No. 10-___

IN THE

Supreme Court of the United States

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

v.

THE SECRETARY OF STATE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

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.

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The opinions of the three-judge panel of the Court of Appeals for the District of Columbia Circuit (Pet. App. A, pp. 1a-43a, *infra*) 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, *infra*) are reported at 610 F.3d 84 (D.C. Cir. 2010). The opinion of the District Court (Pet. App. C, pp.55a-77a, *infra*) is reported at 511 F. Supp. 2d 97. An earlier opinion of the Court of Appeals (Pet. App. D, pp. 77a-90a, *infra*) 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. 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, *infra*). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE AND REGULATIONS 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.

The relevant provisions of the Foreign Affairs Manual ("FAM"), 7 FAM 1380-1383, appear at Pet. App. F, pp. 92a- 95a, *infra*.

STATEMENT

This is an action by an American citizen born in Jerusalem seeking enforcement of a statutory provision directing the Secretary of State to endorse U.S. passports and Consular Reports of Birth Abroad of American citizens born in Jerusalem with "Israel" as the place of birth upon their request. The District Court dismissed the complaint under Fed. R. Civ. P. 12(b)(1) as "nonjusticiable" on the ground that the case required the court to determine a "political question." *Zivotofsky ex rel. Zivotofsky v. Secretary of State*, 511 F. Supp. 2d 97 (D.D.C. 2007). A divided panel of the court of appeals affirmed the dismissal on jurisdictional grounds. *Zivotofsky v. Secretary of State*, 571 F.3d 1227 (D.C. Cir. 2009). When a petition for rehearing *en banc* was denied, Senior

Circuit Judge Edwards issued an eight-page "Statement" expressing his view that "[t]his case raises an extraordinarily important question that should have been reheard *en banc* by this court." Pet. App. B, p. 47a, *infra*. Active Circuit Judges Ginsburg, Rogers, and Kavanaugh noted that they would have granted rehearing *en banc*.

1. Petitioner and His Documentation

Petitioner was born at Shaare Zedek Hospital in West Jerusalem on October 17, 2002. Both his parents were born in the United States. Pursuant to 8 U.S.C. § 1401(c), petitioner was a United States citizen at birth.

Petitioner's mother 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." Her requests were denied. Petitioner's passport and his CRBA list only "Jerusalem" as his place of birth and 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. Pet. App. F, pp. 92a-95a, *infra*. Rules regarding "place of birth transcription" appear at 7 FAM 1383.

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

> **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. 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 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 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 to "United States Policy with Respect to Jerusalem as the Capital of Israel." Subsection (d) directs the Secretary of State to identify a United States citizen born in Jerusalem, upon the citizen's request, as born in "Israel" on a passport or a Consular Report of Birth Abroad.

On signing the Act, the President made the following statement regarding Section 214 (38 Weekly Compilation of Presidential Documents 1658 (Sept. 30, 2002)):

> 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. On September 7, 2004, the district court granted the government's motion to dismiss on the grounds that (1) the petitioner lacked constitutional standing because he suffered no "injury in fact" and (2) his complaint presented a nonjusticiable political question because it challenged the Executive Branch's exclusive authority to recognize foreign sovereigns.

The court of appeals reversed the district court's decision regarding standing and remanded the case for discovery and the development of "a more complete record." 444 F.3d at 620.

5. Facts Established in Discovery

The government admitted, in response to a Request for Admissions, 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." In response to another Request for Admissions, the government acknowledged that "identification is the principal reason" that U.S. passports require "place of birth."

The government responded to Plaintiff's Interrogatories Nos. 15 and 16 as follows:

> 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 designated 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.

6. The District Court's Second Decision

Following discovery, petitioner filed a motion for summary judgment. The government renewed its motion to dismiss and moved alternatively for

summary judgment. The district court did not hold a hearing on the motions but issued an order granting the government's motion to dismiss under Rule 12(b)(1) of the Federal Rules of Civil Procedure 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." 511 F. Supp. 2d at 102 (p. 64a, *infra*).

7. Rulings by the Court of Appeals

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. A, p. 15a, *infra*. 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. A, p.16a, *infra*.

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. B, p. 47a, *infra.*

REASONS FOR GRANTING THE WRIT

I.

A MAJORITY OF THE DISTRICT OF COLUMBIA CIRCUIT IS MISAPPLYING THIS COURT'S "POLITICAL QUESTION" DECISIONS AND ERRONEOUSLY REJECTING CLAIMS ON JURISDICTIONAL GROUNDS

The court of appeals' majority and the district court both relied principally for their "political question" determination on this Court's decision in *Baker v. Carr*, 369 U.S. 186, 217 (1962). *See* 571 F.3d at 1233 (p. 14a, *infra*); 511 F. Supp. 2d at 102 (p. 63a, *infra*). But both courts misapprehended and misapplied that precedent and this Court's subsequent decisions governing the "political question doctrine."

In *Baker v. Carr* the plaintiffs asked the federal courts to enter the "political thicket" of legislative reapportionment. The litigation was initiated because no legislative remedy had been provided for the plaintiffs' constitutional claims. A federal court was being asked to take jurisdiction in the absence of legislation. In that context, this Court articulated six factors that control whether a federal court has jurisdiction to decide "political questions" *that have not been legislatively resolved* when such questions are presented in a federal complaint.

In this case the government argued in the district court and in the court of appeals that two of the *Baker v. Carr* factors – the "textually demonstrable

constitutional commitment of the issue to a coordinate political department" and "a lack of judicially discoverable and manageable standards for resolving it" (369 U.S. at 217) – required dismissal of petitioner's complaint on "political question" grounds.

But the *Baker v. Carr* factors were irrelevant in this case because petitioner's complaint did not seek resolution by the district court of any "political question." Contrary to the assertions of the district court and the court of appeals' majority, the complaint did not ask the court "to decide the political status of Jerusalem" (p. 67a, *infra*) or "whether Jerusalem is part of Israel" (p. 3a, *infra*). The issue to which petitioner's complaint was directed concerned only the identifying designation of an American citizen's birthplace. If that designation depends, *arguendo*, on an underlying "political question," petitioner has not asked *the court* to resolve that "political question" because that question was resolved *in an explicit statute adopted by a "political branch"* – *i.e.*, the Congress of the United States.

The relevant precedent for this case is not *Baker v. Carr* but *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221 (1986). In the *Japan Whaling* case this Court unanimously rejected the contention that a federal court lacked jurisdiction to decide a case involving interpretation of a statute that was enacted on the basis of Congress' resolution of "political questions."

In its *Japan Whaling* decision this Court quoted the observation it had made in *Baker v. Carr* that it is "error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." 478 U.S. at 229-30, quoting 369 U.S. at 211. The Court went on to explain the "political question doctrine" as applicable because courts are "fundamentally underequipped to formulate national policies or develop standards for matters not legal in nature." 478 U.S. at 230. When a court is not asked to "formulate national policies" or "develop standards for matters not legal in nature" but only to enforce a federal statute, the court is performing a traditional judicial function – even if the statute rests on Congress' determination of "national policies" or "matters not legal in nature."

The view of the majority in the court below conflicts with the most recent edition of a widely accepted treatise on Federal Practice which declares: "Interpretation of statutes affecting foreign affairs is not likely to be barred by the political question doctrine." 13C Wright, Miller, Cooper, Freer, *Federal Practice and Procedure* § 3534.2 at 752 (3d ed. 2008), and cases cited in note 35. Under the rationale of the majority of the court of appeals' panel "statutes affecting foreign affairs," like the statute involved in this case, could neither be enforced nor challenged in court because they relate to "national policies" or "matters not legal in nature" – even if the court is not asked or required to reach any determination on these non-judicial subjects.

The District of Columbia Circuit also applied an expansive view of the "political question doctrine" in

its *en banc* ruling in *El-Shifa Pharmaceutical Industries Co. v. United States*, 607 F.3d 836 (D.C. Cir. 2010). A petition for certiorari is presently pending in that case. *El-Shifa Pharmaceutical Industries Co. v. United States*, No. 10-328. The court below apparently held in abeyance for almost one year a decision on the petition for rehearing *en banc* in this case pending the issuance of the *El-Shifa* ruling. Senior Circuit Judge Edwards' statement regarding the denial of petitioner's request for *en banc* consideration referred and distinguished the *en banc* decision in *El-Shifa* that was published shortly before the lower court's disposition of petitioner's request for *en banc* rehearing. *See* p. 53a-54a, *infra*.

This case is, as Senior Circuit Judge Edwards noted, more clearly beyond the limits of the "political question doctrine" than is *El-Shifa.* The *El-Shifa* plaintiffs challenged a military action ordered by the President, and the litigation did not implicate any federal statute or other Congressional judgment conflicting with the President's. Petitioner's complaint requests, by contrast, that the court enforce a federal statute and, if petitioner is correct, the law relates not to foreign policy but to the form by which an American citizen is to be identified. Hence this case is a more suitable vehicle for reviewing the District of Columbia Circuit's erroneous application of the "political question doctrine."

II.

THE COURT OF APPEALS' "POLITICAL QUESTION" ANALYSIS CONFLICTS WITH THE MORE DISCRIMINATING ANALYSIS OF OTHER CIRCUITS

Senior Circuit Judge Edwards noted that the decision of the majority of the court below "raises an extraordinarily important question" that "calls into question the role of a federal court in our system of justice." Pet. App. B, p. 46a, *infra*. The expansive view of the "political question doctrine" announced by the District of Columbia Circuit in this case will affect many cases in which Executive Branch conduct is challenged by individual plaintiffs, particularly since many such actions are brought in the District of Columbia. The approach of the majority of the court below renders irrelevant Congress' judgment on the policies underlying "political questions" and applies the "political question doctrine" much more broadly than other federal courts of appeals have done.

The broad sweep given the "political question doctrine" by the Court of Appeals for the District of Columbia Circuit in this case conflicts with the more discriminating analysis in the opinions of other Circuits that have rejected requests to dismiss claims – frequently based on federal statutes – as presenting nonjusticiable "political questions." *See*, *e.g.*, *Totes-Isotoner Corp. v. United States*, 594 F.3d 1346, 1352-53 (Fed. Cir. 2010); *Connecticut v. American Elec. Power Co., Inc.*, 582 F.3d 309, 320-32 (2d Cir. 2009), *petition for cert. pending,* No. 10-174;

Lane v. Halliburton, 529 F.3d 548, 557-63 (5th Cir. 2008); *Alperin v. Vatican Bank*, 410 F.3d 532, 548-58 (9th Cir. 2005), *cert. denied sub nom. Order of Friars Minor v. Alperin*, 546 U.S. 1137 (2006); *Romer v. Carlucci*, 847 F.2d 445, 461-62 (8th Cir. 1988) (*en banc*).

Particularly when a case concerns, as this one does, individual liberties, as contrasted with commercial or financial interests, other Circuits have recognized that the "political question doctrine" should not bar an otherwise valid lawsuit. *Khouzain v. Attorney General*, 549 F.3d 235, 249-53 (3d Cir. 2008); *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995); *United States v. Decker*, 600 F.2d 733, 738 (9th Cir. 1979).

In a deliberate legislative judgment, Congress sustained petitioner's right to be identified in official governmental documentation by the country he recognizes as his birthplace. Close scrutiny of the reason why a birthplace is specified in these official documents reveals that it is nothing more than a means of identifying the individual American citizen, and that it is not equivalent to the recognition of a foreign sovereign.

The decision below forecloses a lawsuit challenging the State Department's refusal to comply with the Congressional directive without ever examining the adequacy of the Department's stated justification. It is, therefore, an abdication of the court's duty to determine the lawfulness of governmental conduct that affects the rights of individual citizens.

III.

ON REMAND, THIS CASE WILL DETERMINE THE CONSTITUTIONAL ISSUE WHETHER PRESIDENTS MAY UTILIZE "SIGNING STATEMENTS" TO AVOID THIS COURT'S RULING IN *CLINTON v. CITY OF NEW YORK*

Senior Circuit Judge Edwards said that, in his view, the petitioner "will likely lose on the merits," but he nonetheless believed that the threshold jurisdictional issue was "an extraordinarily important question" that demanded authoritative resolution. Pet. App. B, p. 47a, *infra*. Petitioner disagrees with Judge Edwards' prediction regarding the outcome of this litigation. In addition, we note that a decision by this Court reversing the erroneous "political question" holding of the court of appeals will compel the court below to confront the following important legal issue that the lower courts ignored completely although it was briefed in the district court and in the court of appeals:

May a President sign a duly enacted law that directs the Executive Branch to take certain action while effectively vetoing that law (and avoiding the possibility of a veto-override) by declaring in a "Signing Statement" that he considers the law to be unconstitutional?

If the jurisdictional determination of the majority below is reversed on the ground that dismissal on "political question" grounds is not warranted, the court below will have to decide whether the

Secretary of State may flout the specific terms of a law duly enacted by Congress and signed by the President. President Bush did not choose to veto Public Law 107-228 when it was enacted, but instead determined to sign it and then violate the explicit directive of Section 214(d) on the ground, declared in a "Signing Statement," that it "interferes with the President's constitutional authority to conduct the Nation's foreign affairs and to supervise the unitary executive branch." 38 Weekly Compilation of Presidential Documents 1658 (Sept. 30, 2002).

This action by the President was as defective constitutionally as the procedure authorized by the Line Item Veto Act that this Court found unconstitutional in *Clinton v. City of New York*, 524 U.S. 417 (1998).

The Constitution explicitly provides, in painstaking detail, what a President must do if he does not approve of a law enacted by both Houses of Congress. Article I, Section 7, Clause 2 of the Constitution specifies the veto process that must be invoked. A "Signing Statement" may not bypass the constitutional process.

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 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 August 2006 Report of the

American Bar Association's Task Force on Presidential Signing Statements and the Separation of Powers Doctrine stated (p. 22):

> To sign a bill and refuse to enforce some of its provisions because of constitutional qualms is tantamount to exercising the line-item veto power held unconstitutional by the Supreme Court in *Clinton v. New York, supra*. By honoring his obligation to veto any bill he believes would violate the Constitution in any respect the President honors his oath to defend the Constitution. That obligation ensures that both Congress and the President will be politically accountable for their actions and that the law the President enforces will not be different from the one Congress enacted.

If there were merit to the government's contention that compliance with Section 214(d) interferes with the Executive Branch's exclusive authority to conduct foreign affairs, the President could have constitutionally expressed and implemented his constitutional judgment by vetoing the law when it came to his desk for signature. According to the Congressional Research Service ("CRS"), President Reagan issued 276 signing statements over eight years, 71 of which (26 percent) raised constitutional concerns or objections. President George H. W. Bush issued 214 signing statements over four years, 146 of which (68 percent) raised constitutional concerns or objections. President Clinton issued 391 statements in eight

years, 105 of which (27 percent) raised constitutional concerns or objections. At the time of the 2007 CRS report, President George W. Bush had issued 149 signing statements, 127 of which (85 percent) raised constitutional concerns or questions. Library of Congress, Congressional Research Service (CRS), *Presidential Signing Statements: Constitutional and Institutional Implications,* No. RL33667 (Apr. 13, 2007). The constitutional validity of such Executive Branch nullification of Congressional directives is an important issue that should not be aborted by premature dismissal of petitioner's complaint on erroneous "political question" grounds.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

November 24, 2010

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APPENDIX A

United States Court of Appeals,
District of Columbia Circuit.

Ari Z. ZIVOTOFSKY, M.B.Z. by his Parents And Guardians and Naomi Siegman Zivotofsky, M.B.Z. by his Parents and Guardians, Appellants.
v.
SECRETARY OF STATE, Appellee.
No. 07-5347.

