

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

MENACHEM BINYAMIN ZIVOTOFSKY, by )  
his parents and guardians, ARI Z. and NAOMI )  
SIEGMAN ZIVOTOFSKY )  
HaShoshan 10-A )  
Nofei Aviv )  
Beit Shemesh, Israel 99590 )  
) )  
Plaintiffs, )  
) )  
v. )  
) )  
SECRETARY OF STATE )  
United States Department of State )  
2201 C Street, N.W. )  
Washington, DC 20520 )  
) )  
Defendant. )  
\_\_\_\_\_ )

Case No. 1:03CV01921-GK

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

Defendant Secretary of State, by and through undersigned counsel, respectfully moves this Court pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure to dismiss this action for lack of subject-matter jurisdiction. Plaintiff Menachem Binyamin Zivotofsky, a U.S. citizen born in Jerusalem, seeks a declaratory judgment requiring the Secretary to identify Plaintiff’s place of birth as “Israel” on his passport and Consular Report of Birth Abroad (“CRBA”). His claim raises a nonjusticiable political question that is precluded from judicial review under the political question doctrine. The Court accordingly should dismiss his claim for lack of jurisdiction.

Alternatively, Defendant moves this Court for judgment as a matter of law pursuant to Rule 56 of the Federal Rules of Civil Procedure. Although this Court need not reach the merits

of Plaintiff's claim, should the Court do so, the Secretary's decision to deny Plaintiff's request for identification of "Israel" as his place of birth on his passport and CRBA should be upheld. The status of Jerusalem has remained in dispute since 1948 between the parties to the Arab-Israeli conflict, who recognize this issue as one to be addressed in permanent status negotiations. The United States government's longstanding policy has been that the parties to this conflict must resolve Jerusalem's status through such negotiations and that no party should prejudice their outcome. Accordingly, the United States does not officially recognize any country as having sovereignty over Jerusalem and has endeavored to maintain a strict policy of not engaging in official actions that might be perceived as constituting such recognition.

To the extent Section 214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003, which Plaintiff invokes in support of his claim, purports to deviate from that longstanding policy, the doctrine of constitutional avoidance and the rule against implied repeals require that this Court uphold the Executive's interpretation of that Section as permissive, not mandatory. Otherwise, the provision constitutes an unconstitutional intrusion on the Executive's exclusive powers to determine the terms on which recognition is given to a foreign state and the manner in which such recognition is communicated. Accordingly, judgment should be entered in the Secretary's favor.

For all these reasons and those explained more fully in the accompanying Memorandum of Law in Support of Defendant's Renewed Motion to Dismiss or in the Alternative for Judgment as a Matter of Law, this Court should dismiss this action for lack of subject-matter jurisdiction.

Date: October 3, 2006

Respectfully submitted,

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s/Jacqueline Coleman

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**Attorneys for the Secretary of State**

**CERTIFICATE OF SERVICE**

I hereby certify that on October 3, 2006, a true and correct copy of the foregoing Defendant's Renewed Motion to Dismiss or in the Alternative for Judgment as a Matter of law and the accompanying documents in support of that motion were electronically filed through the U.S. District Court for the District of Columbia Electronic Document Filing System (ECF) and that the documents are available for viewing on that system.

s/ Jacqueline Coleman  
JACQUELINE COLEMAN

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**DEFENDANT’S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO  
GENUINE DISPUTE**

Pursuant to Local Rule 7.1(h), Defendant Secretary of State, by and through undersigned counsel, hereby submits the following statement of material facts as to which there is no genuine dispute.

United States Foreign Policy on Status of Jerusalem

1. The status of Jerusalem has remained in dispute since 1948 as the result of wars, key United Nations Resolutions, and other interim arrangements and understandings between the parties to the Arab-Israeli conflict. These parties recognized the special status of Jerusalem when they agreed in 1993 that the status of Jerusalem and certain other issues would be addressed in permanent status negotiations. *See* Declaration of JoAnn Dolan (“Dolan Decl.”) Ex. 1 (Defendant’s Responses to Plaintiff’s Interrogatories to Defendant Relating to “Political

Question” Issue (“Def. Interrogatory Response”) No. 5).

2. The United States policy since the Truman Administration has consistently 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. Def. Interrogatory Response No. 5.

3. The U.S. Administration, in cooperation with Russia, the European Union, and the United Nations (collectively, “the Quartet”), developed A Performance-Based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict that was presented to Israel and the Palestinians on April 30, 2003. Phase III of the Roadmap for Peace provides for Israeli-Palestinian negotiations aiming at a permanent status agreement on borders, Jerusalem, refugees and settlements. Def. Interrogatory Response No. 5.

