

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

MENACHEM BINYAMIN ZIVOTOFSKY, by )  
his parents and guardians, ARI Z. and NAOMI )  
SIEGMAN ZIVOTOFSKY, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
THE SECRETARY OF STATE, )  
 )  
Defendant. )  
\_\_\_\_\_ )

Civil Action No. 03-1921 (GK)

**REPLY IN SUPPORT OF DEFENDANT’S RENEWED MOTION  
TO DISMISS OR IN THE ALTERNATIVE FOR  
JUDGMENT AS A MATTER OF LAW**

**INTRODUCTION**

Plaintiff’s request for relief in this case is based on legislation whose enactment prompted strong protest from foreign entities involved in efforts to resolve the Israeli-Palestinian conflict. His ostensible focus on changing one word in one passport ignores the public and precedent-setting effects of a judgment in his favor: Given plaintiff’s reliance on Section 214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003, a decision in his favor would necessarily hold that Section 214(d) requires the government to indicate in official documents that Jerusalem is under Israeli sovereignty, by putting "Israel" as the place of birth in the passport of any American citizen born in Jerusalem who requests it. Such a holding could be interpreted by the international community as a shift in the U.S. government’s position on the status of Jerusalem, and thereby undermine the ability of the United States to facilitate a resolution of the Israeli-Palestinian conflict.

Plaintiff's opposition to defendant's motion to dismiss or for judgment as a matter of law is not only incorrect; it also fails to address almost all of the core issues discussed in defendant's motion. Plaintiff makes only a token attempt to counter defendant's showing that the issues presented here fall into all six categories of a nonjusticiable political question, and what little he says on that subject indicates an imperfect understanding of the doctrine. Plaintiff also says nothing about the fact that Section 214(d) should be construed as advisory in order to avoid questions as to its constitutionality, in light of the President's exclusive authority to recognize foreign sovereignty and the deference due to the President in matters of foreign policy. Indeed, symptomatic of plaintiff's failure to respond adequately to defendant's motion, he has also failed to respond to Defendant's Statement of Material Facts as to Which There Is No Genuine Dispute, as required by Local Civil Rule 7(h).

As shown below and in defendant's prior memoranda, all of these issues should be decided in defendant's favor, and this action should be dismissed with prejudice, or judgment entered in the Secretary's favor.

### ARGUMENT

I. This Case Involves and Affects Much More Than Plaintiff's Passport

Plaintiff characterizes as "modest" his request to require the Secretary to put "Israel" as the birthplace on his passport. He argues that "[n]o foreign official will be able to tell from his passport that the individual whose passport says 'Israel' was born in Jerusalem and not in Tel Aviv or Haifa." See Plaintiff's Memorandum of Law in Response to Defendant's Renewed Motion to Dismiss or in the Alternative for Judgment as a Matter of Law at 3 (docket #47)

[hereinafter Pl's Response]. Plaintiff misunderstands, however, the ultimate issue in this case, and he vastly understates the political implications of a change in U.S. policy regarding the birthplace of passport applicants born in Jerusalem — whether that change were compelled by a court decision or undertaken upon the Executive's own initiative. Especially in light of plaintiff's explicit reliance on Section 214(d) and his overt effort to enforce his understanding of that statute, this case involves much more than one passport.

As explained in defendant's prior memoranda, the framework for resolving the Israeli-Palestinian conflict, as agreed by the parties to that conflict and supported by the United States and other members of the international community, would require that the status of Jerusalem be addressed through permanent status negotiations. A U.S. policy or practice of putting "Israel" as the birthplace of passport holders born in Jerusalem would, in contrast, signal a departure by the United States from that international understanding. What matters most is not what any individual U.S. passport says per se — which may or may not become generally known — but the overall policy and practice of the United States regarding the passports of persons born in Jerusalem — any change of which would quickly become widely known.

As stated in the Secretary's interrogatory responses:

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 prejudice the outcome of future negotiations between the contending parties . . . .