Argued Oct. 17, 2008.
Decided July 10, 2009.

Background: Following dismissal of action, brought by three-year-old child through his United States citizen parents, alleging that child, who was born in Jerusalem, was entitled, pursuant to the Foreign Relations Authorization Act, to have "Israel" listed as his place of birth on his U.S. passport, appeal was taken. The Court of Appeals, 444 F.3d 614, remanded for further development of the record. On remand, government renewed its motion to dismiss or for summary judgment and child cross-moved for summary judgment. The United States District Court for the District of Columbia, 511 F.Supp.2d 97, granted motion to dismiss. Plaintiff appealed.

Holding: The Court of Appeals, Griffith, Circuit Judge, held that issue of whether State Department could lawfully refuse to record United States citizen's place of birth as "Israel" on passport when citizen was born in Jerusalem was nonjusticiable

under political question doctrine.

Affirmed. Edwards, Senior Circuit Judge, filed an opinion concurring.

*1228 Appeal from the United States District Court for the District of Columbia (No. 03cv01921).Nathan Lewin argued the cause for appellants. With him on the briefs was Alyza D. Lewin.

Lewis Yelin, Attorney, U.S. Department of Justice, argued the cause for appellee. With him on the brief were Jeffrey S. Bucholtz, Acting Assistant Attorney General, Jeffrey A. Taylor, U.S. Attorney, and Douglas N. Letter, Appellate Litigation Counsel. R. Craig Lawrence, Assistant U.S. Attorney, entered an appearance.

Before GRIFFITH, Circuit Judge, and EDWARDS and WILLIAMS, Senior Circuit Judges.

Opinion for the Court filed by Circuit Judge GRIFFITH.

Concurring opinion filed by Senior Circuit Judge EDWARDS.

GRIFFITH, Circuit Judge:

**145 It has been the longstanding policy of the United States to take no side in the contentious debate over whether Jerusalem is part of Israel. In this case, the federal courts are asked to direct the Secretary of State to contravene that policy and

record in official documents that Israel is the birthplace of a U.S. citizen born in Jerusalem. Because the judiciary has no authority to order the Executive Branch to change the nation's foreign policy in this matter, this case is nonjusticiable under the political question doctrine.

I.

That the United States expresses no official view on the thorny issue of whether Jerusalem is part of Israel has been a central and calibrated feature of every president's foreign policy since Harry S. Truman. *See* Br. for Appellee at 6; J.A. at 57 (Defendant's Responses to Plaintiff's Interrogatories). State Department policy governing how to describe the status of Jerusalem in passports and Consular Reports of Birth [FN1] of U.S. citizens born there implements the presidential decision to remain neutral. Although the State Department typically records a passport holder's birthplace as the nation with sovereignty over his city of birth, *see* 7 U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL § 1383.1, passports issued to U.S. citizens born in Jerusalem note only the city, *see id.* § 1360, app. D ("For a person born in Jerusalem, write JERUSALEM as the place of birth in the passport. Do not write Israel...."). The State Department follows the same policy for Consular Reports of Birth. *See* Br. for Appellee at 9.

> FN1. A Consular Report of Birth is an official record of U.S. citizenship for a person born abroad. *See* Application for a Consular Report

> of Birth, http:// www. state. gov/ documents/ organization/ 83127. pdf ("A Consular Report of Birth may be issued for any U.S. citizen child under age 18 who was born abroad and who acquired U.S. citizenship at birth.").

In 2002, Congress passed the Foreign Relations Authorization Act, Fiscal Year 2003, Pub.L. No. 107-228, 116 Stat. 1350 (2002) (codified at 22 U.S.C. § 2651 note (2006)). Section 214 of the Act, entitled "United States Policy with Respect to Jerusalem as the Capital of Israel," challenges the Executive's position on the status of Jerusalem. *Id.* § 214, 116 Stat. at 1365. Subsection 214(a), for example, "urges the President ... to immediately begin the process of relocating the United States Embassy in Israel to Jerusalem." *Id.* § 214(a), 116 Stat. at 1365. Under subsection 214(c), Congress forbids the Executive from using appropriated funds for "publication of any official governmental document which lists countries and their capital cities unless the publication ****146 *1229** identifies Jerusalem as the capital of Israel." *Id.* § 214(c), 116 Stat. at 1366. And subsection 214(d), the provision at issue in this case, states:

> 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 [of State] shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel.

Id. § 214(d), 116 Stat. at 1366. In a written statement issued when he signed the bill into law, the President took the view that section 214 is merely advisory because a congressional command to the Executive to change the government's position on the status of Jerusalem would "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." President George W. Bush, Statement on Signing the Foreign Relations Authorization Act, 38 WEEKLY COMP. PRES. DOC.. 1659 (Sept. 30, 2002). Even in signing the Act, the President made clear that "U.S. policy regarding Jerusalem has not changed." *Id.*

Enactment of the law provoked confusion and criticism overseas. The U.S. Consulate in Jerusalem informed the State Department that "[d]espite [its] best efforts to get the word out that U.S. policy on Jerusalem has not changed, the reservations contained in the President's signing statement have been all but ignored, as Palestinians focus on what they consider the negative precedent and symbolism of an American law declaring that Israel's capital is Jerusalem." J.A. at 398 (October 2002 declassified cable from the U.S. Consulate in Jerusalem to the Secretary of State); *see also id.* at 396-97 (October 2002 declassified cable from the State Department to U.S. missions abroad).

In October 2002, Menachem Zivotofsky was born in Jerusalem to parents who are U.S. citizens, making

him a citizen as well. *See* 8 U.S.C. § 1401(c) (2006). In December 2002, Menachem's mother applied for a U.S. passport and a Consular Report of Birth for her son at the U.S. Embassy in Tel Aviv, Israel. She requested that both documents record her son's place of birth as "Jerusalem, Israel." U.S. diplomatic officials told Mrs. Zivotofsky that State Department policy forbade them from recording "Israel" as her son's birthplace. Consistent with its policy, the State Department issued a passport and Consular Report of Birth identifying "Jerusalem" as Menachem's place of birth without reference to Israel.

In September 2003, Menachem (by his parents) filed this action for declaratory and injunctive relief ordering the State Department to comply with the directive in section 214(d) and record "Jerusalem, Israel," as his birthplace in both his passport and Consular Report of Birth. The district court ruled that Menachem lacked standing to complain about the contents of the documents because he could use them regardless of how they described his birthplace. Invoking the political question doctrine, the court also concluded that it was without jurisdiction to consider his claim because there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department." *Zivotofsky v. Sec'y of State,* No. 03-1921, slip op. at 9 (D.D.C. Sept. 7, 2004) (quoting *Baker v. Carr,* 369 U.S. 186, 217, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962)). In the district court's view, the "desired passport wording ... would confer recognition in an official, diplomatic document that Israel has sovereignty over Jerusalem." *Id.* at 10. Such a result, the court

held, would **147 *1230 unlawfully trench upon the Executive's exclusive power to recognize foreign governments. *Id.*

We reversed the district court's decision on standing, concluding that the relevant issue is not whether Zivotofsky can use his passport. He has standing because "Congress conferred on him an individual right to have 'Israel' listed as his place of birth on his passport and on his Consular Birth Report," and "the Secretary of State violated that individual right." *Zivotofsky v. Sec'y of State*, 444 F.3d 614, 619 (D.C.Cir.2006). We also remanded the case for the district court to determine whether section 214(d) is mandatory or advisory, develop a more complete record, and consider the implications, if any, of Zivotofsky's request, first made in his motion for summary judgment, that his passport and Consular Report of Birth record "Israel" as his place of birth, instead of noting "Jerusalem, Israel," as he pleaded in the complaint. *Id.* at 619-20. On remand, the district court granted the Secretary's motion to dismiss for lack of subject matter jurisdiction under FED.R.CIV.P. 12(b)(1), holding again that because the complaint asserts a claim that implicates the President's recognition power, it "raises a quintessential political question which is not justiciable by the courts." *Zivotofsky v. Sec'y of State*, 511 F.Supp.2d 97, 102 (D.D.C.2007).

Zivotofsky appeals the district court's dismissal of his case, which we review de novo. *See Piersall v. Winter*, 435 F.3d 319, 321 (D.C.Cir.2006). We have jurisdiction to consider the appeal under 28 U.S.C. §

1291 (2006). The threshold question before us is whether the courts have jurisdiction to provide Zivotofsky the relief he seeks or whether he must pursue his remedies from the political branches. *See Lin v. United States*, 561 F.3d 502, 504 (D.C.Cir.2009).

II.

[1] In *Baker v. Carr*, the Supreme Court held that courts may not consider claims that raise issues whose resolution has been committed to the political branches by the text of the Constitution. 369 U.S. at 217, 82 S.Ct. 691; *see also Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230, 106 S.Ct. 2860, 92 L.Ed.2d 166 (1986) (stating that the judiciary may not review "policy choices and value determinations constitutionally committed" to Congress or the Executive). Following the framework laid out in *Nixon v. United States*, we begin by "interpret[ing] the [constitutional] text in question and determin[ing] whether and to what extent the issue is textually committed" to a political branch. 506 U.S. 224, 228, 113 S.Ct. 732, 122 L.Ed.2d 1 (1993); *see also Clinton v. Jones*, 520 U.S. 681, 700 n. 34, 117 S.Ct. 1636, 137 L.Ed.2d 945 (1997); *Powell v. McCormack*, 395 U.S. 486, 519, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969). But to perform the analysis prescribed by Nixon, we must first determine "the issue" before us. Only then can we decide whether that issue has been committed by the Constitution solely to the political branches or whether it is a proper matter for the judiciary to resolve. *See Nixon*, 506 U.S. at 228, 113 S.Ct. 732. Relying on section

214(d) of the Foreign Relations Authorization Act, Zivotofsky asked the district court to "order[ ] the [Secretary of State] to issue a passport to [him] specifying [his] place of birth as [Israel]" and to instruct the Executive "to comply with Section 214(d)." Compl. ¶ 9. Given Zivotofsky's claim, the issue before us is whether the State Department can lawfully refuse to record his place of birth as "Israel" in the face of a statute that directs it to do so. *See id.* The issue is not, as the concurrence asserts, "[w]hether § 214(d) ... is a constitutionally valid enactment," Concurring Op. at 1234. This critical difference ****148 *1231** sets us on different paths at the very outset.

[2] It is well established that the Constitution's grant of authority to the President to "receive Ambassadors and other public Ministers," U.S. CONST. art. II, § 3, includes the power to recognize foreign governments. *See, e.g.,* LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 38 (2d ed.1996) (explaining that the ambassadorial receipt clause in Article II "implies [the] power to recognize (or not to recognize) governments"). That this power belongs solely to the President has been clear from the earliest days of the Republic. *See* Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 312-13 (2001) ("Congress never dictated [to President George Washington] which countries or governments to recognize because it understood that the Constitution had shifted the recognition power from Congress to the President."). The Supreme Court has

recognized this constitutional commitment of authority to the President repeatedly and consistently over many years. *See* *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964) ("Political recognition [of a foreign sovereign] is exclusively a function of the Executive."); *Goldwater v. Carter*, 444 U.S. 996, 1007, 100 S.Ct. 533, 62 L.Ed.2d 428 (1979) (Brennan, J., dissenting) ("Our cases firmly establish that the Constitution commits to the President alone the power to recognize, and withdraw recognition from, foreign regimes." (citing *Sabbatino*, 376 U.S. at 410, 84 S.Ct. 923; *Baker*, 369 U.S. at 212, 82 S.Ct. 691; *United States v. Pink*, 315 U.S. 203, 228-30, 62 S.Ct. 552, 86 L.Ed. 796 (1942))).

[3][4] The President's exercise of the recognition power granted solely to him by the Constitution cannot be reviewed by the courts. *See, e.g., Nat'l City Bank v. Republic of China*, 348 U.S. 356, 358, 75 S.Ct. 423, 99 L.Ed. 389 (1955) ("The status of the Republic of China in our courts is a matter for determination by the Executive and is outside the competence of this Court."). A decision made by the President regarding which government is sovereign over a particular place is an exercise of that power. As the Supreme Court explained nearly two hundred years ago, "when the executive branch ... assume[s] a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department." *Williams v. Suffolk Ins. Co.*, 38 U.S. 415, 418, 13 Pet. 415, 10 L.Ed. 226 (1839) (refusing to question the President's decision regarding which country exercised sovereignty over the Falkland Islands); *see*

also *Baker*, 369 U.S. at 212, 82 S.Ct. 691 ("[T]he judiciary ordinarily follows the executive as to which nation has sovereignty over disputed territory...."). As a result, we have declined invitations to question the President's use of the recognition power. *See* *Lin*, 561 F.3d at 508 (refusing to deem residents of Taiwan U.S. nationals and to declare that they are entitled to U.S. passports because courts may not intrude on the Executive's decision to remain silent about Taiwan's sovereignty).

[5] Thus the President has exclusive and unreviewable constitutional power to keep the United States out of the debate over the status of Jerusalem. Nevertheless, Zivotofsky asks us to review a policy of the State Department implementing the President's decision. But as the Supreme Court has explained, policy decisions made pursuant to the President's recognition power are nonjusticiable political questions. *See* *Pink*, 315 U.S. at 229, 62 S.Ct. 552 ("Objections to the underlying policy as well as objections to recognition are to be addressed to the political department and not to the courts."). And every president**149 *1232 since 1948 has, as a matter of official policy, purposefully avoided taking a position on the issue whether Israel's sovereignty extends to the city of Jerusalem. *See* Br. for Appellee at 6; J.A. at 57 (Defendant's Responses to Plaintiff's Interrogatories). The State Department's refusal to record "Israel" in passports and Consular Reports of Birth of U.S. citizens born in Jerusalem implements this longstanding policy of the Executive. *See* *Haig v. Agee*, 453 U.S. 280, 292, 101 S.Ct. 2766, 69 L.Ed.2d 640 (1981) (recognizing

that a U.S. passport is an official government document used to communicate with foreign governments). By asking the judiciary to order the State Department to mark official government documents in a manner that would directly contravene the President's policy, Zivotofsky invites the courts to call into question the President's exercise of the recognition power. This we cannot do. We therefore hold that Zivotofsky's claim presents a nonjusticiable political question because it trenches upon the President's constitutionally committed recognition power.

Zivotofsky argues that the political question doctrine cannot foreclose a court from enforcing a duly enacted law. In his view, this court is asked to do nothing more than interpret a federal statute-a task within our power and competency. To grant the requested relief would not require that we determine the status of Jerusalem, he argues, because enactment of section 214(d) has decided that question. Enforcement of the rights Congress created presents no political question. The government responds that even if we find jurisdiction to consider Zivotofsky's claim, we must nevertheless strike section 214(d) as an unconstitutional infringement on the President's recognition power. We agree that resolving Zivotofsky's claim either at the jurisdictional stage under the political question doctrine or on the merits by striking section 214(d) implicates the recognition power. Only the Executive-not Congress and not the courts-has the power to define U.S. policy regarding Israel's sovereignty over Jerusalem and decide how best to

implement that policy. The question for us is whether Zivotofsky loses on jurisdictional grounds, or on the merits because Congress lacks the power to give him an enforceable right to have "Israel" noted as his birthplace on his government documents.[FN2]

> FN2. The hypothetical lawsuit posed by the concurrence presents a very different issue than the one we face regarding the Executive's decision to recognize (or not to recognize) which country exercises sovereignty over a disputed area. *See* Concurring Op. at 12. We do not hold, as the concurrence seems to assume, that *any* claim quarreling with a State Department passport policy would necessarily implicate the Recognition Power and therefore raise a political question.

