewable constitutional power" to recognize foreign sovereigns. Pet. App. 9a, 11a, 42a-43a, 66a.[6] The Solicitor General's Brief in Opposition in this Court also asserts that this constitutional clause gives the President exclusive recognition powers that Congress "has no authority to override." Br. in Opp. 8, 12. In fact, the basis for the government's claim of such exclusive authority

[6] The majority opinion in the court of appeals actually went beyond conferring recognition power on the President. It said that the President "has exclusive and unreviewable constitutional power to keep the United States *out of the debate over the status of Jerusalem*." Pet. App. 11a (emphasis added). No source was cited for what appears, on its face, to be a restriction on speech. Congress could – and obviously has – placed the United States into the debate over Jerusalem's status.

in the President is not "well established" by any decided case, and it is contrary to the historical evidence.

The Solicitor General relies on dicta from opinions of this Court (Br. In Opp. 8-9) but ignores other dicta in this Court's opinions that assign the recognition power jointly to the President and to Congress. *Boumedienne v. Bush*, 553 U.S. 723, 753 (2008) ("[T]he Court has held that questions of sovereignty are for *the political branches* to decide" (emphasis added); *Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 380 (1948) ("[T]he determination of sovereignty over an area is for *the legislative and executive departments*") (emphasis added); *Jones v. United States*, 137 U.S. 202, 214 (1890) ("All courts of justice are bound to take judicial notice of the territorial extent of the jurisdiction exercised by the government whose laws they administer, or of its recognition or denial of the sovereignty of a foreign power, as appearing from the public acts *of the legislature and executive*. . . . ") (emphasis added); *Cherokee Nation v. Georgia*, 30 U.S. 1, 46-47 (1831) ("[T]he existence of foreign states cannot be known to this court judicially except by some act or recognition of *the other departments of this government*.") (emphasis added).

Congress' authority to legislate on the subject of recognition was demonstrated when the Philippines were declared independent. In the Hare-Hawes-Cutting Act, Pub. L. No. 72-311, 47 Stat. 761, 768 (1933), Congress overrode President Hoover's veto and directed that "the President . . . shall recognize the independence of the Philippine Islands." This

direction regarding recognition was repeated the following year in the Tydings-McDuffie Act, Pub. L. No. 73-127, 48 Stat. 456, 463 (1934). Congress has also enacted legislation that affects the recognition of Taiwan (22 U.S.C. § 3303(b)(1)) and Cuba (22 U.S.C. § 6065, 6066).

From the historical evidence of the original understanding of the Founding Fathers, the statements made in the opinions of this Court, and Congress' involvement in the recognition of foreign sovereigns, it is surely not "well established" that the President has exclusive "Recognition Power." Indeed, a more reasonable conclusion is that recognition of foreign sovereigns is a shared responsibility and power of the President and the Congress.

B. The "Recognition Power" Does Not Include a Power To Determine Whether a Particular City Is Within the Borders of a Recognized Sovereign.

Assuming *arguendo* that the President does have exclusive authority to recognize foreign sovereigns, that power does not make the President the final unreviewable arbiter of the borders of a sovereign that has been recognized.

None of the lower-court opinions in this case cited any judicial precedent – whether it be a decision of this Court or of any lower court – that held that the President is the exclusive governmental authority who may decide whether a particular city or area is within the borders of an officially recognized nation. Decisions of this Court have indicated that both "political departments" – the Congress and the President – are to be involved in determinations

regarding the jurisdiction over a particular foreign territory.

In *Jones v. United States*, 137 U.S. 202, 212 (1890), the central issue was whether the island of Navassa belonged to Haiti or had been "appertained" by the United States. This Court looked, *inter alia,* to Congressional legislation. The Court said: "Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but a political question, the determination of which *by the legislative and executive departments* of any government conclusively binds the judges, as well as all other officers, citizens and subjects of that government." (Emphasis added.)