4. The President has reaffirmed his commitment to the Roadmap as recently as September 19, 2006. *See* <http://www.whitehouse.gov/news/releases/2006/09/20060919-4.html>.

Department of State Passport Policy

5. The Department of State’s policy on designation of Jerusalem as a place of birth in passports and Consular Reports of Birth Abroad (“CRBA”) is a manifestation of the U.S. government’s foreign policy on the status of Jerusalem. Def. Interrogatory Response No. 5.

6. Volume 7 of the Department of State’s *Foreign Affairs Manual* sets forth the Department’s policy on place of birth transcription and entry in passports.

7. 7 FAM 1383.5-6 sets forth the permissible place of birth designations for U.S. citizens born in 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 that 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).

Dolan Decl. Ex. 2 (7 FAM 1383.5-6 Jerusalem [DOS 001218]). For such persons born within the municipal limits of Jerusalem, enter JERUSALEM. Part II of the birthplace transcription guide, which shows the acceptable name and spelling for specific countries and territories to be used in U.S. passports, indicates that for "JERUSALEM" "[Do not write Israel or Jordan. See sections 7 FAM 1383.5-5, 7 FAM 1383.5-6]." Dolan Decl. Ex. 2 (Part II [DOS 001226]).

8. On September 30, 2002, Congress enacted the Foreign Relations Authorization Act, Fiscal Year 2003. Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, 116 Stat. 1350 (Sept. 30, 2002). Section 214(d) of that Act provides 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.

Pub. L. No. 107-228, § 214(d), 116 Stat. 1366. In his Statement on Signing the Foreign Relations Authorization Act, Fiscal Year 2003, the President explained that

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 on Signing the Foreign Relations Authorization Act, Fiscal Year 2003 (“Presidential Signing Statement”), 2002 U.S.C.C.A.N. 931, 932-33 (Sept. 30, 2002).

9. Following enactment of Section 214(d), the Department of State instructed embassies and other posts overseas that “when the President signed the state authorization bill his signing statement explicitly stated that our policy towards Jerusalem has not changed and made clear the Administration will not consider the provisions concerning Jerusalem to be mandatory. . . . Thus, our policies regarding listing Jerusalem as a place of birth in consular documents . . . has not changed.” Dolan Decl. Ex. 3 (Publicizing that U.S. Policy Towards Jerusalem Has Not Changed (October 2002), [DOS 001792]).

Plaintiff Menachem Binyamin Zivotofsky’s Place of Birth

10. Plaintiff Menachem Binyamin Zivotofsky was born to U.S. citizen parents on October 17, 2002 in the city of Jerusalem. Complaint for Injunction and Declaratory Judgment (“Compl.”) ¶¶ 2, 4.

11. On December 24, 2002, Plaintiff’s mother applied for a passport and CRBA for Plaintiff and requested that his place of birth on those documents be identified as “Jerusalem, Israel.” Compl. ¶ 8.

12. Plaintiff was issued a U.S. passport and CRBA that identify his place of birth as “Jerusalem.” Compl. ¶ 8.

Dated: October 3, 2006

Respectfully submitted,

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Assistant Attorney General,  
Civil Division

JEFFREY A. TAYLOR  
United States Attorney

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

Although Plaintiff Menachem Binyamin Zivotofsky seeks to minimize the import of the relief he is seeking here – a declaratory judgment that the Secretary of State must identify “Israel” as his birthplace on his passport and Consular Report of Birth Abroad (“CRBA”) – such a determination would thrust this Court into the middle of a delicate foreign relations issue concerning the status of Jerusalem. The status of Jerusalem has remained in dispute since 1948 between the parties to the Arab-Israeli conflict, who recognize this issue as one to be addressed in permanent status negotiations. The United States’ policy for the past half century has been and continues to be that the parties to this conflict must resolve Jerusalem’s status through such negotiations and that no party should prejudice their outcome. The United States therefore does not officially recognize Jerusalem as the capital of Israel or the sovereignty of any nation over

Jerusalem. Consistent with that policy, United States passports and CRBAs do not identify the place of birth of United States citizens born in Jerusalem as either “Israel” or “Jerusalem, Israel,” as either formulation would be regarded as official recognition by the United States that Jerusalem is within the sovereign state of Israel. Instead, the place of birth for such individuals is identified as “Jerusalem.”