Under the Supreme Court's precedent and our own, the answer must be the former. We are aware of no court that has held we cannot or need not conduct the jurisdictional analysis called for by the political question doctrine simply because the claim asserted involves a statutory right. We must always begin by interpreting the constitutional text in question and determining "whether and to what extent the issue is textually committed." *Nixon*, 506 U.S. at 228, 113 S.Ct. 732. The question is not whether the courts are competent to interpret a statute. Certainly we are. But as our recent decision makes clear, we will decline to "resolve [a] case through ... statutory construction" when it "presents a political question which strips us of jurisdiction to undertake that otherwise familiar task." *Lin*, 561 F.3d at 506. In a

case such as this, to borrow the words of Professor Wechsler, "abstention of decision" is required because deciding whether the Secretary of **150 *1233 State must mark a passport and Consular Report of Birth as Zivotofsky requests would necessarily draw us into an area of decision making the Constitution leaves to the Executive alone. *See* HERBERT WECHSLER, PRINCIPLES, POLITICS AND FUNDAMENTAL LAW 11-14 (1961). That Congress took a position on the status of Jerusalem and gave Zivotofsky a statutory cause of action in an effort to make good on its pronouncement is of no moment to whether the judiciary has authority to resolve this dispute between the political branches. We have never relied on the presence or absence of a statutory challenge in deciding whether the political question doctrine applies. *See* *Lin,* 561 F.3d at 506; *S. African Airways v. Dole,* 817 F.2d 119, 123 (D.C.Cir.1987) (noting that although the court had " competence to interpret the meaning of section 306(a)(2) of the Anti-Apartheid Act," it first had to "consider ... whether in doing so [it] would trespass on territory reserved to the political branches"); *Population Inst. v. McPherson,* 797 F.2d 1062, 1070 (D.C.Cir.1986) (determining first whether there was a "constitutional commitment of [the] issue to a coordinate branch," which would prevent the court from considering a challenge to an agency's interpretation of the Foreign Assistance and Related Programs Appropriations Act of 1985). We decline to be the first court to hold that a statutory challenge to executive action trumps the analysis in *Baker* and *Nixon* and renders the political question doctrine inapplicable.

III.

Because we conclude that Zivotofsky's complaint raises a nonjusticiable political question, we affirm the district court's dismissal of his suit for lack of subject matter jurisdiction.[FN3] Lacking authority to consider the case, we do not address the merits of the parties' other arguments. The judgment of the district court is

> FN3. Our concurring colleague raises an interesting point about the distinction between questions we do not have jurisdiction to consider and those that are nonjusticiable. *See* Concurring Op. at 5-7. Although *Baker* makes that distinction, *see* 369 U.S. at 198, 82 S.Ct. 691, the Court's other cases suggest that claims raising political questions fall into both categories. *See, e.g., INS v. Chadha*, 462 U.S. 919, 941, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983). We have consistently dismissed claims raising political questions for want of subject matter jurisdiction once we have found nonjusticiability. *See Lin*, 561 F.3d at 504; *Schneider v. Kissinger*, 412 F.3d 190, 193 (D.C.Cir.2005) ("The principle that the courts lack jurisdiction over political decisions that are by their nature committed to the political branches to the exclusion of the judiciary is as old as the fundamental principle of judicial review." (internal quotation marks omitted)). We do not grapple with this dispute, if one indeed exists, because it makes no practical difference in the outcome of the case. Either

> way, we lack authority to consider Zivotofsky's claim.

Affirmed.

EDWARDS, Senior Circuit Judge, concurring:

In 2002, Congress passed the Foreign Relations Authorization Act, Fiscal Year 2003, Pub.L. No. 107-228, 116 Stat. 1350 (2002) ("Foreign Relations Authorizations Act" or "Act"). The Act was signed into law on September 20, 2002 by President George W. Bush. Section 214 of the Act, entitled "United States Policy with Respect to Jerusalem as the Capital of Israel," includes the following provision which is at issue in this case:

> (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**151 *1234 of the citizen or the citizen's legal guardian, record the place of birth as Israel.

Id. § 214(d).

When the Foreign Relations Authorizations Act was signed into law, the President attached a "signing statement," objecting to portions of § 214. The statement asserted that "Section 214, concerning Jerusalem, impermissibly interferes with the President's constitutional authority to ... determine the terms on which recognition is given to foreign states. U.S. policy regarding Jerusalem has not

changed." President George W. Bush, *Statement on Signing the Foreign Relations Authorization Act, Fiscal Year 2003,* 2 PUB. PAPERS 1698 (Sept. 30, 2002).

Menachem Binyamin Zivotofsky was born in 2002 in Jerusalem. Because his parents are United States citizens, Zivotofsky is also a United States citizen. *See* 8 U.S.C. § 1401(c) (2006). After Zivotofsky's birth, his mother filed an application on his behalf for a consular report of birth abroad and a United States passport. She requested of United States officials that these documents indicate her son's place of birth as "Jerusalem, Israel." United States diplomatic officials informed Mrs. Zivotofsky that passports issued to United States citizens born in Jerusalem could not record "Israel" as the place of birth. When the Zivotofskys received Menachem's passport and consular report, both documents recorded his place of birth as "Jerusalem." On his behalf, Zivotofsky's parents filed this action under § 214(d) against the Secretary of State seeking to compel the State Department to identify Menachem's place of birth as "Israel."

In defending against Zivotofsky's action in this case, the Secretary has pressed two principal arguments:

> [1] Zivotofsky has no judicially enforceable right because his complaint presents a political question. The power to recognize foreign sovereigns-including the power to recognize claims over disputed foreign territory-is textually committed by the Constitution to the President, and is therefore

not subject to judicial override.

[2] Section 214(d) is unconstitutional. Article II assigns to the President the exclusive power to recognize foreign sovereigns, and Congress has no authority to override or intrude on that power.

Appellee's Br. at 18, 21. The Secretary's first argument-that Zivotofsky's claim is a nonjusticiable political question-is specious. The Secretary's second argument, contesting the constitutionality of § 214(d), stands on solid footing.

I. THE POLITICAL QUESTION DOCTRINE HAS NO APPLICATION IN THIS CASE

A. The Issue Before the Court

The Secretary does not doubt that Zivotofsky has standing to raise a viable cause of action under § 214(d) of the Foreign Relations Authorizations Act. Nor does the Secretary doubt that Zivotofsky properly invoked the District Court's statutory jurisdiction under 28 U.S.C. §§ 1331, 1346(a)(2), and 1361. Therefore, the issue before this court is:

> Whether § 214(d) of the Foreign Relations Authorizations Act, which affords Zivotofsky a statutory right to have "Israel" listed as the place of birth on his passport, is a constitutionally valid enactment.

Put another way, the court must decide:

> Whether, in enacting § 214(d), a provision

purporting to address "United States Policy with Respect to Jerusalem as the Capital of Israel," Congress impermissibly intruded on the President's exclusive power to recognize foreign sovereigns.

***1235 **152** These questions involve commonplace issues of statutory and constitutional interpretation, and they are plainly matters for the court to decide. And in answering these questions, this court has no occasion to address a "political question" that is reserved to the exclusive authority of one of the political branches of government.

B. First Principles Governing the Jurisdiction of Federal Courts

In considering whether a matter should be dismissed as a nonjusticiable political question, it is important to recall the first principles that govern the jurisdiction of federal courts:

• "It is, emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803).

• "[F]ederal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred." *New Orleans Pub. Serv., Inc. v. Council of New Orleans,* 491 U.S. 350, 358, 109 S.Ct. 2506, 105 L.Ed.2d 298 (1989); *see also Boumediene v. Bush,* --- U.S. ----, 128 S.Ct. 2229, 2262, 171 L.Ed.2d 41 (2008).

> • "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid; but we cannot avoid them." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404, 5 L.Ed. 257 (1821).

In sum, "[w]hen a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction.... The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied." *Willcox v. Consol. Gas Co. of New York*, 212 U.S. 19, 40, 29 S.Ct. 192, 53 L.Ed. 382 (1909).

C. Nonjusticiable "Political Questions"

The political question doctrine embraces a limited exception to the rule that "federal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred." *New Orleans Pub. Serv.*, 491 U.S. at 358, 109 S.Ct. 2506. As the Supreme Court explained in *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), "[w]here the Constitution assigns a particular function wholly and indivisibly to another department, the federal judiciary does not intervene." *Id.* at 246, 82 S.Ct. 691 (Douglas, J., concurring). The converse of this proposition is that a federal court must not abstain from the exercise of jurisdiction that has been conferred, unless it has been asked to conclusively resolve a question that is "wholly and indivisibly" committed by the Constitution to a political branch

of government. "Underlying these assertions is the undisputed constitutional principle that Congress, and not the Judiciary, defines the scope of federal jurisdiction within the constitutionally permissible bounds." *New Orleans Pub. Serv.*, 491 U.S. at 359, 109 S.Ct. 2506.

The Supreme Court has described the political question doctrine as follows:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government**153 *1236 or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker, 369 U.S. at 217, 82 S.Ct. 691; *see also INS v. Chadha*, 462 U.S. 919, 941, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983); *United States v. Munoz-Flores*, 495 U.S. 385, 389-90, 110 S.Ct. 1964, 109 L.Ed.2d 384 (1990). As explained below, this case in no way fits within the frame of the *Baker v. Carr* "political question" paradigm.

D. The Crucial Distinction Between Jurisdiction and Nonjusticiability

In explaining the political question doctrine, the Court in *Baker v. Carr* was careful to amplify a crucial distinction between "cases withholding federal judicial relief [1] rest[ing] upon a lack of federal jurisdiction [and][2] upon the inappropriateness of the subject matter for judicial consideration-what [the Court has] designated 'nonjusticiability.' " 369 U.S. at 198, 82 S.Ct. 691.

> The distinction between the two grounds is significant. In the instance of nonjusticiability, consideration of the cause is not wholly and immediately foreclosed; rather, the Court's inquiry necessarily proceeds to the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded. In the instance of lack of jurisdiction the cause either does not "arise under" the Federal Constitution, laws or treaties (or fall within one of the other enumerated categories of Art. III, § 2), or is not a "case or controversy" within the meaning of that section; or the cause is not one described by any jurisdictional statute.

Id.

When a federal court dismisses a case because it presents a "political question," it does so not because the court lacks subject matter jurisdiction but, rather, because the "duty asserted can[not] be

judicially identified and its breach judicially determined." *Id.* "[T]he mere fact that [a] suit seeks protection of a political right does not mean it presents a political question." *Id.* at 209, 82 S.Ct. 691. And "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Id.* at 211, 82 S.Ct. 691; *see also Simon v. Republic of Iraq,* 529 F.3d 1187, 1197 (D.C.Cir.2008) (the political question doctrine cannot be invoked to dismiss an action merely because it "may affect the foreign relations of the United States"). As noted scholars have pointed out, "[i]nterpretation of statutes affecting foreign affairs is not likely to be barred by [the] political-question doctrine." 13C CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3534.2 (3d ed.2008), cases cited in n. 35.

The political question doctrine is purposely very narrow in scope, lest the courts use it as a vehicle "to decline the exercise of jurisdiction which is given." *Cohens,* 19 U.S. (6 Wheat.) at 404. As the Court noted in *Baker,*

> [t]he doctrine of which we treat is one of "political questions," not one of "political cases." The courts cannot reject as "no law suit" a bona fide controversy as to whether some action denominated " 'political' " exceeds constitutional authority.

369 U.S. at 217, 82 S.Ct. 691. Unsurprisingly, federal cases in which subject matter jurisdiction

and standing are properly asserted are rarely dismissed as nonjusticiable pursuant to the political question **154 *1237 doctrine. Indeed, since *Baker*, the Supreme Court has only dismissed two cases as presenting nonjusticiable political questions. *See Gilligan v. Morgan*, 413 U.S. 1, 5, 93 S.Ct. 2440, 37 L.Ed.2d 407 (1973) (declining "broad call on judicial power to assume continuing regulatory jurisdiction over the activities of the Ohio National Guard" on the basis of an explicit constitutional textual commitment of that power to Congress and President); *Nixon v. United States*, 506 U.S. 224, 113 S.Ct. 732, 122 L.Ed.2d 1 (1993) (finding request to review Senate impeachment proceedings nonjusticiable in light of explicit textual constitutional commitment of impeachment power to Senate).

The Supreme Court often hears and decides cases bearing major foreign policy implications. *See, e.g., Boumediene*, 128 S.Ct. 2229 (declining to dismiss the case under the political question doctrine and ruling that aliens detained as enemy combatants at United States Naval Station at Guantanamo Bay, Cuba, were entitled to the privilege of habeas corpus to challenge the legality of their detention, even though the United States did not claim sovereignty over place of detention). These cases are not dismissed pursuant to the political question doctrine. The reason is simple: Although the establishment of policies governing foreign relations is the business of the political branches, the determination of the meaning and legality of a congressionally enacted statute is the business of the courts.

E. The Legal Principles Controlling This Case

The principles enunciated by *Baker* and its progeny are really quite simple to comprehend and apply in this case. The controlling principles governing this case are these:

- **The federal courts decide matters of statutory construction and constitutional interpretation.** *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230, 106 S.Ct. 2860, 92 L.Ed.2d 166 (1986) ("[U]nder the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones."); *Chadha*, 462 U.S. at 943, 103 S.Ct. 2764 ("Resolution of litigation challenging the constitutional authority of one of the three branches cannot be evaded by courts because the issues have political implications ...."); *see also Goldwater v. Carter*, 444 U.S. 996, 1002, 100 S.Ct. 533, 62 L.Ed.2d 428 (1979) (Powell, J., concurring in the judgment) ("[The Supreme Court has] the responsibility to decide whether both the Executive and Legislative branches have constitutional roles to play in termination of a treaty. If the Congress, by appropriate formal action, had challenged the President's authority to terminate the treaty ... it would be the duty of this Court to resolve the issue.").

- **When the federal courts review the constitutionality of a challenged statute, they do not infringe the authority of the legislative branch.**

In *Munoz-Flores,* 495 U.S. at 390, 110 S.Ct. 1964, the Supreme Court tellingly stated:

> The Government may be right that a judicial finding that Congress has passed an unconstitutional law might in some sense be said to entail a "lack of respect" for Congress' judgment. But disrespect, in the sense the Government uses the term, cannot be sufficient to create a political question. If it were, *every* judicial resolution of a constitutional challenge to a congressional enactment would be impermissible.

• The federal courts may not decide an issue whose resolution is committed155 *1238 by the Constitution to the exclusive authority of a political branch of government.** *See Baker,* 369 U.S. at 217, 82 S.Ct. 691; *Gilligan,* 413 U.S. at 6-7, 93 S.Ct. 2440; *Nixon,* 506 U.S. at 229-36, 113 S.Ct. 732. This does not mean that a court may not decide a case that merely implicates a matter within the authority of a political branch. Congress, alone, has the authority to pass legislation, but it does not follow from this that the courts are without authority to assess the constitutionality of a statute that has been properly challenged. Rather, the political question doctrine bars judicial review only when the precise matter to be decided has been constitutionally committed to the exclusive authority of a political branch of government. *Compare Nixon,* 506 U.S. at 229-36, 113 S.Ct. 732, *with Powell v. McCormack,* 395 U.S. 486, 519-22, 89 S.Ct. 1944, 23 L.Ed.2d 491

(1969).

• **The courts may, however, decide whether and to what extent a matter is reserved to the exclusive authority of a political branch.** *Baker*, 369 U.S. at 211, 82 S.Ct. 691 ("Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution."); *Powell*, 395 U.S. at 521, 89 S.Ct. 1944 ("[W]hether there is a 'textually demonstrable constitutional commitment of the issue to a coordinate political department' of government and what is the scope of such commitment are questions we must resolve."); *Nixon*, 506 U.S. at 238, 113 S.Ct. 732 ("[C]ourts possess power to review either legislative or executive action that transgresses identifiable textual limits").