See Declaration of JoAnn Dolan (docket #44-2) [hereinafter Dolan Decl.], Ex. 1, at 9. Such a change would, in turn, damage the ability of the United States to facilitate a peaceful final

resolution of the Middle East conflict. The Secretary has explained, for example, that a judgment for the plaintiff here —

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 [toward a permanent resolution, and would] 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.

See id.; see also id. at 11 ("a reversal of U.S. policy on Jerusalem's status would be immediately and publicly known"). Even aside from the United States' ability to facilitate a resolution of the Israeli-Palestinian conflict, "the reversal of United States policy not to prejudge a central final status issue [such as the status of Jerusalem] could . . . seriously damage our relations with friendly Arab and Islamic governments, adversely affecting relations on a range of bilateral issues, including trade and treatment of Americans abroad." Id.

The reaction in the Middle East and elsewhere in 2002 to the enactment of Section 214(d) — the statute on which the plaintiff seeks to rely here — is representative of the effects that would follow any actual reversal of U.S. policy regarding the status of Jerusalem. As described in the Secretary's interrogatory responses —

Palestinians from across the political spectrum strongly condemned all four Jerusalem provisions [in Section 214] . . . . The PLO Executive Committee, the Fateh Central Committee, and the Palestinian Authority cabinet issued statements harshly critical and asserting that [Section 214] "undermines the role of the U.S. as a sponsor of the peace process." The Speaker of the Palestinian Legislative Council issued a statement that the law was "an unprecedented undervaluing of Palestinian, Arab and Islamic rights in Jerusalem" that "raises questions about the real position of the U.S. Administration vis-a-vis Jerusalem."

Id. at 10 (emphasis added); see Dolan Decl., Exs. 3, 4 (summarizing Arab reaction in 2002).

"Numerous [other] political personalities [also] issued statements condemning the law." See

Dolan Decl., Ex. 1, at 10. For example, a member of the Palestinian parliament stated, "We condemn the US Congress decision and call on Arabs, Muslims and Christians to intervene for an end to the United States' support for the Israeli aggression." See [Palestinian Anger at US Jerusalem Law](#), BBC, Oct. 4, 2002, [http://news.bbc.co.uk/2/hi/middle\\_east/2300073.stm](http://news.bbc.co.uk/2/hi/middle_east/2300073.stm).

Another Palestinian government official declared that Section 214 "contradicts all UN Security Council resolutions and blows up the entire peace march." See [Arab fury at Jerusalem decision](#), BBC, Oct. 5, 2002, [http://news.bbc.co.uk/2/low/not\\_in\\_website/syndication/monitoring/media\\_reports/2302487.stm](http://news.bbc.co.uk/2/low/not_in_website/syndication/monitoring/media_reports/2302487.stm). Similar reactions also came from national governments geographically removed from the Middle East; the government of Russia criticized the legislation, for instance, saying that no unilateral decisions should be taken that would encroach on future negotiations over the status of Jerusalem. See [S. Arabia, Russia, Iran Flay US over Al Quds](#), DAWN, Oct. 3, 2002, <http://www.dawn.com/2002/10/03/top11.htm> (Pakistani newspaper).

Plaintiff's explicit reliance on a statute would further exacerbate the effects of any judgment in his favor. To one degree or another, such a judgment would necessarily entail a holding regarding the impact of Section 214(d) and the judicial enforceability of plaintiff's reading of the statute. To the extent future passport applicants were to secure similar relief against the Secretary by relying on that holding, the judgment would become part of a judicially-mandated change in the practice of the United States regarding the birthplace of passport holders born in Jerusalem, and, thus, in the perception of the United States' policy regarding sovereignty over Jerusalem.

Further, plaintiff's argument that no "great harm" has resulted from mistaken references to "Jerusalem, Israel" in Department of State materials misses the point. See [Pl's Response at 4](#).