Similarly, in *Pearcy v. Stranahan*, 205 U.S. 257 (1907), in which the central issue for customs duty purposes was Cuban jurisdiction over the Isle of Pines, this Court considered "the action of *both political departments*" in reaching its judgment. 205 U.S. at 272 (emphasis added). Among the relevant considerations was a Congressional statute (the "Platt Amendment") that had omitted the Isle of Pines from Cuba's "constitutional boundaries."

The language on which the courts below and the Solicitor General rely in asserting that the President has exclusive authority to determine whether territory is within the borders of a foreign nation appears in *Williams v. Suffolk Ins. Co.*, 38 U.S. 415, 420 (1839), where the President's determination

regarding jurisdiction over the Falkland Islands was said to be "conclusive on the judicial department." [7] There was, however, no determination made in *Williams* by the Congress, and the Court's opinion stated only that the President's decision regarding jurisdiction over the Falkland Islands was conclusive "on the judicial department." Hence the *Williams* case does not address the power of Congress on the subject. We acknowledge that, in the absence of a statute, the judicial branch may not overrule or disagree with a Presidential determination of jurisdiction over particular territory. But when, as is true here, Congress conflicts with the Executive Branch's conclusion on this issue, it is Congress' decision that controls.

Finally, it is noteworthy that in none of this Court's cases concerning jurisdiction over foreign territory did the Court rely on the President's "Recognition Power." It is, therefore, fair to infer that if the "Recognition Power" gives the President some exclusive authority to grant official status to foreign sovereigns, that power does not extend to determining the borders of recognized sovereigns or to deciding whether a particular city or territory is within the foreign nation's jurisdiction.

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[7] The quotation in the majority opinion of the court of appeals (Pet. App. 10a) is from the argument of counsel and not from the decision of this Court. We acknowledge, however, that the Court's opinion affirmed the proposition that – at least in the absence of any contrary indication from the legislative branch – the President's determination was binding on the judiciary.

C. The State Department's Designation of Place of Birth in a Passport or Birth Certificate Is Not an Exercise of the President's Authority To Recognize Foreign Sovereigns.

The courts below and the Solicitor General have sought to justify the State Department's refusal to permit "Israel" to be listed on the passport or birth certificate of a Jerusalem-born American citizen on the ground that the passport refusal implements the President's authority to recognize foreign sovereigns. This rationale might be credible if place-of-birth designations on passports or CRBAs were, in fact, limited to sovereigns that the United States has formally recognized. In that event, the place-of-birth designation could be viewed as part and parcel of a national policy that limits legal rights and benefits (such as the right to sue) to foreign nations that have been formally recognized by the President.

But the actual administration of the place-of-birth rules belies this justification. The applicable provisions of the Foreign Affairs Manual authorize designating "GAZA STRIP" or "WEST BANK" as a place of birth. JA 109-110. Neither the Gaza Strip nor the West Bank is a sovereign that the United States has ever recognized.

Nor has Palestine ever been recognized as a sovereign by the United States. Yet the Foreign Affairs Manual declares, "PALESTINE is the alternate acceptable entry provided the applicant was born before 1948." JA 110. These illustrations demonstrate that the passport designation has nothing to do with any authority to recognize foreign sovereigns.

D. The President Does Not Have Exclusive Authority To Conduct the Nation's Foreign Policy.

Justice Sutherland's celebrated and much-criticized dicta in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-320 (1936), are frequently cited to support the proposition – accepted by the courts below and advocated by the Solicitor General – that the President has "the very delicate, plenary and exclusive power . . . as the sole organ of the federal government in the field of international relations." In the *Curtiss-Wright* case, however, the President was acting under a broad delegation of authority conferred by Congress. Indeed, Justice Sutherland noted, "Practically every volume of the United States Statutes contains one or more acts or joint resolutions of Congress authorizing action by the President in respect of subjects affecting foreign relations, which either leave the exercise of the power to his unrestricted judgment, or provide a standard far more general than that which has always been considered requisite with regard to domestic affairs." 299 U.S. at 223.