• **The courts routinely adjudicate separation-of-powers claims.** As the Court noted in *Munoz-Flores*, 495 U.S. at 393, 110 S.Ct. 1964:

> In many cases involving claimed separation-of-powers violations, the branch whose power has allegedly been appropriated has both the incentive to protect its prerogatives and institutional mechanisms to help it do so. Nevertheless, the Court adjudicates those separation-of-powers claims, often without

suggesting that they might raise political questions. *See, e.g.,* *Mistretta v. United States,* 488 U.S. 361, 371-379, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989) (holding that Sentencing Reform Act of 1984, 18 U.S.C. § 3551 *et seq.,* and 28 U.S.C. § 991 *et seq.,* did not result in Executive's wielding legislative powers, despite either House's power to block Act's passage); *Morrison v. Olson,* 487 U.S. 654, 685-696, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988) (holding that independent counsel provision of Ethics in Government Act of 1978, 28 U.S.C. § 591 *et seq.,* is not a congressional or judicial usurpation of executive functions, despite President's veto power); *INS v. Chadha,* 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983) (explicitly finding that separation-of-powers challenge to legislative veto presented no political question). In short, the fact that one institution of Government has mechanisms available to guard against incursions into its power by other governmental institutions does not require that the Judiciary remove itself from the controversy by labeling the issue a political question.

• If a federal court finds that a political branch has overreached in its **156 *1239 claim of constitutionally committed authority, the court will decide the matter that is properly before it for resolution on the merits. *Baker,* 369 U.S. at 211, 82 S.Ct. 691 ("Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in

constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution"); *accord* *Powell*, 395 U.S. at 521, 89 S.Ct. 1944.

• **If a federal court determines that a political branch has acted within the compass of exclusive authority granted to it by the Constitution, the court may determine whether the other branch has acted to infringe that authority. The court does not review the substantive decision reached by the branch with exclusive authority; it merely determines whether the exercise of that authority has been infringed by the other branch.** *Baker*, 369 U.S. at 212, 82 S.Ct. 691 ("[O]nce sovereignty over an area is politically determined and declared, courts may examine the resulting status and decide independently whether a statute applies to that area."); *Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 380-81, 69 S.Ct. 140, 93 L.Ed. 76 (1948) (holding question whether Fair Labor Standards Act covered employees allegedly engaged in the production of goods for commerce on a leasehold of the United States was not a political question; in reaching this conclusion, the Court made clear it was not second-guessing the Executive's determination regarding the sovereignty of Great Britain over the foreign territory).

F. The Zivotofsky Claim is Plainly Justiciable

In light of the legal principles that control this case, the Secretary's attempt to invoke the political question doctrine is meritless. The following example

amplifies the point:

Assume that a lawfully enacted congressional statute provides that individuals over the age of 18 have a right to secure a passport on their own. Assume further that the statute gives individuals an enforceable right of action. If the Secretary of State adopts a policy pursuant to which 18-year-olds are denied passports without parental consent, claiming an exercise of the Executive's recognition power, an aggrieved party would have a right of action to challenge the Secretary. A federal court hearing the case would be without authority to dismiss the action as a nonjusticiable political question. Why? Because the plaintiff has standing to pursue her claim and the court has jurisdiction to hear it. And the court would be well able to evaluate the competing claims of power and easily determine that the Executive overreached in its claim to exclusive authority under the recognition power. The court would find no valid exercise of textually committed power by the executive branch. *See* *Powell,* 395 U.S. 486, 89 S.Ct. 1944.

The flip side of this example is seen in a case like *Nixon,* 506 U.S. 224, 113 S.Ct. 732. In *Nixon,* the petitioner asked the Court to decide whether Senate Rule XI, which allowed "a committee of Senators to hear evidence against an individual who has been impeached and to report that evidence to the full Senate," violated the Constitution's Impeachment Trial Clause, Art. I, § 3, cl. 6. 506 U.S. at 226, 113 S.Ct. 732. The Trial Clause provides that the "Senate shall have the *sole* Power to try all **157

*1240 Impeachments." *Id.* (emphasis added). The Court first found that this provision reflects a clear "grant of authority to the Senate, and the word 'sole' indicates that this authority is reposed in the Senate and nowhere else." *Id.* at 229, 113 S.Ct. 732. Having found a textually demonstrable constitutional commitment of the impeachment issue to a coordinate political department, the Court held that the action involved a nonjusticiable political question. Zivotofsky's claim, which is founded on a cause of action under § 214(d), is nothing like Nixon's claim.

In this case, there are two questions that are properly before the court: (1) whether the Executive's passport policy reflects an action taken within the President's exclusive power to recognize foreign sovereigns; and (2) if so, whether Congress' enactment of § 214(d) impermissibly intruded on the President's exclusive power to recognize foreign sovereigns. These questions raise issues that are constitutionally committed to the judicial branch to decide. Zivotofsky's claim resting on § 214(d) does not require this court to evaluate the wisdom of the Executive's foreign affairs decisions or to determine the political status of Jerusalem. The court's role in this case is to determine the constitutionality of a congressional enactment. And this role is well within the constitutional authority of the judiciary. *Japan Whaling Ass'n,* 478 U.S. at 230, 106 S.Ct. 2860 ("[U]nder the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones.").

II. SECTION 214(D) UNCONSTITUTIONALLY INFRINGES THE EXECUTIVE'S EXCLUSIVE AUTHORITY UNDER THE RECOGNITION POWER

Zivotofsky has asked the court to direct the State Department to designate "Israel" as his place of birth on his passport pursuant to Congress' directive in § 214(d). The Executive asserts that § 214(d), if construed to be mandatory, represents an unconstitutional infringement of the President's recognition power as it concerns Jerusalem.

A. The Recognition Power

The Executive has exclusive and unreviewable authority to recognize foreign sovereigns. This power derives from Article II, § 3 of the Constitution, which gives the President the sole power to "receive Ambassadors and other public Ministers" from foreign countries. U.S. CONST. Art. II, § 3. The power to receive ambassadors includes the power to recognize governments with whom the United States will establish diplomatic relationships. This recognition power is vested solely in the President. *See Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 410, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964) ("Political recognition is exclusively a function of the Executive."); *Baker,* 369 U.S. at 212, 82 S.Ct. 691 ("[R]ecognition of foreign governments so strongly defies judicial treatment that without executive recognition a foreign state has been called 'a republic of whose existence we know nothing....' ").

It is also clear that, under the recognition power, the President has the sole authority to make determinations regarding the sovereignty of disputed territories. *See* *Williams v. Suffolk Ins. Co.*, 38 U.S. (13 Pet.) 415, 420 (1839) (stating that when the executive branch "assume[s] a fact in regard to the sovereignty of any island or country ... it is conclusive on the judicial department"); *Baker*, 369 U.S. at 212, 82 S.Ct. 691 ("[T]he judiciary ordinarily follows the executive as to which nation has sovereignty over disputed territory...."). Finally, and importantly, the recognition power is "not limited to a determination of **158 *1241 the government to be recognized. It includes the power to determine the policy which is to govern the question of recognition." *United States v. Pink*, 315 U.S. 203, 229, 62 S.Ct. 552, 86 L.Ed. 796 (1942).

B. The President's Passport Policy Regarding the Designation of Jerusalem Is an Exercise of the Recognition Power

The Executive and Congress historically have shared authority over the regulation of passports. However, "[f]rom the outset, Congress [has] endorsed not only the underlying premise of Executive authority in the areas of foreign policy and national security, but also its specific application to the subject of passports. Early Congresses enacted statutes expressly recognizing the Executive authority with respect to passports." *Haig v. Agee*, 453 U.S. 280, 294, 101 S.Ct. 2766, 69 L.Ed.2d 640 (1981); *see also* *id.* at 292-300, 101 S.Ct. 2766 (discussing history of congressional legislation and Executive control over

passports); *Kent v. Dulles*, 357 U.S. 116, 122-24, 78 S.Ct. 1113, 2 L.Ed.2d 1204 (1958) (same). Congress passed the first Passport Act in 1856, endorsing the Executive's power to control passports, *Kent*, 357 U.S. at 123, 78 S.Ct. 1113. The current Passport Act maintains this recognition of Executive authority. 22 U.S.C. § 211a ("The Secretary of State may grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by diplomatic and consular officers of the United States and by such other employees of the Department of States....").

Although Congress often has recognized the authority of the Executive to regulate the issuance of passports, this obviously does not confirm that the Executive retains exclusive control over all matters relating to passports. Indeed, the history of congressional legislation in this area suggests otherwise. *See, e.g.,* 22 U.S.C. § 211a (restricting the Executive department from designating a passport as restricted for travel "[u]nless authorized by law"). It is clear, however, that Congress lacks the power to interfere with a passport policy adopted by the Executive in furtherance of the recognition power. Appellant Zivotofsky does not dispute this. Rather, Zivotofsky contends that the passport rules regarding Israel do not embody a policy in furtherance of the Executive's recognition power. Zivotofsky's position fails. The record in this case supports the Secretary's claim that the policy relating to the designation of Jerusalem on passports lawfully "govern[s] the question of recognition." *Pink*, 315 U.S. at 229, 62 S.Ct. 552.

"The status of Jerusalem is one of the most sensitive and long-standing disputes in the Arab-Israeli conflict, having remained unsettled since 1948." Appellee's Br. at 6. The United States has long refrained from recognizing Jerusalem as a city located within the sovereign state of Israel. *See* Defendant's Responses to Plaintiff's Interrogatories, *reprinted in* Joint Appendix ("J.A.") 56-57. Instead, United States policy since the Truman Administration has been "to promote a final and permanent resolution of final status issues, including the status of Jerusalem, through negotiations by the parties and supported by the international community." *Id.* at 57. "U.S. Presidents have consistently endeavored to maintain a strict policy of not prejudging the Jerusalem status issue and thus not engaging in official actions that would recognize, or might be perceived as constituting recognition of, Jerusalem as either the capital city of Israel, or as a city located within the sovereign territory of Israel." *Id.* at 59. These points are uncontested.

The Secretary's rules regarding the designation of Jerusalem on passports obviously aims to further the United States' **159 *1242 policy regarding the recognition of Israel. The State Department's policies and procedures for preparing passports and reports of birth are outlined in its Foreign Affairs Manual ("FAM"). J.A. 376. The FAM includes a "Birthplace Transcription Guide," which details the "acceptable name and spelling for specific countries and territories to be used in U.S. passports," in accordance with United States policy. J.A. 381. The

rules provide that, as a general matter, the country recognized by the United States as having sovereignty over the place of birth of a passport applicant is recorded on the passport. *See* 7 FAM 1383.5-4, J.A. 378. However, "[w]here the birthplace of the applicant is located in territory disputed by another country, the city or area of birth may be written in the passport ... if shown on the application and if included for use on the birthplace transcription guide." 7 FAM 1383.5-2, J.A. 377. There are special rules for Jerusalem because it is a disputed territory. For citizens born after 1948 in Jerusalem, the Birthplace Transcription Guide instructs that only "Jerusalem" should be recorded as the place of birth. *See id.* at 1383.1, J.A. 376, 387; 7 FAM 1383.5-6, J.A. 379. The Guide specifically indicates that the official is not to write " Israel" or "Jordan." J.A. 387. The Guide further instructs that Israel " [d]oes not include Jerusalem or areas under military occupation," and Jordan " [d]oes not include Jerusalem." *Id.* These rules plainly implement the Executive's determination not to recognize Jerusalem as part of any sovereign regime.

Zivotofsky contends that the "designation of a passport holder's place of birth does not involve the 'recognition of foreign sovereigns.' " Appellant's Br. at 27. This argument misperceives the issues in this case. As noted above, the recognition power is "not limited to a determination of the government to be recognized. It includes the power to determine the policy which is to govern the question of recognition." *Pink,* 315 U.S. at 229, 62 S.Ct. 552. The rules regarding the designation of Jerusalem are part of

the Executive's overarching policy governing the recognition of Israel.

Zivotofsky also claims that the " 'birthplace' entry on a passport ... is nothing more than one means of identifying the passport-holder." Appellant's Br. at 37. This attempt to downplay the significance of a passport is futile. As the Supreme Court has said, "[a] passport is, in a sense, a letter of introduction in which the issuing sovereign vouches for the bearer." *Agee,* 453 U.S. at 292, 101 S.Ct. 2766. It is a "political document" that is "addressed to foreign powers," "by which the bearer is recognized, in foreign countries, as an American citizen." *Id.* (quoting *Urtetiqui v. D'Arcy,* 34 U.S. (9 Pet.) 692, 698, 9 L.Ed. 276 (1835)). A "political document" indicating that a person born in Jerusalem is from the sovereign nation of Israel misstates the United States' position on the recognition of Israel. So long as the Executive remains neutral on the question of Jerusalem, the Secretary surely may adopt polices declining to issue official documents that suggest otherwise.

Finally, Zivotofsky argues that, because the Secretary's passport rules concerning Jerusalem have only a "negligible impact on American foreign policy," the rules cannot be viewed as policy governing the recognition of Israel. Appellant's Br. at 33. The Secretary responds by pointing to evidence of the international reaction to the enactment of § 214 in 2002. According to the State Department, "Palestinians from across the political spectrum strongly condemned the Jerusalem

provisions of the [Act], interpreting those provisions as a reversal of longstanding U.S. policy that Jerusalem's status should be determined by Israel and the Palestinians in final status**160 *1243 talks." J.A. 398-99. One need not assess the international reaction to § 214 to find that the Secretary's rules regarding the designation of Jerusalem on passports aims to further the United States' policy of neutrality on the question of Jerusalem. It is obvious. The Executive's policy is not to prejudge the status of Jerusalem, and any official statement to the contrary impinges upon the Executive's prerogative. The Executive has the *exclusive* authority to implement policies in furtherance of the recognition power and this court has no authority to second-guess the Executive's judgment when, as here, it is clear that the disputed policy is in furtherance of the recognition power.

C. Section 214(d) is a Mandatory Statutory Provision

The Secretary also argues that "Section 214(d) constitutes only a legislative recommendation-not a command-to the Executive Branch with respect to recognition of sovereignty over Jerusalem," Appellee's Br. at 20, and therefore there is no reason for this court to opine on its constitutionality. The District Court rejected this argument, finding that "it is difficult to construe Section 214(d) as anything but mandatory." *Zivotofsky ex rel. Zivotofsky v. Sec'y of State*, 511 F.Supp.2d 97, 105 (D.D.C.2007). This is an understatement. Section 214(d) states, "[T]he Secretary shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as

Israel." As appellant aptly notes, "section 214(d) is as mandatory as a statute can be." Appellant's Reply Br. at 7. The words of the statute make it plain that "Congress was fully aware when it enacted the law that the Secretary of State was acting differently than Congress wanted him to act. It enacted subsection (d) with the specific intent of altering the State Department practice." *Id.* at 8.

Section 214(d) is plainly mandatory. The provision dictates that the Secretary *shall* record Israel as the place of birth upon the request of a citizen who is born in Jerusalem and entitled to a United States passport. "Shall" has long been understood as "the language of command." *Escoe v. Zerbst*, 295 U.S. 490, 493, 55 S.Ct. 818, 79 L.Ed. 1566 (1935); *see also Miller v. French*, 530 U.S. 327, 337, 120 S.Ct. 2246, 147 L.Ed.2d 326 (2000) (referring to the "mandatory term 'shall' "); *Ass'n of Civilian Technicians, Mont. Air Chapter No. 29 v. Fed. Labor Relations Auth.*, 22 F.3d 1150, 1153 (D.C.Cir.1994) ("The word 'shall' generally indicates a command that admits of no discretion on the part of the person instructed to carry out the directive.").