Invoking Section 214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003, Plaintiff, who was issued a passport and CRBA properly designating his place of birth as “Jerusalem,” urges this Court to overturn longstanding U.S. foreign policy by forcing the Secretary to declare publicly in officially issued government documents that an individual born in “Jerusalem” was born in “Israel.” In effect, Plaintiff asks this Court to resolve whether to recognize the sovereignty of Israel over Jerusalem and the communication of such recognition publicly. The political question doctrine, however, excludes from judicial review decisions that, as here, involve matters that are constitutionally committed to the political branches of government. As this Court previously has concluded, the recognition of sovereigns is constitutionally committed to the Executive. Since Plaintiff’s request implicates that authority of the President, Plaintiff’s claim is wholly unsuited for judicial resolution. Accordingly, this Court should dismiss this action under the political question doctrine.

If, notwithstanding that compelled disposition of this action, this Court reaches the merits of Plaintiff’s claim, the Court should uphold the Department of State’s decision to deny Plaintiff’s request, consistent with longstanding U.S. government policy of identifying only “Jerusalem” as the place of birth on the passports and CRBAs of U.S. citizens born within that city. Although Section 214(d) of the Foreign Relations Authorization Act purports to give such

citizens the option of requesting that “Israel” be designated as their place of birth, the doctrine of constitutional avoidance compels this Court to construe that statute as permissive not mandatory. Otherwise, Section 214(d) is a clear infringement on the President’s plenary authority to conduct foreign affairs. By construing that section as indicating Congress’s preference as to the place of birth designations of U.S. citizens born in Jerusalem, this Court need not reach the constitutionality of Section 214(d). Such construction is also consistent with the rule against implied repeals of statutes – here, 22 U.S.C. § 211a and 22 U.S.C. § 2656, which together give the Secretary wide discretion over U.S. passport policy. But if the Court were to decide the constitutionality of Section 214(d), that provision should be struck down as an unconstitutional infringement on the President’s authority. Regardless, Plaintiff’s claim fails on the merits, and the Secretary of State is entitled to judgment in her favor.

#### **RELEVANT STATUTORY PROVISION AND CONSULAR POLICY**

On September 30, 2002, Congress enacted the Foreign Relations Authorization Act, Fiscal Year 2003 to authorize billions of dollars in appropriations to the Department of State. Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, 116 Stat. 1350 (Sept. 30, 2002). Included among the over two hundred twenty sections of the Act is a section entitled “United States Policy with Respect to Jerusalem as the Capital of Israel.” Pub. L. No. 107-228, § 214, 116 Stat. 1365-66.

Subsection (a) of that section reaffirms Congress’s “commitment to relocating the United States Embassy in Israel to Jerusalem” and “urges” the President “to immediately begin the [relocation] process.” Pub. L. No. 107-228, § 214(a), 116 Stat. 1365. Subsections (b) and (c) purport to impose certain limitations on the funds authorized to be appropriated pursuant to the

Act. Specifically, none of the funds “may be expended for the operation of a United States consulate or diplomatic facility in Jerusalem unless such consulate or diplomatic facility is under the supervision of the United States Ambassador to Israel” or “may be available for the publication of any official government document which lists countries and their capital cities unless the publication identifies Jerusalem as the capital of Israel.” Pub. L. No. 107-228, § 214(b), (c), 116 Stat. 1366.

The remaining subsection, Section 214(d), purports to expand the permissible place of birth designations on passports of U.S. citizens born in Jerusalem by providing that:

[f]or 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.

Pub. L. No. 107-228, § 214(d), 116 Stat. 1366. However, as a matter of longstanding U.S. government policy, the United States does not recognize Israel or any other state as having sovereignty over Jerusalem. Consistent with that policy, the Department of State prohibits the identification of “Israel” as the place of birth on passports and CRBAs for a U.S. citizen born in Jerusalem. Thus, the Department of State’s Foreign Affairs Manual instructs consular offices that

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.

Declaration of JoAnn Dolan (“Dolan Decl.”) Ex. 2 (7 FAM 1383.5-6); *see also id.* (7 FAM 1380

Pt. II) (instructing as to Jerusalem “Do not write Israel or Jordan” as the place of birth on U.S. passports). For persons born after May 14, 1948 within the municipal limits of that city, “Jerusalem” is identified as the place of birth.