When the President acts in the foreign-policy arena pursuant to Congressional authorization, he may suspend provisions of an otherwise applicable law. This Court has recently cited the *Curtiss-Wright* opinion as authority for such a holding. *Republic of Iraq v. Beaty*, 129 S.Ct. 2183, 2189 (2009). In these circumstances, Congress might "think it prudent to afford the President some flexibility." *Id.* That principle does not apply, however, when the President acts without

Congressional authorization or, as in this case, contrary to Congress' policy as expressed in a duly enacted law.

Professor Henkin's treatise on "Foreign Affairs and the United States Constitution" notes that "in the competition for power in foreign relations," Congress has an "impressive array of powers expressly enumerated in the Constitution." *Id.* at 63-82. The view of the Congress on its powers was expressed in a 1864 House Resolution. It declared that "Congress has a Constitutional right to an authoritative voice in declaring and prescribing the foreign policy of the United States . . . and it is the Constitutional duty of the executive department to respect that policy, not less in diplomatic negotiations than in the use of national forces when authorized by law . . . ." Cong. Globe, 38th Cong., 2d Sess. 65-67, quoted in Henkin, *op. cit.* at 77.

Notwithstanding the broad language in the *Curtiss-Wright* opinion, this Court has never held that if the President's foreign-policy determination conflicts with Congress', the President prevails. *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *United States v. Pink*, 315 U.S. 203 (1942); and *United States v. Belmont*, 301 U.S. 324 (1937), sustained the foreign-policy authority of Presidents to enter into executive agreements that affected the rights of individual Americans without securing Congressional approval. But in none of these cases did Congress explicitly disagree with the Executive Branch decision.

In *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003), this Court held that *federal*

foreign-policy objectives can impliedly preempt inconsistent state laws. Although the *Garamendi* majority opinion cited Justice Sutherland's *Curtiss-Wright* decision and noted the "lead role in foreign policy" that the President occupies (539 U.S. at 414-415), it did not address the distribution of foreign-policy authority between the President and the Congress.

Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634-55 (1952), has been adopted by this Court as "the accepted framework for evaluating executive action in this [foreign-policy] area." *Medellin v. Texas*, 552 U.S. 491, 524. That concurring opinion sets out a "familiar tripartite scheme." *Id.* This case falls within Justice Jackson's third category – "[w]hen the President takes measures incompatible with the expressed or implied will of Congress." 343 U.S. at 637. Hence "his power is at its lowest ebb" and the President's "claim to a power at once so conclusive and preclusive must be scrutinized with caution." *Id.* at 638. The State Department's bar against designation of "Israel" on the passport or birth certificate of a Jerusalem-born American citizen cannot withstand such scrutiny.

E. Section 214(d) Will Have Negligible or Trivial Impact on American Foreign Policy.

In discovery petitioner inquired how implementation of Section 214(d) would cause "harm to the foreign policy of the United States." The government's response to Interrogatory No. 5 stated that the statute would "adopt a policy or practice that equated to officially recognizing Jerusalem as a

city located within the sovereign state of Israel" and that this "would represent a dramatic reversal of the longstanding foreign policy of the United States for over half a century, with severe adverse consequences for U.S. national security interests." JA 49-50. The response went on to state that "[t]he Palestinians would view any United States change with respect to Jerusalem as an endorsement of Israel's claim to Jerusalem and a rejection of their own." JA 53. The government asserted that Congress' enactment of Section 214(d) "provoked strong reaction throughout the Middle East," that "Palestinians from across the political spectrum strongly condemned all four Jerusalem provisions under Section 214," and it cited various "statements condemning the law." JA 53-54.