Just as the above-described effects would flow from a change in the United States' policy or practice regarding the birthplace of passport holders born in Jerusalem — independent of the content of any one passport — any isolated, erroneous references to "Jerusalem, Israel" that plaintiff might be able to find on Department of State Internet pages or that might appear in scattered individual passports or Consular Reports of Birth Abroad — references that plaintiff himself admits are "mistaken" — do not constitute a change in policy and do not, therefore, damage the interests of the United States abroad. *Id.*; *see Dolan Decl., Ex. 1*, at 6 ("Misstatements and clerical errors in isolated official documents pertaining to Jerusalem can be explained as not reflecting any change in official policy or practice with respect to the status of Jerusalem."). In any event, as indicated in defendant's earlier filings, the Department of State is in the process of correcting those mistaken references, as appropriate. *See id.* at 5, 13-17.<sup>1</sup>

## II. The Issues Presented Here Are Nonjusticiable Political Questions

Defendant's prior memoranda have shown that plaintiff's request for an order requiring the Secretary to put "Israel" as the birthplace on his passport pursuant to Section 214(d) falls into all six categories of a nonjusticiable political question: There is a "textually demonstrable constitutional commitment" of the recognition of foreign sovereignty to the Executive branch; there are no "judicially discoverable and manageable standards for resolving" the recognition of foreign sovereignty; it would be impossible to resolve foreign sovereignty in court "without an

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<sup>1</sup> Additionally, the Internet page referred to in plaintiff's opposition as "measur[ing] the geographic area of Israel by including Jerusalem," *see* Pl's Response at 4, explicitly acknowledges that the figure includes Jerusalem, and explains that "Israel proclaimed Jerusalem as its capital in 1950" but that "[t]he United States, like nearly all other countries, maintains its embassy in Tel Aviv. *See Background Note: Israel*, <http://www.state.gov/r/pa/ei/bgn/3581.htm>. That page does not, therefore, suggest a policy of recognizing Jerusalem as under the governmental sovereignty of the State of Israel.

initial policy determination of a kind clearly for nonjudicial discretion"; resolving the issues presented here would entail a "lack of respect due [to one of the] coordinate branches of government"; this case presents "an unusual need for unquestioning adherence to a political decision already made"; and resolving this matter judicially would present "the potentiality of embarrassment of multifarious pronouncements by various departments on one question." See Schneider v. Kissinger, 412 F.3d 190, 193-94 (D.C. Cir. 2005) (quoting Baker v. Carr, 369 U.S. 186, 217 (1962)).

For the most part, plaintiff's opposition memorandum simply does not address these issues. He does not, for example, address the facts that granting judgment in his favor would entail a "lack of respect due [to one of the] coordinate branches of government," that determining the birthplace designation of passport applicants born in Jerusalem presents "an unusual need for unquestioning adherence to a political decision already made," and that granting judgment in his favor would give rise to "the embarrassment of multifarious pronouncements by various departments on one question." Each of these circumstances, alone, compels dismissal of this case as nonjusticiable. See Schneider, *id.* (noting that these "six factors [are listed] in the disjunctive, not the conjunctive" and that "[t]o find a political question, [a court] need only conclude that one factor is present, not all").

Plaintiff's only responses regarding the justiciability of this case, in his opposition memorandum, are to assert (1) that putting "Israel" as the birthplace on his passport would not equate to recognition of a foreign sovereign, see Pl's Response at 2, and (2) that this case involves a judicially cognizable question of statutory construction and enforcement rather than a nonjusticiable question of foreign sovereignty. See id. at 1-3. The foregoing discussion