In signing the Foreign Relations Authorization Act, Fiscal Year 2003 into law, the President addressed the proper reconciliation of Section 214 with the United States’ longstanding recognition policy as to Jerusalem:

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 on Signing the Foreign Relations Authorization Act, Fiscal Year 2003 (“Presidential Signing Statement”), 2002 U.S.C.C.A.N. 931, 932-33 (Sept. 30, 2002). Notwithstanding the President’s approval of the Act, he refused to adopt the “various statements of policy in the Act as U.S. foreign policy.” *Id.* Rather, “[g]iven the Constitution’s commitment to the presidency of the authority to conduct the Nation’s foreign affairs, the executive branch shall construe such policy statements as advisory, giving them the due weight that comity between the legislative and executive branches should require, to the extent consistent with U.S. foreign policy.” *Id.* at 933.

Consistent with that presidential directive, the Department of State instructed embassies and other posts overseas that they should “use all possible means to spread the message that our policy has not changed and that we will not implement the [] Jerusalem related provisions in the [Act].” Dolan Decl. Ex. 3 (Publicizing that U.S. Policy Towards Jerusalem has not Changed

(Oct. 2002)). Thus, “Israel” remains an impermissible place of birth designation on passports and CRBAs of U.S. citizens born in Jerusalem.

### STATEMENT OF FACTS AND PROCEDURAL HISTORY

Plaintiff Menachem Binyamin Zivotofsky was born on October 17, 2002 in Jerusalem to U.S. citizen parents. Complaint for Injunction and Declaratory Judgment (“Compl.”) ¶ 2. On December 24, 2002, Plaintiff’s mother applied for a passport in his name at the Embassy of the United States in Tel Aviv, Israel. Compl. ¶ 8. She requested that Plaintiff be registered as a United States citizen and issued a passport in which his place of birth would be designated as “Jerusalem, Israel.” Compl. ¶ 8. Embassy officials refused her request. Compl. ¶ 8. Plaintiff instead was issued a passport and CRBA that identified his place of birth as “Jerusalem.” Compl. ¶ 8. On September 16, 2003, Plaintiff, by and through his parents, filed this action seeking a declaratory judgment that Section 214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003 required the Secretary of State to issue Plaintiff a passport and CRBA that designated his place of birth as “Jerusalem, Israel.” Compl. ¶ 9.

Upon consideration of Defendant’s motion to dismiss for lack of jurisdiction and Plaintiff’s motion for summary judgment, this Court granted Defendant’s motion and dismissed this action because Plaintiff had suffered no injury in fact sufficient to confer standing and his claim presented a nonjusticiable political question. *See* Memorandum Opinion (“Mem. Op.”) at 11 (Sept. 7, 2004). Plaintiff appealed. The D.C. Circuit concluded that Plaintiff’s “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” was sufficient to confer standing. *Zivotofsky v. Secretary of State*, 444 F.3d 614, 619 (D.C. Cir. 2006). Although recognizing that this Court

alternatively dismissed this action under the political question doctrine, the D.C. Circuit concluded that Plaintiff's claim on appeal was not the one this Court had considered. The D.C. Circuit therefore remanded to this Court for a determination of whether Plaintiff's reformulated claim – whether Section 214(d) entitles him to have “Israel,” as opposed to “Jerusalem, Israel,” designated his place of birth on his passport and CRBA – also presents a nonjusticiable political question.

On remand, this Court ordered the parties to conduct discovery limited to the “political question” issue. Plaintiff propounded written discovery, including interrogatories, document requests, and requests for admission, upon the Secretary and deposed a 30(b)(6) witness designated by the Department of State. Following the close of discovery, the Secretary now renews her motion to dismiss for lack of jurisdiction.

#### **ARGUMENT**

#### **I. THIS ACTION SHOULD BE DISMISSED BECAUSE IT PRESENTS A NONJUSTICIABLE POLITICAL QUESTION.**

Plaintiff's reformulated request for identification of “Israel” as his birthplace on his passport and CRBA raises the same political question that his prior request for “Jerusalem, Israel” did. Therefore, the Court should again dismiss this action under the political question doctrine. *See* Mem. Op. at 10. That doctrine “excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch.” *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 (1986); *El-Shifa Pharmaceutical Indus. Co. v. United States*, 402 F. Supp. 2d 267, 273 (D.D.C. 2005) (same). Such preclusion of judicial review is “primarily a function of the separation of powers” among the three coordinate