This response essentially asserts that the mistaken *perception* by "Palestinians" and enemies of Israel that American policy regarding Jerusalem has been "dramatically reversed" justifies nullification of a Congressional enactment. The obvious counter to this misperception, however, would be a public affirmation by the Department of State that American policy regarding Jerusalem has not changed, and that the law enacted by Congress only gives individuals born in Jerusalem the right to describe themselves as born in "Israel."

The government's stated rationale for viewing Section 214(d) as harmful to American foreign policy is a self-fulfilling prophecy. Once the State Department has announced publicly that there will be "strong reaction" and condemnations by Palestinians if its past practice – no matter how

erroneous it may have been – is abrogated, the implementation of Section 214(d) inevitably results in protest and condemnations from Palestinians. If this rationale is approved, any State Department policy – no matter how erroneous or misguided – must be retained forever because any change would generate protest.

In fact, the FAM grants Palestinian-American passport-holders great leeway in selecting a place of birth for their own passports. Consular officers and Department of State officials have been instructed, in virtually every instance other than the case of Jerusalem-born citizens, to apply the place-of-birth requirement flexibly in order to accommodate the personal ideologies and sentiments of passport-holders. *See* pp. 3-4, *supra.* Any Palestinian who objects to having "Israel" in his or her passport may eliminate that country designation totally and list only his or her city of birth. If born before 1948, the passport-holder may list "Palestine" – a country that did not exist – in order to avoid having "Israel" in his or her passport. Section 214(d) grants to Jerusalem-born American citizens who have personal ideological reasons for wanting to see "Israel" on their passports the same flexibility that the current FAM provisions accord to those who object to being recorded as born in "Israel."

There are currently approximately 100,000 American citizens whose passports state that they were born in "Israel" because they were born in cities like Tel Aviv, Haifa, or Beersheba – all of which have been recognized since 1948 as being within Israel. The practical effect of implementing Section 214(d)

is to add a potential 50,000 Americans born in Jerusalem to those whose passports say "Israel."

When a Jerusalem-born American crosses a border with a passport stating that he was born in "Israel," he will be indistinguishable from similar U.S. citizens born in Tel Aviv or Haifa. No "severe adverse consequences for U.S. national security interests" can possibly result from this additional number of American citizens who are identified in an official document as born in "Israel."

Moreover, the history of the place-of-birth entry on a passport and the explanation given by the government in deposition and in its response to discovery demonstrate conclusively that the place-of-birth entry on a passport is designed not for any foreign-policy purpose but only to identify the passport-holder. See pp. 7-10, *supra.* Like the passport-holder's photograph, date of birth, and the physical characteristics that used to be listed on a passport, the place of birth has no foreign-policy significance.

Surveys of foreign governments conducted by the Department of State in 1976-1977 and in 1986-1987 and a "Report to the Congress" provided by the General Accounting Office in August 1987 establish that the place-of-birth entry on a passport is totally devoid of foreign-policy significance. See p. 12, *supra*. Many foreign governments have no objection to the total removal of "place of birth" from United States passports. And no country has viewed this entry on a United States passport as having any significance other than to aid in finding the passport-holder.

F. There Has Been No Adverse Foreign-Policy Consequence from "Clerical Errors" and the Designation "Jerusalem, Israel" in Official Documents of Other Executive Departments.

The government acknowledged in discovery that because of "clerical errors" some United States passports and CRBAs specifying "Israel" have been issued to citizens born in Jerusalem. JA 50. No "severe adverse consequences" have resulted from the "erroneous" governmental issuance of these documents. Moreover, these "errors" continue to occur, as the *amicus curiae* brief of the Zionist Organization of America reports.

Nor is the prohibition applied to passports and CRBAs by the State Department universal throughout the Executive Branch. The *amicus curiae* brief of the Zionist Organization of America reports that in many Executive Branch departments the designation "Jerusalem, Israel" appears. Identification of Jerusalem within Israel by Departments such as the Departments of Justice, State, and Defense has not led to protests and condemnations by Palestinians.