There are rare exceptions to this rule that apply only where it would make little sense to interpret "shall" as "must." *See, e.g., Town of Castle Rock v. Gonzales*, 545 U.S. 748, 760, 125 S.Ct. 2796, 162 L.Ed.2d 658 (2005) (declining to read "shall" as mandatory in statute intended to give local police broad powers to enforce domestic abuse restraining orders in light of the "well established tradition of police discretion"). There is no evidence in this case that the legislature

intended "shall" in § 214(d) to mean anything other than "must." Indeed, when § 214(d) is read in conjunction with the title of § 214-"*United States Policy with Respect to Jerusalem as the Capital of Israel* "-there can be little doubt about Congress' intent. This conclusion is bolstered by reference to the language in § 214(a), where Congress merely "*urges* the President ... to immediately begin the process of relocating the United States Embassy in Israel to Jerusalem." Foreign Relations Authorization Act, Fiscal Year 2003, Pub.L. No. 107-228, § 214(a), 116 Stat. 1350 (2002). Given the structure of the statute, Congress obviously understood the difference between **161 *1244 an advisory provision and a statutory command. *See Jama v. Immigration and Customs Enforcement,* 543 U.S. 335, 346, 125 S.Ct. 694, 160 L.Ed.2d 708 (2005) (juxtaposing the permissive "may" with the mandatory "shall"). Section 214(d) is undoubtedly mandatory.

The Secretary also argues that "Section 214(d) should be interpreted as advisory to avoid constitutional doubt." Appellee's Br. at 35. However, because the statute is unambiguous, the canon of constitutional avoidance does not apply in this case. *Clark v. Martinez,* 543 U.S. 371, 385, 125 S.Ct. 716, 160 L.Ed.2d 734 (2005) ("The canon of constitutional avoidance comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction."); *United States v. Albertini*, 472 U.S. 675, 680, 105 S.Ct. 2897, 86 L.Ed.2d 536 (1985) ("Statutes should be construed to avoid constitutional

questions, but this interpretative canon is not a license for the judiciary to rewrite language enacted by the legislature."). The congressional command of § 214(a) is clear and unmistakable; therefore, this court is obliged to render a decision on its constitutionality.

D. Section 214(d) Unconstitutionally Infringes the President's Exclusive Power to Recognize Foreign Sovereigns

The final question in this case is whether § 214(d) of the Foreign Relations Authorizations Act, which affords Zivotofsky a statutory right to have "Israel" listed as the place of birth on his passport, is a constitutionally valid enactment. Given the mandatory terms of the statute, it can hardly be doubted that § 214(d) intrudes on the President's recognition power. In commanding that the Secretary *shall* record Israel as the place of birth upon the request of a citizen who is born in Jerusalem and entitled to a United States passport, the statute plainly defies the Executive's determination to the contrary. As noted above, the rules adopted by the Secretary of State explicitly ban government officials from recording "Israel" as the place of birth for citizens born in Jerusalem. Section 214(d) effectively vitiates the Executive's policy.

Zivotofsky argues that § 214(d) cannot be seen to interfere with the Executive's recognition power, because the statute here is no different from another uncontested legislative action taken by Congress with respect to Taiwan. In 1994, Congress enacted a

provision requiring that, "[f]or purposes of the registration of birth or certificate of nationality of a United States citizen born in Taiwan, the Secretary of State shall permit the place of birth to be recorded as Taiwan." Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub.L. No. 103-236, § 132, 108 Stat. 382 (1994) (as amended by State Department: Technical Amendments, Pub.L. No. 103-415, § 1(r), 108 Stat. 4299, 4302 (1994)). This example is inapposite. Following the enactment of the statute covering Taiwan, the State Department determined that the congressional provision was consistent with the United States' policy that the People's Republic of China is the "sole legal government of China" and "Taiwan is a part of China." U.S. Department of State Passport Bulletin 94-12 (Nov. 7, 1994), J.A. 142-43. Because listing "Taiwan" did not contravene the President's position regarding China's sovereignty, the State Department allowed American citizens born in Taiwan to record "Taiwan" as their place of birth. *See id.* The present case is different from the Taiwan example. The State Department here has determined that recording Israel as the place of birth for United States citizens born in Jerusalem misstates the terms of this country's recognition of Israel.

***1245 **162** The more important point here is that the President has the exclusive power to establish the policies governing the recognition of foreign sovereigns. The Executive may treat different situations differently, depending upon how the President assesses each situation. These are matters within the exclusive power of the Executive under

Art. II, § 3, and neither Congress nor the Judiciary has the authority to second-guess the Executive's policies governing the terms of recognition.

"[I]t remains a basic principle of our constitutional scheme that one branch of the government may not intrude upon the central prerogatives of another." *Loving v. United States*, 517 U.S. 748, 757, 116 S.Ct. 1737, 135 L.Ed.2d 36 (1996). In my view, the bottom line of the court's judgment in this case is inescapable: "Section 214(d) is unconstitutional. Article II assigns to the President the exclusive power to recognize foreign sovereigns, and Congress has no authority to override or intrude on that power." Appellee's Br. at 21. Section 214(d) impermissibly intrudes on the President's exclusive power to recognize foreign sovereigns. Because appellant Zivotofsky has no viable cause of action under § 214(d), I concur in the judgment.

APPENDIX B

United States Court of Appeals,
District of Columbia Circuit.

Ari Z. **ZIVOTOFSKY**, M.B.Z. by his parents and guardians and Naomi Siegman **Zivotofsky**, M.B.Z. by his parents and guardians, Appellants
v.
SECRETARY OF STATE, Appellee.
No. 07-5347.

June 29, 2010.

Appeal from the United States District Court for the District of Columbia (No. 03cv01921).
On Petition for Rehearing En Banc.
Alyza Doba Lewin, Nathan Lewin, Lewin & Lewin, LLP, Washington, DC, for Appellants.

R. Craig Lawrence, U.S. Attorney's Office, Civil Division, Douglas N. Letter, Esquire, Lewis Yelin, U.S. Department of Justice, Civil Division, Appellate Staff, Washington, DC, for Appellee.

Before: SENTELLE, Chief Judge, and GINSBURG, HENDERSON, ROGERS, TATEL, GARLAND, BROWN, GRIFFITH, and KAVANAUGH, Circuit Judges. Circuit Judges GINSBURG, ROGERS, and KAVANAUGH would grant the petition for rehearing en banc.

A statement by Senior Circuit Judge EDWARDS is attached.

ORDER

Appellants' petition for rehearing *en banc* and the response thereto were circulated to the full court, and a vote was requested. Thereafter, a majority of the judges eligible to participate did not vote in favor of the petition. Upon consideration of the foregoing, it is

ORDERED that the petition be denied.

EDWARDS, Senior Circuit Judge, statement regarding the court's denial of en banc review:

By a divided vote, the active Judges of the court have voted against *en banc* review of this case. In my view, the court has made a serious mistake.

It would be a stretch to say that the appellants, Ari Zivotofsky and his parents, have suffered a travesty of justice. The ***85** panel majority ruled that the Zivotofskys' claim should be dismissed because it raises a nonjusticiable political question. *Zivotofsky v. Sec'y of State*, 571 F.3d 1227 (D.C.Cir.2009). I dissented from this decision because, in my view, it is wrong as a matter of law. *Id.* at 1233. However, I agree that even if the Zivotofskys are given their fair day in court, as is their due, they will likely lose on the merits. A shallow view of this case would thus suggest that *en banc* review looks like too much work for too little gain. I reject this view.

There is much more at stake in this case than just the personal claim raised by the Zivotofskys. This case calls into question the role of a federal court in our system of justice. And it concerns the responsibility of a federal court to ensure that parties who are properly before the court are heard and afforded a just and coherent answer to their claims. The court's action today ignores that our system of justice is founded on a "starting presumption that when jurisdiction is conferred, a court may not decline to exercise it." *Union Pacific R.R. Co. v. Bhd. of Locomotive Eng'rs and Trainmen*, ---U.S. ----, 130 S.Ct. 584, 590, 175 L.Ed.2d 428 (2009). A federal court has the *duty* to review the constitutionality of congressional enactments.... "Our system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility." *Powell v. McCormack*, 395 U.S. 486, 549, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969).

United States v. Munoz-Flores, 495 U.S. 385, 391, 110 S.Ct. 1964, 109 L.Ed.2d 384 (1990) (emphasis added). The federal courts cannot seek refuge in the political question doctrine to avoid their constitutional responsibility, for " '[w]e have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.' " *Union Pacific R.R. Co.*, 130 S.Ct. at 590 (quoting *Cohens v. Virginia*, 6 Wheat. 264, 404, 5 L.Ed. 257 (1821)).

In refusing to rehear this case *en banc,* the court has effectively conflated the distinction between cases involving justiciable separation of powers issues and nonjusticiable political questions, expanded the political question doctrine beyond anything that the Supreme Court has ever endorsed, and left the law of the circuit in a state of disarray. This case raises an extraordinarily important question that should have been reheard *en banc* by this court. The inconvenience of *en banc* review is no justification for its denial in a case of this importance.

* * * *

In 2002, Congress passed the Foreign Relations Authorization Act, Fiscal Year 2003, Pub.L. No. 107-228, 116 Stat. 1350 (2002). Section 214 of the Act, entitled "United States Policy with Respect to Jerusalem as the Capital of Israel," includes the following provision which is at issue in this case:

> (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.

Id. § 214(d). Menachem Binyamin Zivotofsky was born in 2002 in Jerusalem. Because his parents are United States citizens,***86** Zivotofsky is also a United States citizen. After Zivotofsky's birth, his mother filed an application on his behalf for a consular report of birth abroad and a United States

passport. She requested of United States officials that these documents indicate her son's place of birth as "Jerusalem, Israel." United States diplomatic officials informed Mrs. Zivotofsky that, pursuant to Executive regulations, passports issued to United States citizens born in Jerusalem could not record "Israel" as the place of birth. When the Zivotofskys received Menachem's passport and consular report, both documents recorded his place of birth as "Jerusalem." On his behalf, Zivotofsky's parents filed this action under § 214(d) against the Secretary of State seeking to compel the State Department to identify Menachem's place of birth as "Israel."

The Secretary does not doubt that the Zivotofskys have standing to raise a viable cause of action under § 214(d) of the Foreign Relations Authorizations Act. Nor does the Secretary doubt that the Zivotofskys properly invoked the District Court's statutory jurisdiction under 28 U.S.C. §§ 1331, 1346(a)(2), and 1361. Therefore, the issue before this court is:

> Whether § 214(d) of the Foreign Relations Authorizations Act, which affords Zivotofsky a statutory right to have "Israel" listed as the place of birth on his passport, is a constitutionally valid enactment.

Put another way, the court must decide:

> Whether, in enacting § 214(d), which is aimed at "United States Policy with Respect to Jerusalem as the Capital of Israel," Congress impermissibly

> intruded on the President's exclusive power to recognize foreign sovereigns.

These questions involve commonplace issues of statutory and constitutional interpretation, and they are plainly matters for the court to decide. The Supreme Court has made it clear time and again that the "federal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred." *New Orleans Pub. Serv., Inc. v. Council of New Orleans,* 491 U.S. 350, 358, 109 S.Ct. 2506, 105 L.Ed.2d 298 (1989); *see also Boumediene v. Bush,* 553 U.S. 723, 128 S.Ct. 2229, 2252-53, 171 L.Ed.2d 41 (2008); *Munoz-Flores,* 495 U.S. at 390-91, 110 S.Ct. 1964; *I.N.S. v. Chadha,* 462 U.S. 919, 941-43, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983); *Powell v. McCormack,* 395 U.S. 486, 521, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969); *Baker v. Carr,* 369 U.S. 186, 211, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962); *Vermilya-Brown Co. v. Connell,* 335 U.S. 377, 380, 69 S.Ct. 140, 93 L.Ed. 76 (1948).

In this case, there are two questions that are properly before the court: (1) whether the Executive's passport policy reflects an action taken within the President's exclusive power to recognize foreign sovereigns; and, if so, (2) whether Congress' enactment of § 214(d) impermissibly intrudes on the President's exclusive power to recognize foreign sovereigns. These questions raise issues that are constitutionally committed to the Judicial Branch to decide. The Zivotofskys' claim resting on § 214(d) does not require this court to evaluate the wisdom of the Executive's foreign affairs decisions or to

determine the political status of Jerusalem. The court's role in this case is to determine the constitutionality of a congressional enactment. And this role is well within the constitutional authority of the judiciary. *Baker*, 369 U.S. at 212, 82 S.Ct. 691 ("[O]nce sovereignty over an area is politically determined and declared, courts may examine the resulting status and decide independently whether a statute applies to that area."); *Vermilya-Brown Co.*, 335 U.S. at 380-81, 69 S.Ct. 140 (Whether the *87 Fair Labor Standards Act covered employees allegedly engaged in commerce or production of goods for commerce on a leasehold of the United States, located on the Crown Colony of Bermuda, was not a political question outside of judicial power but could be determined by the court).

The panel majority opinion in this case is founded on the view that the court cannot award the relief the Zivotofskys seek because that relief can be granted only by the Executive Branch. But this puts the cart before the horse. A conclusion that relief can be granted only by the Executive Branch can only be reached *after* the court addresses the separation of powers question that is at the heart of this case. The Executive Branch does not prevail merely because it *asserts* that it has exercised its recognition power. As noted above, this court must first determine whether the Executive's passport policy reflects an action taken within the President's exclusive power to recognize foreign sovereigns and, if so, whether Congress' enactment of § 214(d) impermissibly intruded on the President's exclusive power. A simple hypothetical amplifies this point.

Assume that a lawfully enacted congressional statute provides that individuals over the age of 18 have a right to secure a passport on their own. Assume further that the statute gives individuals an enforceable right of action. If the Secretary of State adopts a policy pursuant to which 18-year-olds are denied passports without parental consent, claiming an exercise of the Executive's recognition power, an aggrieved party would have a right of action to challenge the Secretary. A federal court hearing the case surely would entertain the plaintiff's claim and decide it on the merits. Indeed, we would reject as absurd any claim by the Executive that the plaintiff's claim should be dismissed as a "political question" merely because the Executive has *asserted a right* to deny passports without parental consent. The plaintiff would have standing to pursue her claim and the federal court would have jurisdiction to decide it. And the court would be well able to evaluate the competing claims of power and easily determine that the Executive overreached in its assertion of exclusive authority under the recognition power. The court would find no valid exercise of textually committed power by the Executive Branch.

In this case, Congress has passed a bill that purports to regulate passports. The Executive has contended that the statute exceeds the authority of Congress because it interferes with the Executive's exercise of its recognition power. The court must therefore determine the constitutionality of the statute. As the Court noted in *Munoz-Flores*:

> The Government may be right that a judicial finding that Congress has passed an unconstitutional law might in some sense be said to entail a "lack of respect" for Congress' judgment. But disrespect, in the sense the Government uses the term, cannot be sufficient to create a political question. If it were, *every* judicial resolution of a constitutional challenge to a congressional enactment would be impermissible. Congress often explicitly considers whether bills violate constitutional provisions.... Yet such congressional consideration of constitutional questions does not foreclose subsequent judicial scrutiny of the law's constitutionality. On the contrary, this Court has the duty to review the constitutionality of congressional enactments.