regarding the effects of a judgment in plaintiff's favor also serves in disposing of the first assertion. Saying that Americans born in Jerusalem were born in "Israel" is effectively the same as saying that Jerusalem is within the sovereign territory of Israel. The authority to recognize foreign sovereigns — which is indisputably the sole province of the Executive — obviously includes the authority to recognize the extent of a sovereign's territorial sovereignty. See Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 410 (1964) ("Political recognition [of other countries] is exclusively a function of the Executive."); Americans United for Separation of Church & State v. Reagan, 786 F.2d 194, 202 (3d Cir. 1986) ("There is . . . a textually demonstrable commitment with respect to recognition of foreign states. Only the President has the power to 'receive Ambassadors and other public Ministers'. . . . Diplomatic relations are established by receiving and sending ambassadors or other public ministers.") (citations omitted); Goldwater v. Carter, 617 F.2d 697, 707-08 (D.C. Cir.) ("It is undisputed that the Constitution gave the President full constitutional authority to recognize the PRC and to derecognize the ROC."), vacated on other grounds, 444 U.S. 996 (1979). Therefore, whether to say, in United States passports, that citizens born in Jerusalem were born in "Israel" is constitutionally committed to the Executive and is not cognizable in court. See Schneider, 412 F.3d at 193-94.

Plaintiff's second response on the "political question" issue — that this case presents a mere question of statutory construction and enforcement rather than an issue of foreign sovereignty — reflects an incomplete understanding of the political question doctrine. Although some questions are nonjusticiable because they are inappropriate for judicial resolution and are thus reserved for the political branches — that is, the Executive and/or the Legislative — certain questions are nonjusticiable because of a "textually demonstrable constitutional commitment of

the issue to a coordinate political department." Importantly, the Supreme Court in Baker v. Carr did not say "textually demonstrable commitment to the coordinate political departments" (in the plural), but rather "textually demonstrable . . . commitment . . . to a coordinate political department" (in the singular). 369 U.S. at 217 (emphasis added).

Indeed, the Supreme Court's first reference to the political question doctrine, which appeared in Marbury v. Madison, related specifically to the commitment of a question to the Executive. As quoted by the D.C. Circuit in Schneider v. Kissinger:

In the venerable case of Marbury v. Madison, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803), Chief Justice Marshall first expressed the recognition by the judiciary of the existence of a class of cases constituting "political act[s], belonging to the executive department alone, for the performance of which entire confidence is placed by our Constitution in the supreme executive; and for any misconduct respecting which, the injured individual has no remedy." Id. at 164.

412 F.3d at 193 (emphasis added). Thus, if an issue is constitutionally committed to the Executive, it is inappropriate for resolution by any other Branch, and is not cognizable in court. Since the statute on which plaintiff attempts to rely deals with an issue committed to the Executive — the recognition of foreign sovereignty — this case cannot present a mere question of statutory construction and enforcement.

In an earlier case involving foreign affairs and the power of the Executive, this Court declined, based on the political question doctrine, to consider whether United States Forces were involved in "hostilities" for purposes of the War Powers Resolution. See Lowry v. Reagan, 676 F. Supp. 333, 340 (D.D.C. 1987). The Court observed that "a declaration of 'hostilities' by this Court could impact on statements by the Executive that the United States is neutral in the Iran-Iraq war and, moreover, might create doubts in the international community regarding the resolve

of the United States to adhere to this position." Id. at 340. Similarly, an order requiring the Executive to enter "Israel" as the birthplace of passport holders pursuant to Section 214(d) would interfere with the carefully articulated U.S. policy with respect to the issue of Jerusalem, and would "create doubts" — even more than Section 214(d) has already created — "in the international community regarding the resolve of the United States to adhere to this position." Even more than the situation during the Iran-Iraq war, "the volatile situation in the [Middle East] demands . . . a 'single-voiced statement of the Government's views.'" Id. (quoting Baker v. Carr, 369 U.S. at 211). As in Lowry, therefore, this Court should "refrain[ ] from joining the debate" on sovereignty over Jerusalem. Id.<sup>2</sup>