branches of government. *Bancoult v. McNamara*, 445 F.3d 427, 432 (D.C. Cir. 2006); *see also Baker v. Carr*, 369 U.S. 186, 210 (1962); *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10, 15 (D.D.C. 2005). Controversies that implicate this doctrine are characterized by: (1) “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 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 of multifarious pronouncements by various departments on one question.” *Schneider v. Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005); *see also Baker*, 369 U.S. at 217. The presence of any one of these elements renders a case nonjusticiable under the political question doctrine. *See Bancoult*, 445 F.3d at 432 (“To find a political question, we need only conclude that one factor is present, not all”); *Schneider*, 412 F.3d at 194 (same); *El-Shifa*, 402 F. Supp. 2d at 274 (“If even one of these elements is present, then adjudication of the case may be said to require resolution of a political question, which is nonjusticiable and hence not reviewable by a court.”). That determination “requires a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action.” *Ibrahim*, 391 F. Supp. 2d at 15; *see also Baker*, 369 U.S. at 211. Here such an analysis compels dismissal of Plaintiff’s claim as a nonjusticiable political question.

**A. The Recognition of Sovereignty Over Jerusalem is Constitutionally Committed to the Executive Branch.**

This Court should dismiss Plaintiff’s claim because it is inextricably intertwined with U.S. foreign policy on Israel and the Arab-Israeli conflict. The conduct of foreign relations “is committed by the Constitution to the Executive and Legislative – the political – Departments of the Government.” *Schneider*, 412 F.3d at 194. Article I, Section 8 of the Constitution, which enumerates the powers of the Legislature, “is richly laden with delegation of foreign policy and national security powers.” *Id.*; *see, e.g.*, U.S. Const. art. I, § 8, cl. 1; U.S. Const. art. I, § 8, cl. 3; U.S. Const. art. I, § 8, cl. 10; U.S. Const. art. I, § 8, cl. 11; U.S. Const. art. I, § 8, cl. 12; U.S. Const. art. I, § 8, cl. 13; U.S. Const. art. I, § 8, cl. 14; U.S. Const. art. I, § 8, cl. 15. Article II “likewise provides allocation of foreign relations and national security powers to the President, the unitary chief executive.” *Schneider*, 412 F.3d at 195; *see, e.g.*, U.S. Const. art. II, §2; U.S. Const. art. II, § 3. Although “the language of textual commitment of the President is not as extensive as that relating to the legislative branch, nonetheless it is plain that that commitment is real.” *Schneider*, 412 F.3d at 195. Indeed, the Supreme Court has regarded the President as “possessing ‘plenary and exclusive power’ in the international arena and ‘as [being] the sole organ of the federal government in the field of international relations.’” *Id.* (citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936)).

In contrast, Article III of the Constitution, which enumerates the powers of the judiciary, lacks such indicia of textual commitment of foreign relations to that branch of government. *Schneider*, 412 F.3d at 195; *see also Bancoult*, 445 F.3d at 433 (noting that the “fundamental division of authority and power established by the Constitution precludes judges from overseeing

the conduct of foreign policy”). Thus, foreign policy decisions are clearly “the subject of just such a textual commitment” to render them inappropriate for judicial inquiry or decision. *Schneider*, 412 F.3d at 194; *see also Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952) (matters relating “to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference”); *Haig v. Agee*, 453 U.S. 280, 292 (1981) (“Matters intimately related to foreign policy . . . are rarely proper subjects for judicial intervention.”); *Mahorner v. Bush*, 224 F. Supp. 2d 48, 53 (D.D.C. 2002) (noting that “[a]mong the areas which courts have traditionally deemed to involve political questions is the conduct of foreign relations, which is committed by the Constitution to . . . ‘the political’ departments of the government”); *Islamic American Relief Agency v. Unidentified FBI Agents*, 394 F. Supp. 2d 34, 45 (D.D.C. 2005) (noting that “[a]s a general principal, . . . [c]ourt[s] should avoid impairment of decisions made by the Congress or the President in matters involving foreign affairs”).

Nowhere is judicial inquiry more inappropriate than in the area in which Plaintiff would have this Court intrude – the recognition of foreign sovereigns. *See 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) (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.”); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964) (“Political recognition is exclusively a function of the Executive.”); *Baker*, 369 U.S. at 212 (“recognition of foreign governments so strongly defies judicial treatment that . . . the judiciary

ordinarily follows the executive as to which nation has sovereignty over disputed territory”); *Williams v. Suffolk Ins. Co.*, 38 U.S. 415, 420 (1839) (“can there be any doubt that when the executive branch of the government, which is charged with our foreign relations, shall in its correspondence with a foreign nation assume a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department . . . [and] obligatory on the people and government of the Union”). That “authority is not limited to a determination of the government to be recognized. . . . [but i]ncludes the power to determine the policy which is to govern the question of recognition.” *United States v. Pink*, 315 U.S. 203, 229 (1942) (concluding that “[w]hat government is to be regarded here as representative of a foreign sovereign state is a political rather than a judicial question”). Where, as here, a case involves “[o]bjections to the underlying policy as well as objections to recognition[, such] are to be addressed to the political department and not to the courts.” *Id.*; see also *Baker*, 369 U.S. at 212. Thus, this Court should dismiss Plaintiff’s claim as improper for judicial treatment.