495 U.S. at 390-91, 110 S.Ct. 1964.

In a case of this sort, the political question doctrine would bar judicial review only if the precise matter to be decided has been constitutionally committed to the exclusive authority of one of the political *88 branches of government. *Compare* *Nixon v. United States*, 506 U.S. 224, 229-36, 113 S.Ct. 732, 122 L.Ed.2d 1 (1993), *with* *Powell*, 395 U.S. at 519-22, 89 S.Ct. 1944. Because there is nothing in the Constitution that gives either political branch the exclusive authority to determine whether the Executive has acted pursuant to the recognition power or whether a congressional enactment has infringed the Executive's power, the court must resolve the issues.

The simple point here is that it is the role and responsibility of the federal courts to decide whether and to what extent a matter is reserved to the exclusive authority of a political branch. *See* *Nixon*, 506 U.S. at 238, 113 S.Ct. 732 ("[C]ourts possess power to review either legislative or executive action that transgresses identifiable textual limits."); *Powell*, 395 U.S. at 521, 89 S.Ct. 1944 ("[W]hether there is a 'textually demonstrable constitutional commitment of the issue to a coordinate political department' of government and what is the scope of such commitment are questions we must resolve."); *Baker*, 369 U.S. at 211, 82 S.Ct. 691 ("Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.").

* * * *

The court's recent *en banc* decision in *El-Shifa Pharmaceutical Industries Co. v. United States*, 607 F.3d 836 (D.C.Cir.2010), lends no credence to the panel majority opinion in this case. *El-Shifa* states that a court must "conduct a discriminating analysis of the particular question posed in the specific case before the court," *id.* at 841 (internal quotation marks omitted), before applying the political question doctrine. Obviously, this means that we must look to the disputed statute itself and ask whether that statute sets limits on Executive authority, or whether the statute authorizes or

necessitates judicial review of actions textually committed to the President. If we follow this prescription here, there can be no doubt that the Zivotofskys' claim in this case raises a separation of powers rather than political question issue. Section 214(d), the statutory provision at issue in this case, is straightforward and clearly aimed at infringing on the Executive's authority. The statute is boldly entitled "United States Policy with Respect to Jerusalem as the Capital of Israel." And Congress has provided that, "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." § 214(d). What could be more clear? The statute raises a simple separation of powers issue that is ripe for judicial resolution.

In *El-Shifa,* by contrast, resolution of the case required an examination of the President's reasons for a military strike, based on general laws that are not on their face aimed at Executive authority. *Zivotofsky* and *El-Shifa* are on opposite ends of the separation of powers/political question spectrum.

* * * *

The panel majority opinion is ironic insofar as it proclaims to dismiss the Zivotofskys' action solely on "jurisdictional" grounds and disclaims any decision on the merits. The truth of the matter is just the opposite. The panel majority opinion rather obviously rests on the premise that, ***89** because § 214(d) directly infringes the Executive's recognition

power, Congress exceeded its constitutional authority in enacting the disputed statute. Absent this premise, the judgment reached by the panel majority would be incomprehensible. Indeed, Government counsel conceded during oral argument that a judgment in its favor undoubtedly would be taken as a declaration by this court that Congress' statutory enactment is unconstitutional. I agree with this conclusion, which obviously does not implicate the political question doctrine.

APPENDIX C

United States District Court,
District of Columbia.

Menachem Binyamin ZIVOTOFSKY, by his parents and guardians, Ari Z. and Naomi Siegman ZIVOTOFSKY, Plaintiffs,
v.

The SECRETARY OF STATE, Defendant.
Civil Action No. 03-1921 (GK).

Sept. 19, 2007.

Background: Following dismissal of action, brought by three-year-old child through his United States citizen parents, alleging that child, who was born in Jerusalem, was entitled, pursuant to the Foreign Relations Authorization Act, to have "Israel" listed as his place of birth on his U.S. passport, appeal was taken. The Court of Appeals, 444 F.3d 614,

remanded for further development of the record. On remand, government renewed its motion to dismiss or for summary judgment and child cross-moved for summary judgment.

Holding: The District Court, Gladys Kessler, J., held that request to have passport and other documents identify plaintiff's place of birth as "Israel" presented a non-justiciable political question.

Dismissed.

MEMORANDUM OPINION

GLADYS KESSLER, District Judge.

This case involves the question of whether an American citizen, born in Jerusalem, has the right to have "Israel" listed as his place of birth on his United States passport. The Plaintiff is Menachem Binyamin Zivotofsky, a United States citizen born in Jerusalem on October 17, 2002. He brings this suit by his parents, Ari Z. and Naomi Siegman Zivotofsky, against the Secretary of State (the "Secretary"), alleging that the Secretary's failure to list his place of birth as "Israel" on his passport violates Section 214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003, Pub.L. No. 107-228, 116 Stat. 1350, 1365-66 (2002) (the "Act").

This matter is now before the Court on the Secretary's Renewed Motion to Dismiss for Lack of Subject Matter Jurisdiction pursuant to Fed.R.Civ.P. 12(b)(1) [**Dkt. No. 44**] or in the alternative for

Summary Judgment pursuant to Fed.R.Civ.P. 56 [**Dkt. No. 46**] and Zivotofsky's Motion for Summary Judgment pursuant to Fed.R.Civ.P. 56 [**Dkt. No. 39**]. Upon consideration of the Motions, Oppositions, Replies, and the entire record herein, and for the reasons set forth below, the Court concludes that this case poses a non-justiciable political question. Accordingly, the Secretary's Motion to Dismiss is **granted** and the parties' Motions for Summary Judgment are **denied as moot.**

I. BACKGROUND

A. Facts [FN1]

> FN1. The undisputed facts contained herein are drawn from the Complaint, the parties' Statements of Material Facts submitted pursuant to Local Civil Rule 7(h), and declarations submitted by the parties in support of their Motions for Summary Judgment.

Plaintiff was born at the Shaare Zedek Hospital in the City of Jerusalem on October 17, 2002. Because both of his parents are United States citizens, Plaintiff was also born an American citizen and was entitled to a United States passport. On December 24, 2002, Plaintiff's mother, Naomi Siegman Zivotofsky, applied on the Plaintiff's behalf for a United States passport and Consular Report of Birth Abroad from the United States Embassy in Tel Aviv, Israel. She requested in her application that the passport and Consular Report of Birth Abroad list

the Plaintiff's birthplace as "Israel." However, she was told that "Israel" would not be listed as the place of birth in these documents pursuant to State Department regulations. Instead, the State Department issued Plaintiff a passport and Consular Report of Birth Abroad that listed "Jerusalem" as Plaintiff's place of birth and made no mention of "Israel."

*100 The final political status of Jerusalem has been in dispute since 1948 as a result of the long-standing Arab-Israeli conflict. Since the Truman Administration, the executive branch has pursued a policy of encouraging the parties to that conflict to settle all outstanding issues, including the final status of Jerusalem, through peaceful negotiations between the parties with the support of the broader international community. Therefore, the executive branch of the United States government does not acknowledge the sovereignty of any state over Jerusalem.

State Department passport policy reflects the executive branch's policy with regard to the status of Jerusalem. The State Department's *Foreign Affairs Manual* requires that citizens born in Jerusalem after May 14, 1948 shall have their place of birth listed as "Jerusalem." Declaration of JoAnn Dolan, Sept. 29, 2006 ("Dolan Decl."), Ex. 2 (7 FAM § 1383.1(b) & Part II: Other Countries & Territories). The *Manual* makes clear that "Israel" should not be entered on the passports of United States citizens born in Jerusalem. *Id.*

On September 30, 2002, Congress enacted the Foreign Relations Authorization Act for Fiscal Year 2003. Pub.L. No. 107-228, 116 Stat. 1350 (2002). Section 214 is titled "United States policy with respect to Jerusalem as the capital of Israel." *Id.* at 1365. Subsection (a), which is not at issue here, "urges the President" to relocate the United States Embassy in Israel from Tel Aviv to Jerusalem. *Id.* Subsection (d) provides

> 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.

Id. at 1366.

The President signed the Act into law on the same day, and made the following statement:

> 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.

Statement by President George W. Bush Upon Signing H.R. 1646, 2002 U.S.C.C.A.N. 931, 932 (Sept. 30, 2002).

Following the enactment of Section 214(d), a State Department cable to its overseas posts noted that the "media and public in many Middle Eastern and Islamic states continue to believe that the State Authorization Bill signals a change in U.S. policy towards Jerusalem." Dolan Decl., Ex. 3 (DOS 001791). The cable clarified that, despite the enactment of Section 214, United States policy regarding Jerusalem had not changed, that the status of Jerusalem "must be resolved through negotiations between the parties," and that the United States opposed actions by any party that would prejudice those negotiations. *Id.* (DOS 001792).

B. Procedural History

Plaintiff filed suit against the Secretary of State in September 2003, claiming that ***101** Section 214(d) required the Secretary to issue Plaintiff a passport and Consular Record of Birth Abroad with the designation of "Jerusalem, Israel" as the place of birth. Compl. ¶ 9. Plaintiff sought a declaratory judgment and permanent injunction ordering the Secretary to issue these documents with corrected place of birth designations and also requested attorney's fees and costs pursuant to 28 U.S.C. §

2412.

In December 2003, the Secretary filed a Motion to Dismiss [Dkt. No. 6] pursuant to Fed.R.Civ.P. 12(b)(1) and Fed.R.Civ.P. 12(b)(6) arguing, *inter alia,* that Plaintiff lacked standing and that the case presented a non-justiciable political question. In February 2004, Plaintiff filed his Opposition to the Motion to Dismiss in conjunction with a Motion for Summary Judgment. [Dkt. No. 14]. In a Memorandum Opinion and accompanying Order dated September 7, 2004, this Court held that Plaintiff lacked standing and that the case presented a non-justiciable political question, and therefore dismissed the case for lack of subject matter jurisdiction. [Dkts. No. 21 & 22].

Plaintiff appealed the Order dismissing the case. On February 17, 2006, our Court of Appeals reversed and remanded for further proceedings. *Zivotofsky v. Sec'y of State,* 444 F.3d 614 (D.C.Cir.2006). The Court of Appeals held that Plaintiff had standing to sue. *Id.* at 617. It also held that, for purposes of analyzing whether the case presented a political question, "[t]he case ... no longer involves the claim the district court considered." *Id.* at 619. The Complaint initially sought an injunction requiring the Secretary to issue Plaintiff a passport and Consular Report of Birth Abroad with "Jerusalem, Israel" listed as the place of birth. *Id.* at 616, n. 1. On appeal, however, the parties agreed that the proper question was whether Section 214(d) entitles Plaintiff to a passport and Consular Report of Birth Abroad that records "Israel" as his place of birth. *Id.*

at 619.

The Court of Appeals noted that "[w]hether this, too, presents a political question depends on the meaning of § 214(d)-is it mandatory or, as the government argues, merely advisory?" *Id.* The Court of Appeals also noted that the question may turn on the foreign policy impact of "listing 'Israel' on the passports of citizens born in Jerusalem." *Id.* The case was remanded to this Court "so that both sides may develop a more complete record." *Id.* at 620.

Following remand, this Court issued a Scheduling Order providing for three months of discovery to allow the parties to develop a more complete record. [Dkt. No. 30]. After completion of discovery, the parties filed the pending dispositive motions.

II. STANDARD OF REVIEW

[1][2][3] To prevail on a motion to dismiss for lack of subject matter jurisdiction under Fed.R.Civ.P. 12(b)(1), it is the plaintiff's burden to establish that the court has subject matter jurisdiction to hear the case. *In re Swine Flu Immunization Prods. Liab. Litig.*, 880 F.2d 1439, 1442-43 (D.C.Cir.1989); *Jones v. Exec. Office of the President*, 167 F.Supp.2d 10, 13 (D.D.C.2001). While the Court must accept as true all factual allegations contained in the complaint, *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993), "plaintiff's factual allegations in the complaint ... will bear closer scrutiny in resolving a 12(b)(1) motion than in

resolving a 12(b)(6) motion for failure to state a claim," because the plaintiff bears the burden of proof. ***102***Grand Lodge of the Fraternal Order of Police v. Ashcroft,* 185 F.Supp.2d 9, 13-14 (D.D.C.2001) (internal quotation marks omitted). In making its determination regarding the existence of subject matter jurisdiction, the court may consider matters outside the pleadings, *Lipsman v. Sec'y of the Army,* 257 F.Supp.2d 3, 6 (D.D.C.2003), especially where, as here, the court has allowed jurisdictional discovery.

III. ANALYSIS

[4] The courts lack jurisdiction over "political questions that are by their nature 'committed to the political branches to the exclusion of the judiciary.' " *Schneider v. Kissinger,* 412 F.3d 190, 193 (D.C.Cir.2005) (quoting *Antolok v. United States,* 873 F.2d 369, 379 (D.C.Cir.1989) (separate opinion of Sentelle, J.)). Thus, "[t]he nonjusticiability of a political question is primarily a function of the separation of powers." *Baker v. Carr,* 369 U.S. 186, 210, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962).

In *Baker,* the Supreme Court laid out the six factors that characterize a non-justiciable political question:

> Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of

> deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

369 U.S. at 217, 82 S.Ct. 691. The presence of any one factor indicates that the case presents a non-justiciable political question. *Schneider*, 412 F.3d at 194.

"The contours of the political question doctrine are murky and unsettled" and "[n]ot every political case presents a political question." *Bancoult v. McNamara*, 445 F.3d 427, 435 (D.C.Cir.2006) (internal quotation marks omitted). However, cases involving questions of foreign policy and national security "serve as the quintessential sources of political questions." *Id.* at 433. "Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention." *Haig v. Agee*, 453 U.S. 280, 292, 101 S.Ct. 2766, 69 L.Ed.2d 640 (1981).

The Government argues that five of the six *Baker* factors apply in this case. When we apply these factors of the *Baker* analysis to this case, we see that it raises a quintessential political question which is not justiciable by the courts.

A. The Text of the Constitution Commits Foreign Policy Questions to the Political Branches of the Government

The first *Baker* factor requires the Court to determine if there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department." 369 U.S. at 217, 82 S.Ct. 691.

"The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative-'the political'-Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." *Schneider*, 412 F.3d at 194 (quoting *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302, 38 S.Ct. 309, 62 L.Ed. 726 (1918)).

***103** Articles I and II of the Constitution provide a number of specific grants of power to Congress and the President to manage the nation's foreign policy and provide for the nation's security. *See Schneider*, 412 F.3d at 194-95. In particular, Article II, Section 3 provides that the President "shall receive Ambassadors and other public Ministers." The Supreme Court has construed this clause to include the power of the President to recognize foreign sovereigns. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964) ("Political recognition is exclusively a function of the Executive"); *Baker*, 369 U.S. at 212, 82 S.Ct. 691 ("recognition of foreign governments so strongly

defies judicial treatment that without executive recognition a foreign state has been called 'a republic of whose existence we know nothing' ") (quoting *United States v. Klintock*, 18 U.S. (5 Wheat.) 144, 149, 5 L.Ed. 55 (1820)).

[5] The authority to recognize a foreign sovereign "is not limited to a determination of the government to be recognized. It includes the power to determine the policy which is to govern the question of recognition." *United States v. Pink*, 315 U.S. 203, 229, 62 S.Ct. 552, 86 L.Ed. 796 (1942). More specifically and most relevantly to this case, "the judiciary ordinarily follows the executive as to which nation has sovereignty over disputed territory." *Baker*, 369 U.S. at 212, 82 S.Ct. 691. *See also Occidental of Umm al Qaywayn, Inc. v. Certain Cargo of Petroleum*, 577 F.2d 1196, 1203 (5th Cir.1978) ("The ownership of lands disputed by foreign sovereigns is a political question of foreign relations, the resolution or neutrality of which is committed to the executive branch by the Constitution.").

[6] The grant of power to the President in Article II to receive ambassadors, which has been construed by the courts to include the power to recognize the sovereignty of foreign governments over disputed territory, demonstrates a constitutional commitment of this issue to the executive branch of the Government.