### III. Section 214(d) Should Be Construed as Advisory

As explained in defendant's motion papers, assuming that the issues presented here were justiciable, Section 214(d) should be construed as advisory rather than mandatory, in order to avoid questions as to the constitutionality of its intrusion into the sole province of the Executive and in light of the deference due to the Executive in matters of foreign policy. A "fundamental

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<sup>2</sup> Plaintiff contends that the current policy on passport applicants born in Jerusalem results in "discrimination" because "American citizens . . . who do not want to see 'Israel' on their passports are permitted to choose a city of birth or 'Palestine' in place of 'Israel,' whereas American citizens [who want] to see 'Israel' on their United States passports are denied that privilege if they were born in Jerusalem." See Pl's Response at 4. There is no "discrimination," however, because similarly-situated persons are treated identically under the Department's policy. First, plaintiffs are simply incorrect to the extent they argue that the Department of State will list "Palestine," if requested, as the place of birth of a person born in Jerusalem after May 14, 1948 (the date when the State of Israel was founded); all persons born in Jerusalem after that date — regardless of their feelings about having "Israel" as the place of birth on their passports — will get "Jerusalem" as their place of birth. See Dolan Decl., Ex. 2, at DOS 001218, DOS 001226. Further, although persons born within the State of Israel but outside Jerusalem after that date may have "the city or town of birth" rather than "Israel" listed as their birthplace, see id. at DOS 001217, that rule also applies to all such applicants who "object[ ] to showing the country having present sovereignty."

rule of judicial restraint" is that courts will not adjudicate the constitutionality of a statute if "a construction of the statute is fairly possible by which the question may be avoided." Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C., 467 U.S. 138, 157 (1984); Public Citizen v. Department of Justice, 491 U.S. 440, 465-66 (1989). Since the recognition of foreign sovereigns and their territory is exclusively an Executive function, Section 214(d) must be construed as advisory to avoid questions as to its constitutionality. Similarly, even aside from the constitutionality of Section 214(d), the Secretary of State is statutorily entrusted with issuing passports and otherwise managing the United States' foreign affairs, see 22 U.S.C. §§ 211a, 2656, and the courts are obliged, particularly in "matters . . . which involve foreign policy and national security . . . to defer to the discretion of executive agencies interpreting their governing law." See Paradissiotis v. Rubin, 171 F.3d 983, 988 (5th Cir. 1999).<sup>3</sup>

Plaintiff has made absolutely no response to these arguments.<sup>4</sup> The courts will "take . . . to be conceded" any argument to which the other party has failed to respond. See Clifton Power Corp. v. FERC, 88 F.3d 1258, 1267 (D.C. Cir. 1996); see also, e.g., Geller v. Randi, 40 F.3d 1300, 1304 (D.C. Cir. 1994); Farmer v. Hawk-Sawyer, 69 F. Supp. 2d 120, 128 (D.D.C. 1999) ("Plaintiff has conceded that she has failed to state an Eighth Amendment claim by failing to

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<sup>3</sup> Plaintiff has not responded to defendant's argument that Section 214(d) should be construed as advisory to avoid an implied partial repeal of statutes governing the issuance of passports and the management of foreign affairs. See 22 U.S.C. §§ 211(a), 2656.

<sup>4</sup> Plaintiff asserts that a presidential signing statement cannot change the meaning of a statute. See Pl's Response at 5. Defendant has not argued, however, that the President's statement in signing the Foreign Relations Authorization Act, Fiscal Year 2003, alone establishes that Section 214(d) is advisory. Rather, the statement shows that there has been no change in the United States' policy regarding Jerusalem, and that the President construes Section 214(d) as advisory rather than mandatory.

respond to Defendants' arguments for summary judgment."). If, therefore, the issues here are found to be justiciable, the Court should conclude that Section 214(d) is advisory rather than mandatory.

CONCLUSION

Accordingly, for the reasons stated above and in defendants' earlier memoranda, the Court should dismiss this action as nonjusticiable or enter judgment in favor of the Secretary.

Dated: December 7, 2006

Respectfully submitted,

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