Plaintiff’s request for “Israel” to be designated as his place of birth on his passport and CRBA is tantamount to requesting that this Court override long-standing U.S. government policy on the status of Jerusalem and would have the same effect on international relations as designating “Jerusalem, Israel” his place of birth. The United States does not recognize any country as having sovereignty over Jerusalem. Rather, that city’s status is to be finally resolved through permanent status negotiations between the parties to the Arab-Israeli conflict.<sup>1</sup> See

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<sup>1</sup> “The U.S. Administration, in cooperation with Russia, the European Union, and the United Nations (collectively, “the Quartet”), developed A Performance-Based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict that was presented to Israel and the Palestinians on April 30, 2003. Phase III of the Roadmap for Peace provides for Israeli-Palestinian negotiations aiming at a permanent status agreement on borders, Jerusalem, refugees

Dolan Decl. Ex. 1 (Def. Interrogatory Response No. 5) (“The United States policy since the Truman Administration has consistently 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.”). Plaintiff, who was born in Jerusalem, cannot divorce his request for “Israel” to be designated as his birthplace on his U.S. passport and CRBA from an official recognition of Israel’s sovereignty over Jerusalem in a U.S. government document.<sup>2</sup> *See* Mem. Op. at 10 (“The desired passport wording in this case would confer recognition in an official, diplomatic document that Israel has sovereignty over Jerusalem.”). Any decision by this Court other than to dismiss would invade this clearly political area within the exclusive power of the President. *See Doe I v. State of Israel*, 400 F. Supp. 2d 86, 111-12 (D.D.C. 2005) (concluding that “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”). Since the doctrine of separation of powers precludes such invasion, dismissal of this action is compelled.

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and settlements.” Dolan Decl. Ex. 1 (Def. Interrogatory Response No. 5). The President and the Secretary of State recently reaffirmed the United States’ commitment to this policy. *See* <http://www.whitehouse.gov/news/releases/2006/09/20060919-4.html> (reaffirming that achievement of the “vision set forth in the roadmap” is “one of the great objectives of my presidency”); <http://www/un.org/News/Press/docs/2006/sq2116.doc.htm> (reaffirming the Quartet’s “commitment to the roadmap as the means to realize the goal of two democratic states – Israel and Palestine – living side by side in peace and security”).

<sup>2</sup> A passport is “in the character of a political document” and “proof of allegiance to the United States.” *Agee*, 453 U.S. at 292, 293. As such, a passport is “allied to, and at times a part of, the conduct of foreign affairs.” *Shachtman v. Dulles*, 225 F.2d 938, 940 (D.C. Cir. 1955).

**B . Plaintiff's Claim Cannot Be Decided Without an Initial Policy Determination of a Kind Clearly for Nonjudicial Discretion nor Are There Manageable Judicial Standards to Resolve His Claim.**

Although this Court need not determine that other characteristics of a political question are present to dismiss this action under that doctrine, Plaintiff's claim also implicates the other factors of a political question. Executive decisions regarding foreign policy are "of a kind for which the Judiciary has neither the aptitude, facilities, nor responsibility." *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948); *Mahorner*, 224 F. Supp. 2d at 52. Courts "are decidedly ill-equipped to consider such questions as they are not privy to all relevant intelligence information." *Schneider v. Kissinger*, 310 F. Supp. 2d 251, 263 (D.D.C. 2004) (concluding that "the 'nuances' of the foreign policy of the United States . . . are much more the province of the Executive Branch and Congress than of this Court"). Such decisions, moreover, are "delicate, complex, and involve large elements of prophecy" and thus "are and should be undertaken by only those directly responsible to the people whose welfare they advance or imperil." *Chicago & S. Air Lines*, 333 U.S. at 111.