Plaintiff argues that this case does not require the Court to determine the status of Jerusalem but only to interpret and apply the provisions of Section 214.

Plaintiff is wrong. Resolving his claim on the merits would necessarily require the Court to decide the political status of Jerusalem. The case law makes clear that the Constitution commits that decision to the executive branch. The first *Baker* factor is therefore present in this case.

B. The Court Lacks Judicially Manageable Standards for Resolving Foreign Policy Questions

The second *Baker* factor examines whether there is "a lack of judicially discoverable and manageable standards for resolving" the question before the Court. 369 U.S. at 217, 82 S.Ct. 691.

In *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111, 68 S.Ct. 431, 92 L.Ed. 568 (1948), the Supreme Court held that foreign policy decisions are "of a kind for which the Judiciary has neither aptitude, facilities nor responsibility." Questions of foreign policy are "delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil." *Id.* "Unlike the executive, the judiciary has no covert agents, no intelligence sources, and no policy advisors" to assist in making such decisions. *Schneider*, 412 F.3d at 196.

As the Government correctly argues, the Court cannot resolve Plaintiff's claim without considering current United States policy regarding the status of Jerusalem and ***104** weighing the possible consequences of changes in that policy.

In the State Department's judgment, an order by this Court that Plaintiff's passport record "Israel" as his place of birth would signal, symbolically or concretely, that [the United States] recognizes that Jerusalem is a city that is located within the sovereign territory of Israel [and] would critically compromise the ability of the United States to work with Israelis, Palestinians and others in the region to further the peace process, to bring an end to violence in Israel and the Occupied Territories, and to achieve progress on the Roadmap. The 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. It would be seen as a breach of the cardinal principle of U.S. foreign policy barring any unilateral act(s) that could prejudge the outcome of future negotiations between the contending parties and cause irreversible damage to the credibility of the United States and its capacity to facilitate a final and permanent resolution of the Arab-Israeli conflict.

Dolan Decl., Ex. 1 (Def.'s Interrogatory Response No. 5). Moreover, the destabilizing impact of any Court order would be felt regardless of whether the place of birth for citizens born in Jerusalem was recorded as "Israel" or "Jerusalem, Israel." *Id.*

The international reaction to the enactment of Section 214(d) further corroborates the State Department's analysis. According to a State Department cable summarizing that reaction:

> Palestinians from across the political spectrum strongly condemned the Jerusalem provisions of the State Authorization Bill, interpreting those provisions as a reversal of longstanding U.S. policy that Jerusalem's status should be determined by Israel and the Palestinians in final status talks.

Dolan Decl., Ex. 4 (DOS 001867). The Governments of Saudi Arabia, Russia, and Iran joined in the criticism. *S. Arabia, Russia, Iran Flay U.S. over Al Quds,* DAWN, Oct. 3, 2002 (available at http:// www. dawn. com/ 2002/ 10/ 03/ top 11. htm).

The political situation in the Middle East is enormously complex, volatile, and long-standing. Indeed, "it is hard to conceive of an issue more quintessentially political in nature than the ongoing Israeli-Palestinian conflict, which has raged on the world stage with devastation on both sides for decades." *Doe I v. State of Israel*, 400 F.Supp.2d 86, 111-12 (D.D.C.2005).

[7] There are no judicially discoverable or manageable standards for the Court to apply in considering this fundamental and extraordinarily weighty question of U.S. foreign policy. As our Court of Appeals held in *Schneider,* the courts lack the policy advisors, intelligence sources, and other institutional resources to even begin to resolve a foreign policy issue of this magnitude. 412 F.3d at 196. Nor has the Plaintiff suggested any judicially discoverable or manageable standards that could be applied in this case. Accordingly, the second *Baker* factor is also present here.

C. Resolution of this Case Would Be Impossible Without Expressing Lack of Respect to Coordinate Branches of Government

The fourth *Baker* factor [FN2] is triggered by "the impossibility of a court's undertaking ***105** independent resolution without expressing lack of the respect due coordinate branches of government." 369 U.S. at 217, 82 S.Ct. 691.

> FN2. The Government does not argue that the third *Baker* factor, "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion," 369 U.S. at 217, 82 S.Ct. 691, applies to this case.

In *Sanchez-Espinoza v. Reagan,* 568 F.Supp. 596 (D.D.C.1983), *aff'd on other grounds,* 770 F.2d 202 (D.C.Cir.1985), twelve members of Congress brought suit against President Ronald Reagan for allegedly violating the Boland Amendment, which prohibited the use of funds to support the Contra insurgents fighting the Sandinista regime in Nicaragua. President Reagan had publicly stated that the Administration was not violating the Boland Amendment-a statement that was met with strenuous disagreement from many members of Congress. *Id.* at 600. The court held that were it "to decide, on a necessarily incomplete evidentiary record, that President Reagan either is mistaken, or is shielding the truth, one or both of the coordinate branches would be justifiably offended." *Id.*

[8] Here too, a decision by the Court would run the risk of "justifiably offending" one or both of the political branches. Since the Truman Administration, the executive branch has pursued a policy of not recognizing the sovereignty of any state over Jerusalem, pending the outcome of negotiations between the parties to the Arab-Israeli dispute. Congress apparently sought to alter this policy through the enactment of Section 214, which is titled "United States policy with respect to Jerusalem as the capital of Israel." The President views Section 214, if construed as mandatory, as impermissibly interfering "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." 2002 U.S.C.C.A.N. at 932.

This conflict between the political branches could be avoided if, as the Secretary urges, Section 214(d) could be construed as advisory, and not mandatory. But it is difficult to construe Section 214(d) as anything but mandatory. It states that the "Secretary *shall,* upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel." 116 Stat. at 1366 (emphasis added). The term "shall" has generally been construed as mandatory language that does not permit the exercise of discretion. *See, e.g.,* *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, --- U.S. ----, 127 S.Ct. 2518, 2531-32, 168 L.Ed.2d 467 (2007) (statutory language that the EPA "shall approve" an application if nine statutory factors are present does not permit agency discretion to consider other

factors). By contrast, Congress chose very different language in another subsection of the same statute, Section 214(a), when it "urge[d]" the President to relocate the U.S. Embassy to Jerusalem. This contrasting language clearly indicates that Congress understood the difference between "urging" the President to take certain action and "mandating" it. The Congressional intent to make Section 214(d) mandatory is clear.

Therefore, a decision by this Court on the merits would risk offending either, or both, the legislative and executive branches, which are at loggerheads over United States policy regarding Jerusalem. Such conflicts are best resolved through political means, by the two political branches themselves. *Goldwater v. Carter*, 444 U.S. 996, 1003, 100 S.Ct. 533, 62 L.Ed.2d 428 (1979) (Rehnquist, J., concurring). Thus, the fourth *Baker* factor is also present in this case.

***106 D. Resolution of this Case Involves the Potentiality of Embarrassment from Multifarious Pronouncements by Various Departments on One Question**

The sixth Baker factor [FN3] involves "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." 369 U.S. at 217, 82 S.Ct. 691.

> FN3. Given that four of the six *Baker* factors are present in this case, the Court need not address the fifth *Baker* factor: whether there is an unusual need to adhere to a previously

> made political decision. *See* *Population Inst. v. McPherson*, 797 F.2d 1062, 1070 (D.C.Cir.1986) (the "unusual need for adherence to a political decision already made" factor is among the most nebulous identified in *Baker*).

[9] The effect of conflicting pronouncements by coordinate branches on the political status of Jerusalem is already apparent. Congress' enactment of Section 214 created outrage among Palestinians and was subject to criticism by foreign governments. A State Department cable regarding Section 214 stated that "[d]espite our best efforts to get the word out that U.S. policy on Jerusalem has not changed, the reservations contained in the President's signing statement have been all but ignored, as Palestinians focus on what they consider the negative precedent and symbolism of an American law declaring that Israel's capital is Jerusalem." Dolan Decl., Ex. 4 (DOS 001867).

Should this Court add its voice to those of the President and Congress on the subject of Jerusalem's status, a controversial reaction is virtually guaranteed. Such a reaction can only further complicate and undermine United States efforts to help resolve the Middle East conflict. Therefore, the sixth *Baker* factor is also present here.

E. Plaintiff's Other Arguments Do Not Address *Baker*

Plaintiff fails to address the six *Baker* factors.

Instead, Plaintiff raises a number of arguments that are irrelevant to the *Baker* analysis. Even if the arguments had merit, which they do not, they would still have no bearing on determining whether this case poses a non-justiciable political question.

First, Plaintiff argues that the State Department's acquiescence in 1994 to legislation permitting the Secretary of State to list "Taiwan" as a place of birth, State Department Authorization Technical Corrections Act of 1994, Pub.L. No. 103-415, 108 Stat. 4299, shows that there would be no adverse foreign policy consequences in this case because the Taiwan legislation and Section 214(d) are virtually identical.

In response, the Secretary argues that the Taiwan legislation did not require the executive branch to alter its pre-existing "One China" policy, which acknowledged the People's Republic of China as the sole legitimate government of China. The Taiwan legislation permits a United States citizen born in "Taiwan" to have "Taiwan" entered on his or her passport. Entering the geographic term "Taiwan" does not contradict the "One China" policy because it does not necessarily imply that Taiwan is not subject to Chinese sovereignty. It is also consistent with the policy expressed in the *Foreign Affairs Manual* that citizens are allowed to designate the city or town rather than the country of their birth if they object to the entry of a country name.

Section 214, by contrast, directs the Secretary to enter the country name "Israel" for persons born in

the city of Jerusalem. According to the Secretary, this does contradict existing executive branch policy because*107 it at least implicitly recognizes the city of Jerusalem to be within the sovereign territory of Israel.

Thus, the two situations are simply not analogous.

Second, Plaintiff argues that past surveys of foreign governments indicate that many of these governments would accept passports that do not disclose the bearer's place of birth. In 1977 and 1986, the State Department surveyed a number of foreign governments regarding their attitudes toward the inclusion of place of birth information in U.S. passports. The results were mixed: some countries stated that they would accept passports that did not contain place of birth information, while other countries stated that they would not accept passports that did not contain that information, including such countries as France, Germany, and Italy. Declaration of Alyza D. Lewin, Oct. 3, 2006 ("Lewin Decl.") Ex. 15 (DOS 001778-79); Lewin Decl. Ex. 16 (DOS 001285). Based on these results, the State Department chose to continue to include place of birth information on United States passports.

Plaintiff argues that these survey results show that the inclusion of place of birth information in United States passports has no foreign policy implications. The survey results do not support this argument. Indeed, it is difficult to draw any conclusions from the mixed responses of the responding governments, especially because the rationale that underlay the

response of each foreign government is unknown. Moreover, it is clear from the record in this case that foreign governments *did* react negatively when Congress enacted Section 214.

Third, Plaintiff argues that the fact that some official documents have already inadvertently referred to "Jerusalem, Israel" without generating controversy demonstrates that this case does not have serious foreign policy implications. However, these clerical errors have not had an adverse impact on the foreign policy interests of the United States because they are just that-clerical errors, and did not constitute official statements of United States policy. Furthermore, the contentious foreign response to the passage of Section 214 directly conflicts with Plaintiff's argument that this case will not have a serious impact on United States foreign policy.

Finally, and most significantly, none of these arguments are germane to the *Baker* analysis which the Court must conduct. Consequently, they present no reason to alter the Court's conclusion that this case presents a non-justiciable political question. Because the Court lacks subject matter jurisdiction, it need not address the arguments raised in the parties' Motions for Summary Judgment.

IV. CONCLUSION

For the foregoing reasons, the Secretary's Motion to Dismiss for Lack of Subject Matter Jurisdiction [**Dkt. No. 44**] is **granted;** the Secretary's Motion in the Alternative for Summary Judgment [**Dkt. No. 46**]

and Plaintiff's Motion for Summary Judgment [**Dkt. No. 39**] are **denied as moot.** This case is **dismissed** for lack of subject matter jurisdiction. An Order shall issue with this Memorandum Opinion.

APPENDIX D

United States Court of Appeals,
District of Columbia Circuit.

Menachem Binyamin ZIVOTOFSKY, by his parents and guardians, ARI Z. and Naomi Siegman Zivotofsky, Appellant
v.
SECRETARY OF STATE, Appellee.
No. 04-5395

Argued Nov. 10, 2005.
Decided Feb. 17, 2006.

Background: Three-year-old child born in Jerusalem, through his United States citizen parents, brought action alleging that Foreign Relations Authorization Act entitled child to have "Israel" listed on his United States passport as his place of birth. The United States District Court for the District of Columbia, Gladys Kessler, J., dismissed action for lack of standing. Child appealed.

Holdings: The Court of Appeals, Randolph, Circuit Judge, held that:
(1) child suffered injury in fact, as required for standing, and
(2) remand was appropriate so that District Court

could develop more complete record as to whether action presented nonjusticiable political question.

So ordered.

*615 Appeal from the United States District Court for the District of Columbia (No. 03cv01921).Nathan Lewin argued the cause for appellant. With him on the briefs was Alyza D. Lewin.

Steven Lieberman was on the brief for amici curiae American Association of Jewish Lawyers and Jurists, et al. in support of appellant.

Paul Kujawsky was on the brief for amici curiae Congressmembers Henry A. Waxman, et al.

Douglas N. Letter, Litigation Counsel, U.S. Department of Justice, argued the cause for appellee. With him on the brief were Peter D. Keisler, Assistant Attorney General, Kenneth L. Wainstein, U.S. Attorney, Gregory G. Katsas, Deputy Assistant Attorney General, and Lewis Yelin, Attorney.

Before: SENTELLE, RANDOLPH, and ROGERS, Circuit Judges.

Opinion for the Court filed by Circuit Judge RANDOLPH.

RANDOLPH, Circuit Judge.

**270 Menachem Binyamin Zivotofsky was born in

Jerusalem on October 17, 2002. As a child of U.S. citizens who have resided in the United States, he also is a U.S. citizen. 8 U.S.C. § 1401(c). The ultimate issue in this appeal is whether § 214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003, Pub.L. No. 107-228, 116 Stat. 1350, 1365-66 (2002) ("Authorization Act"), entitles Menachem to have "Israel" listed on his U.S. passport as his place of birth. The district court did not reach the issue. It dismissed the complaint for lack of standing and because it believed the case presented a political question it could not resolve.

I.

The complaint alleges that Menachem's mother visited the Embassy of the United States in Tel Aviv, Israel ("Embassy"), on December 24, 2002, to request that her son be registered as a U.S. citizen and issued a passport and Consular Report of Birth Abroad with his place of birth designated as "Jerusalem, Israel." A Consular Birth Report is "a formal document certifying the acquisition of U.S. citizenship at birth of a person born abroad." 7 U.S. DEPARTMENT OF STATE, FOREIGN AFFAIRS MANUAL ("FAM") § 1441(a). Embassy officials denied Mrs. Zivotofsky's request. According to her declaration, they told her that although "the issue ha[d] been debated in Congress it ha[d] not become law." The Embassy issued a passport listing Menachem's**271 *616 place of birth as "Jerusalem" and a Consular Birth Report designating his birthplace as "Jerusalem." Neither document lists a country of birth.

A few months before Mrs. Zivotofsky visited the Embassy, the President signed the Authorization Act into law. Section 214 is titled "United States policy with respect to Jerusalem as the capital of Israel." Subsection (a) "urges the President" to relocate the U.S. Embassy in Israel to Jerusalem. Subsections (b) and (c) concern the use of appropriated funds. Subsection (d), which is the focus of this appeal, provides:

> 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.