G. No Harm to American Foreign Policy Resulted from the Virtually Identical 1994 Law Directing That "Taiwan" Be a Permissible Place of Birth Notwithstanding the President's Recognition of China.

In 1994 Congress enacted Pub. L. No. 103-236. Section 132 (amended by Pub. L. No. 103-415) directed that "Taiwan" be recorded, on request, as the place of birth on passports of American citizens

born in Taiwan. By 1994 the United States no longer recognized Taiwan as independent from China. The People's Republic of China was officially deemed to be the sole legal government of the area that included Taiwan.

The government of the People's Republic of China objected so strenuously to designation of "Taiwan" on an American passport that it had, prior to 1994, refused to endorse visas on passports that recorded "Taiwan" as the passport-holder's place of birth. There was, therefore, substantial basis for apprehension over the harmful consequences of an official policy that permitted "Taiwan" to be recorded as a place of birth on a passport.

Moreover, recording "Taiwan" on a U.S. passport was a more serious and direct conflict with American foreign policy in 1994 than recording "Israel" after 1967. Neither the United States nor the People's Republic of China recognized the existence of a sovereign known as "Taiwan," and endorsing that name on a United States passport was an affront to China. On the other hand, Palestinians and the Arab world know and recognize "Israel" as a sovereign nation. Hence the mere appearance of that name on a passport violates no foreign-policy understanding.

Nonetheless, the Department of State acquiesced immediately when Congress passed a law requiring it to record "Taiwan" as a permissible place of birth. It cabled instructions directing compliance with the statute. JA 148-152, 156-163. The cabled instruction stated: "Although Taiwan may be listed as a place of birth in passports, the United States does not recognize Taiwan as a foreign state. The U.S.

recognizes the government of the People's Republic of China as the sole legal government of China, and it acknowledges the Chinese position that there is only one China and Taiwan is part of China." JA 151, 154.

There is no meaningful difference between the 1994 experience with Taiwan and the 2002 Congressional enactment of Section 214(d). If Taiwan could be recorded on a passport because the passport-holder's personal wishes were enacted into law by Congress, the same should hold true after the 2002 enactment that prescribed recording "Israel" for any Jerusalem-born citizen who requests it.

III.

SECTION 214(d) IS APPROPRIATE PASSPORT LEGISLATION

The Thirty-Fourth Congress enacted passport legislation in 1856 authorizing the Secretary of State "to grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by such diplomatic or consular officers of the United States, and under such rules as the President shall designate and prescribe for and on behalf of the United States." 11 Stat. 52, 60-61 (1856).

Another Passport Act was passed in 1926 by the Sixty-Ninth Congress. 44 Stat. 887. The 1926 law specified that the validity of a passport was "limited to a period of two years." Congress has dealt frequently and repeatedly with the subject of passports, and this Court has looked to Congress' expressed policy and intention in resolving passport

issues. *E.g.*, *Regan v. Wald*, 468 U.S. 222 (1984); *Haig v. Agee*, 453 U.S. 280 (1981); *Zemel v. Rusk*, 381 U.S. 1 (1965). Section 214(d), which controls one line on the American passport, is a legitimate and permissible Congressional directive in the context of Congress' authority to legislate on the form and content of a passport.

IV.

SECTION 214(d) REMEDIES THE FAM'S DISCRIMINATION AGAINST SUPPORTERS OF ISRAEL

The terms of the Foreign Affairs Manual ("FAM") discriminate against supporters of Israel who would like personally, or through their children, to be identified with the State of Israel. Only with respect to "Palestine," "Israeli – Occupied Areas," and "Jerusalem" does the FAM direct that the wishes of the passport-holder be overridden by a national policy.

Individuals born in Tel Aviv or Haifa after 1948 – when Israel was officially recognized by then-President Truman – have the option of listing their city or town of birth "if the applicant objects to showing the country having present sovereignty" – *i.e.,* Israel. Hence the FAM authorizes acceding to the wishes of a passport-holder who wants not to be identified with Israel but does not make a similar accommodation for those who support Israel.