Although Plaintiff disavows any political significance to this Court's ordering the Secretary of State to designate his birthplace as "Israel" on his passport and CRBA, his claim at its core is "peculiarly volatile, undeniably political, and ultimately nonjusticiable." *Doe I*, 400 F. Supp. 2d at 112 (noting that "[w]hether plaintiffs dress their claims in the garb of . . . other federal statutes . . . the character of those claims is, at its core, the same"). Indeed, reaction to the enactment of the statutory provision that Plaintiff invokes as requiring his preferred passport wording is indicative of the political volatility of his request. Upon Section 214's enactment, Palestinians from across the political spectrum strongly condemned all four

Jerusalem provisions under Section 214. The PLO Executive Committee, the Fateh Central Committee, and the Palestinian Authority cabinet issued statements harshly critical and asserting that it “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.”

Dolan Decl. Ex. 1 (Def. Interrogatory Response No. 5); *see also* Dolan Decl. Ex. 4. This Court plainly cannot decide Plaintiff’s claim without making initial policy determinations as to the United States’ position vis-a-vis Jerusalem and the impact of a perceived or real change in that policy. Since such policy determinations unquestionably do not lie within judicial discretion and have no judicially manageable standards to resolve them, these additional characteristics of Plaintiff’s claim compel dismissal under the political question doctrine. *Cf. Schneider*, 310 F. Supp. 2d at 263 (concluding that this political question factor counseled against the court hearing the case because the court lacked an “appropriate legal standard to determine the gravity of the threat to the United States that might be caused by a (hostile) foreign government”).<sup>3</sup>

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<sup>3</sup> Although some speculation is involved in determining the extent of the harm that a change in foreign policy, such as the identification of “Israel” on passports as the place of birth of U.S. citizens born in Jerusalem, that assessment is constitutionally entrusted to the Executive Branch. In the Department of State’s assessment

Any unilateral action by the United States that would signal, symbolically or concretely, that it recognizes that Jerusalem is a city that is located within the sovereign territory of Israel 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 prejudice 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.

**C. The Resolution of Plaintiff’s Claim Would Require This Court to Pass Judgment on the Executive Branch’s Long-Standing Policy on Jerusalem.**

Resolving this action in Plaintiff’s favor would manifest a lack of respect for the President’s policy concerning the status of Jerusalem. “A court should refrain from entertaining a suit if it would be unable to do so without expressing a lack of respect due to its co-equal Branches of Government.” *Schneider*, 412 F.3d at 198 (observing that “it seems apparent to us that we could not determine Appellant’s claims without passing judgment on the decision of the executive branch to participate in the alleged covert operations”); *e.g.*, *El-Shifa*, 402 F. Supp. 2d at 275-76 (concluding that a “judicial inquiry into the reasonableness of the judgments made regarding the El-Shifa plant . . . could require an inappropriate second-guessing of executive branch decisions”); *Sanchez-Espinoza v. Reagan*, 568 F. Supp. 596, 600 (D.D.C. 1983) (concluding that “[w]ere this Court to decide . . . that President Reagan either is mistaken, or is shielding the truth, one or both of the coordinate branches would be justifiably offended . . . . therefore, it is up to Congress and the President to try to resolve their differences and jointly set a course for U.S. involvement in Central America”). Similar considerations counsel in favor of this Court dismissing this action as presenting a nonjusticiable political question. *Cf. Hwang Geum Joo v. Japan*, 413 F.3d 45, 53 (D.C. Cir. 2005) (concluding that “[f]or the court to disregard th[e] judgment, to which the Executive has consistently adhered . . . would be imprudent to a degree beyond our power”).

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Dolan Decl. Ex. 1 (Def. Interrogatory Response No. 5); *see also* Dolan Decl. Ex. 4.

The issue of whether the Secretary is statutorily required to identify on the passport and CRBA of Plaintiff, who undisputedly was born in Jerusalem, “Israel” as his birthplace calls into question the Executive’s long-standing policy of refraining from any unilateral action that could be perceived as supporting the claim of any party to the Arab-Israeli conflict to sovereignty over Jerusalem. *See* Dolan Decl. Ex. 1 (Def. Interrogatory Response No. 5) (explaining that “[f]rom a foreign policy perspective, regardless of whether ‘Israel’ or ‘Jerusalem, Israel,’ were to be recorded as the place of birth for a person born in Jerusalem, such a reversal of U.S. policy on Jerusalem’s status would be immediately and publicly known, as was the enactment of Section 214 in 2002. The implications would be equally adverse and dramatic.”). The United States’ policy for the past half century has been and continues to be that the parties to the Middle East conflict are to finally resolve the status of Jerusalem through permanent status negotiations. *See* Dolan Decl. Ex. 1 (Def. Interrogatory Response No. 5) (“The United States policy since the Truman Administration has consistently 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.”). Until such time, the United States does not recognize any country as having sovereignty over Jerusalem. The identification of Plaintiff’s birthplace as “Israel” on his U.S. passport and CRBA is contrary to that foreign policy decision of the President. Although the language of Section 214 arguably calls into question Congress’s adherence to that policy, this Court plainly cannot decide Plaintiff’s claim without contradicting either or both political branches of government on this issue. Since the political question doctrine contemplates precluding judicial review under those circumstances, this additional characteristic of Plaintiff’s claim compels dismissal under that doctrine. *Cf. Schneider*, 310 F.