Authorization Act § 214(d).[FN1]

> FN1. The complaint sought an injunction requiring the Secretary of State to issue Menachem a passport and Consular Birth Report with "Jerusalem, Israel" recorded as his place of birth. Plaintiff's counsel came to realize that § 214(d) speaks only in terms of "Israel." In his memorandum in support of summary judgment in the district court and in his briefs and oral argument on appeal, he sought only the designation "Israel." The government also treats the case as raising the question whether § 214(d) entitles Menachem to that relief, and the government has no objection to our doing the same.

When the President signed the Authorization Act into law, he made the following statement regarding § 214:

> 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.

Statement by President George W. Bush Upon Signing H.R. 1646, 2002 U.S.C.C.A.N. 931, 932 (Sept. 30, 2002). The status of Jerusalem is, as a matter of U.S. policy, "a matter to be resolved by negotiation between the Israelis and Palestinians" in light of their competing claims of sovereignty over the city. Br. for Appellee 7.

Section 214 of the Authorization Act conflicts with instructions in the State Department's Foreign Affairs Manual. As a "general rule," consular officers must "enter the country of the applicant's birth in the passport." 7 FAM § 1383.1(a). It is the State Department's "policy [to] show[ ] the birthplace as the country having present sovereignty." *Id.* § 1383.5-4 (Palestine); *see also id.* § 1383.5-5 (Israel-

Occupied Areas). But when "the birthplace of the applicant is located in territory disputed by another country, the city or area of birth may be written in the passport." *Id.* § 1383.5-2 (Disputed Territory). The Manual generally gives U.S. citizens born abroad the option of listing the city of birth "when there are objections to the country listing shown on the [Department's] birthplace guide." *Id.* § 1383.6(a) (City of Birth Listing). For applicants wishing to exercise this option, the Manual requires consular officers to inform them of the "difficulties which they may encounter in traveling to, or obtaining visas for entry into, certain foreign countries." *Id.* ****272 *617** § 1383.6(b).FN2

> FN2. We will assume, as the parties do, that the State Department's policies regarding place of birth transcription on Consular Birth Reports are the same as they are for passports. *See* 7 FAM § 1445.5-1 (Children Previously Documented as U.S. Citizens).

The Manual has special rules regarding Israel and the occupied territories. For example, if a passport applicant was "born [before 1948] in the area formerly known as Palestine," the passport may "show Palestine as the birthplace in individual cases upon consideration of all the circumstances"; if the applicant was born in 1948 or thereafter, "the city or town of birth may be listed if the applicant objects to showing the country having present sovereignty." *Id.* § 1383.5-4. The same is true of "Israel-Occupied Areas," such as the Golan Heights, the West Bank, and the Gaza Strip. *See id.* § 1383.5-5. With regard

to Jerusalem, the Manual differentiates between applicants born before and after the existence of an official Israeli state. *See id.* § 1383.5-6 (Jerusalem). For those like Menachem-a citizen born in Jerusalem after May 14, 1948-the Manual requires the person's place of birth to be recorded as "JERUSALEM." *See id.* § 1383.1(b) (requiring compliance with the "birthplace transcription guide" when "entering the place of birth in the passport"); *id.* § 1383 Ex. 1383.1, Pt. II (Birthplace Transcription Guide for Use in Preparing Passports) (JERUSALEM) (citing *id.* §§ 1383.5-5, .5-6); *see also id.* (ISRAEL) (indicating that Israel "[d]oes not include Jerusalem") (citing *id.* § 1383.5-5).

II.

[1] As to Menachem's standing to bring this action, the government argues that he cannot satisfy the injury-in-fact requirement derived from Article III of the Constitution. *See* *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). He is now only three years old. The claim that someday, when he is older, he might suffer psychological harm from the Secretary's passport decision is, the government argues, purely conjectural and in any event not an imminent injury, as the law requires.[FN3] However that may be, we think he has suffered another sort of injury in fact and therefore has standing.

> FN3. Menachem did not claim that he was experiencing "difficulties ... in traveling to, or obtaining visas for entry into, certain foreign

countries" because his passport indicates his city of birth. 7 FAM § 1383.6(b).

[2][3] The Supreme Court has recognized that "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n. 3, 93 S.Ct. 1146, 35 L.Ed.2d 536 (1973). Or stated differently, "Congress may create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute." *Warth v. Seldin*, 422 U.S. 490, 514, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975); *see Lujan*, 504 U.S. at 578, 112 S.Ct. 2130.

[4][5] A common example of such a statute is the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. Anyone whose request for specific information has been denied has standing to bring an action; the requester's circumstances-why he wants the information, what he plans to do with it, what harm he suffered from the failure to disclose-are irrelevant to his standing. *See, e.g., Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 449, 109 S.Ct. 2558, 105 L.Ed.2d 377 (1989). The ****273 *618** requester is injured-in-fact for standing purposes because he did not get what the statute entitled him to receive. *See FEC v. Akins*, 524 U.S. 11, 23-25, 118 S.Ct. 1777, 141 L.Ed.2d 10 (1998); *id.* at 30-31, 118 S.Ct. 1777 (Scalia, J., dissenting); *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. at 449, 109 S.Ct. 2558; *Pub. Citizen v. FTC*, 869 F.2d 1541, 1548 n. 13 (D.C.Cir.1989);

Rushforth v. Council of Econ. Advisers, 762 F.2d 1038, 1039 n. 3 (D.C.Cir.1985); *Brandon v. Eckard*, 569 F.2d 683, 687-88 (D.C.Cir.1977). The same injury can give a plaintiff standing to enforce the Government in the Sunshine Act, 5 U.S.C. § 552b, *see Rushforth*, 762 F.2d at 1039 n. 3, and the Federal Advisory Committee Act, 5 U.S.C. app. 2 §§ 1-16, *see Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. at 449, 109 S.Ct. 2558.[FN4] Other Supreme Court statutory standing cases are similar. The "Supreme Court has expressly ruled that persons seeking to vindicate a statutory right to information have standing even if they know or should know that the untruthful information they receive is false, *see Havens Realty* [*Corp. v. Coleman*, 455 U.S. 363, 374, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982)], and even if the information is available to them through other channels, *see* [*Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 n. 15, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976)]." *Pub. Citizen v. FTC*, 869 F.2d 1541, 1548 n. 13 (D.C.Cir.1989).

> FN4. For this reason, no one questioned the plaintiffs' standing in *Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Group*, 219 F.Supp.2d 20 (D.D.C.2002), *ordered dismissed by In re Cheney*, 406 F.3d 723, 731 (D.C.Cir.2005) (en banc).

The Supreme Court has qualified statutory standing in one respect. In *Lujan* the Court held that the citizen-suit provision of the Endangered Species Act of 1973 § 11(g), 16 U.S.C. § 1540(g), could not bestow

standing on plaintiffs who claimed no "particularized" injury, but only a generalized interest shared by all citizens in the proper administration of the law. 504 U.S. at 573-74, 112 S.Ct. 2130; *see also Sierra Club v. Morton,* 405 U.S. 727, 738, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972) ("[Statutory] broadening [of] the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury."). By "particularized" the Court meant "that the injury must affect the plaintiff in a personal and individual way." *Lujan,* 504 U.S. at 560 n. 1, 112 S.Ct. 2130. While a person would have standing to vindicate his "individual right" created by statute, "the public interest in the proper administration of the laws ... [cannot] be converted into an individual right by a statute that denominates it as such, and that permits all citizens (or, for that matter, a subclass of citizens who suffer no distinctive concrete harm) to sue." *Id.* at 576-77, 112 S.Ct. 2130. Otherwise, the federal courts would intrude upon the President's constitutional duty to "take Care that the Laws be faithfully executed," U.S. CONST. art. II, § 3, in violation of the separation of powers. *Lujan,* 504 U.S. at 577, 112 S.Ct. 2130.[FN5]

> FN5. This case would be like *Lujan* if someone born in the United States with no connection to anyone born in Jerusalem sued the State Department claiming that it was violating § 214(d) by not complying with requests of U.S. citizens born in Jerusalem to put "Israel" on

their passports.

[6][7] Menachem's case presents no such problem. When a plaintiff is the "object of [government] action (or forgone action) .... there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it." ***619 **274** *Id.* at 561-62, 112 S.Ct. 2130. Although it is natural to think of an injury in terms of some economic, physical, or psychological damage, a concrete and particular injury for standing purposes can also consist of the violation of an individual right conferred on a person by statute. Such an injury is concrete because it is of "a form traditionally capable of judicial resolution," *Schlesinger v. Reservists Comm. to Stop the War,* 418 U.S. 208, 220-21, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974), and it is particular because, as the violation of an *individual* right, it "affect[s] the plaintiff in a personal and individual way," *Lujan,* 504 U.S. at 560 n. 1, 112 S.Ct. 2130.

The injuries in the FOIA cases mentioned above are of this sort. *See Sargeant v. Dixon,* 130 F.3d 1067, 1070 (D.C.Cir.1997) ("The receipt of information is a tangible benefit the denial of which constitutes an injury."). And so is Menachem's. *See Allen v. Wright,* 468 U.S. 737, 751-52, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984) ("In many cases the standing question can be answered chiefly by comparing the allegations of the particular complaint to those made in prior standing cases."). His allegation that Congress conferred on him an individual right to have "Israel" listed as his place of birth on his passport and on his Consular

Birth Report is at the least a colorable reading of the statute. He also alleges that the Secretary of State violated that individual right. This is sufficient for Article III standing. *See Reservists Comm. to Stop the War*, 418 U.S. at 224 n. 14, 94 S.Ct. 2925. Menachem's injury is not "too abstract," the connection between the allegedly illegal conduct and the injury is not "too attenuated," and the prospect of his obtaining relief from a favorable ruling is not "too speculative." *Allen*, 468 U.S. at 752, 104 S.Ct. 3315. Under Article III of the Constitution, the "imperatives of a dispute capable of judicial resolution are sharply presented issues in a concrete factual setting and self-interested parties vigorously advocating opposing positions." *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 403, 100 S.Ct. 1202, 63 L.Ed.2d 479 (1980). Menachem's suit satisfies each element and he therefore has standing to sue.

III.

[8] The district court concluded that a U.S. passport inscribed "Jerusalem, Israel" might signify to others that the United States recognized Israel's sovereignty over Jerusalem. Yet "[p]olitical recognition is exclusively a function of the Executive." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964); *see also Williams v. Suffolk Ins. Co.*, 38 U.S. (13 Pet.) 415, 420, 10 L.Ed. 226 (1839). For this reason the district court found that the case presented a political question-that is, a claim of unlawfulness that was nonjusticiable. *See Vieth v. Jubelirer*, 541 U.S. 267, 277, 124 S.Ct. 1769, 158

L.Ed.2d 546 (2004) (plurality opinion); *Schneider v. Kissinger*, 412 F.3d 190, 193-94 (D.C.Cir.2005). The case, however, no longer involves the claim the district court considered. *See supra* note 1. Both sides agree that the question now is whether § 214(d) entitles Menachem to have just "Israel" listed as his place of birth on his passport and on his Consular Birth Report.

[9] Whether this, too, presents a political question depends on the meaning of § 214(d)-is it mandatory or, as the government argues, merely advisory? And it may depend also on what the effect would be of listing "Israel" on the passports of citizens born in Jerusalem. Among other things, Menachem contends that there "are tens of thousands of American citizens today whose passports identify them as born in 'Israel,' " Br. for Appellant 20; ****275 *620** that "no one will be able to distinguish" those born in Jerusalem "from American citizens born in Tel Aviv or Haifa" if their passports list "Israel" as their birthplace, *id.;* that "there is little foreign-policy impact in how American citizens are described in their passports," *id.* at 21; and that "[f]oreign sovereigns rely only on the 'identity and nationality' attestation of the Secretary of State, not on the passport's other information such as the passport-holder's date or place of birth," *id.* at 22. Menachem also cites evidence that "the United States Embassy in Tel Aviv issues death certificates that describe Shaarei Zedek Hospital in Jerusalem-the same hospital where the plaintiff was born-as located in " 'JERUSALEM, ISRAEL.' " *Id.* at 26. As to the last point, the government denies that there is any such

policy with respect to death certificates. Br. for Appellee 27 n. 3. And the government also takes issue with Menachem's other factual assertions.[FN6]

> FN6. Some of the government's nonjusticiability arguments are based on separation-of-powers principles. Because "[t]he nonjusticiability of a political question is primarily a function of the separation of powers," *Baker v. Carr*, 369 U.S. 186, 210, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), these arguments overlap and, in light of our disposition, we decline to reach them.

In light of all this, we believe the proper course is to remand the case to the district court so that both sides may develop a more complete record relating to these and other subjects of dispute.

So ordered.

APPENDIX E

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

August 31 2010

Mr. Nathan Lewin
Lewin & Lewin, LLP
1828 L Street, N.W.
Suite 901
Washington, DC 20036

Re: M.B.Z., by his parents and guardians Ari Z. Zivotofsky, et ux. v. Hillary Clinton, Secretary of State, Application No. 10A227

Dear Mr. Lewin:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to The Chief Justice, who on August 31, 2010 extended the time to and including November 26, 2010.

This letter has been sent to those designated on the attached notification list.

Sincerely,
William K. Suter, Clerk
Erik A. Fossum, Case Analyst

APPENDIX F

7 FAM 1380 PASSPORT PREPARATION

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7 FAM 1383.1 Transcription and Entry of Passports

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7 FAM 1383.2 Persons Born in the United States

*****

7 FAM 1383.3 Naturalized Persons Whose Country of Birth Agrees With Former Nationality

*****

7 FAM 1383.4 Naturalized Persons Whose Country of Birth Differs from Former Nationality

*****

7 FAM 1383.5 Persons Whose Country Is Incorporated Into Another Country

*****

7 FAM 1383.5-4 Palestine

Applicants who were born in the area formally 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. In such instances the general policy of showing the birthplace as the country having present sovereignty must be explained to the applicant. Consular officers may make exceptions to show Palestine as the birthplace in

individual cases upon consideration of all the circumstances, provided the applicant was born before 1948. If the applicant was born in 1948 or thereafter, the city or town of birth may be listed if the applicant objects to showing the country having present sovereignty. (See section 7 FAM 1383.6.) For information on that part known as the West Bank, see sections 7 FAM 1383.5-5 and 7 FAM 1383.5-6.

7 FAM 1383.5-5 Israel-Occupied Areas

As a result of prior conflicts and the so-called "June 1967 war," the Government of Israel currently occupies and administers *the Golan Heights, the West Bank, and the Gaza Strip. U.S. policy hold that the Golan Heights is Syrian territory, and that the West Bank and Gaza Strip are territories whose final status must be determined by negotiations.* Generally, the policy is to write the name of the country which retains sovereignty as the place of birth. If the applicant objects, enter the area or city name as listed in this section. Make clear to the applicant, however, that a foreign official who examines the passport and is unfamiliar with (*or objects to*) the area name may question its appearance in the passport and *possibly deny entry to the bearer.*

Area Name	Country Name
Golan Heights	SYRIA
West Bank, Jordan	WEST BANK
Gaza Strip	GAZA STRIP (preferred)
Sinai	EGYPT

NOTE: Do not enter ISRAEL is U.S. passports as the place of birth for applicants born in the occupied territories.

NOTE: The GAZA STRIP area was last part of a sovereign nation when part of Palestine. Therefore, PALESTINE is the alternate acceptable entry provided the applicant was born before 1948.

NOTE: Those persons born before May, 1948 in the area known as the West Bank may prefer to have PALESTINE listed as an alternate entry. Those born in 1948 or later may prefer to have their city of birth as an alternate entry. Persons born in the West Bank in 1948 or later may not have Palestine transcribed as an alternate entry.

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).