With regard to "Israeli-Occupied Areas," the existing practice is absolutely to prohibit, regardless of the passport-holder's wishes, any reference to

Israel if the baby is born on the Golan Heights or on the West Bank. A "Note" to 7 FAM 1383.5-5 suggests solicitously that persons born before May 1948 in the West Bank might prefer to have 'Palestine' listed and those born after 1948 may prefer to list their city of birth.

Jerusalem-born Americans who wish to identify with Israel are denied the option of recording "Israel" in their passports. No matter where in Jerusalem an American citizen may be born (including West Jerusalem, which has been part of Israel since 1948), he or she does not have the option given to American citizens born in Tel Aviv or Haifa to specify or suppress the name of a country that accords with his or her ideology. Special provision is made for American citizens born after 1948 in "a location that was outside Jerusalem's municipal limits [on May 14, 1948] and was later annexed by the city." They may, if they choose, "enter the name of the location (area/city) as it was known prior to annexation."

The administration of the place-of-birth entry on a passport is biased against one category of passport-holder – the American citizen born in Jerusalem (or in other areas currently governed by Israel) who views himself or herself (or their children) as born in Israel. In September 2002 Congress rectified this discrimination with the enactment of Section 214(d). That remedial measure should be enforced.

V.

THE PRESIDENT MAY NOT EFFECTIVELY VETO A LAW WITH A "SIGNING STATEMENT"

Petitioner's principal brief in the court of appeals (pp. 28-31) and reply brief (pp. 5-6) challenged the government's refusal to comply with Section 214(d) on an additional constitutional ground, but the court of appeals failed to address that issue in its opinion.

In 2002, when Section 214(d) was enacted, President George W. Bush failed to veto it. He signed the law although he expressed his opinion in a "Signing Statement" that all of Section 214, if read as a mandate, was unconstitutional because it "impermissibly interferes with the President's constitutional authority to conduct the Nation's foreign affairs and to supervise the unitary executive branch." Ct. Apps. JA 15.

The President had a constitutionally permissible course that he could have followed if he disapproved of the duly enacted federal statute. He could have vetoed the law. Instead of exercising a veto, President Bush chose to sign the law.

The Constitution explicitly provides, in painstaking detail, what a President must do if he disapproves of a law enacted by both Houses of Congress. Article I, Section 7, Clause 2 instructs the President to sign legislation if he "approves." The Constitution goes on to direct what the President must do if he does not approve of the legislation:

> [H]e shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it.

The Constitution goes on to direct that "[i]f after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law."

By signing the law containing Section 214(d) while simultaneously announcing in a "Signing Statement" that he will not implement it because it assertedly interferes with authority that resides exclusively with the President. President Bush bypassed the constitutionally mandated procedure. His "Objections" were not sent to the House of Representatives, the House had no opportunity to consider them, and the Senate was given no possibility of considering the President's views and expressing its agreement or disagreement with a vote on overriding the veto.

This Court observed in *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 951 (1983), and again in *Clinton v. City of New York*, 524 U.S. 417, 439-40 (1998), that the power to enact federal statutes may only "be exercised in accord with a single, finely wrought and exhaustively considered procedure" set out in Article I, Section 7, Clause 2 of the Constitution. The President has no authority to vary from this procedure if he

disapproves of legislation and intends not to enforce it.

The effect of President Bush's "Signing Statement" and consequent refusal to enforce Section 214(d) is the same as the effect of the Line Item Veto Act that this Court found unconstitutional in *Clinton v. City of New York*, 524 U.S. 417 (1998). It should be similarly invalidated, and the Secretary of State should be directed to comply with the law that the President signed.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the District of Columbia Circuit should be reversed.

Respectfully submitted,

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