Supp. 2d at 264 (concluding that where “[i]t is not realistically possible for the Judiciary to add its voice or its opinion without contradiction to either or both of the[] other Branches . . . the fourth *Baker* factor also leans toward dismissal”).

**D. The Unusual Need for This Court to Adhere to a Political Decision Already Made Compels Dismissal of This Action Under the Political Question Doctrine.**

This action’s implication of a fifth characteristic of a controversy involving a political question – an unusual need for unquestioning adherence to a political decision already made – further compels dismissal. *Baker*, 369 U.S. at 217; *see, e.g., Bancoult*, 370 F. Supp. 2d at 17 (concluding that this factor supported dismissal of plaintiffs’ challenge to a decision made thirty years earlier by the political branches). As already discussed, the status of Jerusalem has remained in dispute since 1948 between the parties to the Arab-Israeli conflict, who have recognized that issue as one of the core issues to be addressed in permanent status negotiations. Since the Truman Administration, the United States has faithfully adhered to a policy of promoting 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.” *See Dolan Decl. Ex. 1* (Def. Interrogatory Response No. 5). That position repeatedly has been reaffirmed by the U.S. government, most recently by the President on September 19, 2006 and the Secretary of State in the Statement of the Quartet on September 20, 2006. *See* <http://www.whitehouse.gov/news/releases/2006/09/20060919-4.html>; <http://www.un.org/News/Press/docs/2006/sq2116.doc.htm>.

Notwithstanding Congress's passage of Section 214 of the Foreign Relations Authorization Act, Fiscal Year 2003,<sup>4</sup> the President has made clear that the United States' position on Jerusalem has not changed. *See* Presidential Signing Statement, 2002 U.S.C.C.A.N. at 932. Such a change would be regarded as harmful to relations between the Arab world and the United States. Indeed, in the Department of State's estimation "the reversal of United States policy not to prejudge a central final status issue could provoke uproar throughout the Arab and Muslim world and 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." Dolan Decl. Ex. 1 (Def. Interrogatory Response No. 5) (explaining that "Arab nations have warned that any American move to recognize [Jerusalem] as Israel's capital would severely harm relations between the Arab world and the United States"); *see also* Dolan Decl. Ex. 4. Against this background, there clearly is a need for "unquestioning adherence" to the United States' long-standing foreign policy not to prejudge the status of Jerusalem. Thus, for this additional reason, the Court should dismiss this action as nonjusticiable.

**E. Potential Embarrassment from Differing Pronouncements by this Court and the Political Branches on the Status of Jerusalem Counsels Against Hearing Plaintiff's Claim.**

For all the reasons that adherence to the United States' long-standing policy on Jerusalem compels dismissal of this action, the potential embarrassment from a differing pronouncement by this Court on that policy also compels that result. Controversies that involve "a potential for embarrassment if the judicial and the political branches made conflicting pronouncements on

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<sup>4</sup> Although several individual congressmen filed an amicus brief in support of Plaintiff's position in the D.C. Circuit, Congress itself has not asserted any position in this lawsuit.

questions relating to foreign affairs” raise a nonjusticiable political question. *Bancoult*, 370 F. Supp. 2d at 17 (dismissing case as nonjusticiable “due to the potentiality of embarrassment from multifarious pronouncements by various departments on one question”). That potential is clearly apparent from the record before this Court. A court order requiring the Department of State to issue a passport and CRBA identifying “Israel” as Plaintiff’s place of birth may be construed as a judicial determination of Israeli sovereignty over Jerusalem, which would be an embarrassing inconsistency with the Administration’s position. Thus, the presence of yet another characteristic of a political question counsels against this Court deciding Plaintiff’s claim.

**II. THIS COURT SHOULD UPHOLD THE SECRETARY’S DENIAL OF PLAINTIFF’S REQUEST FOR “ISRAEL” ON HIS PASSPORT.**

If this Court reaches the merits of Plaintiff’s claim, notwithstanding the presence of all of the characteristics of a political question – each of which warrants dismissal – judgment should be entered in the Secretary’s favor. Plaintiff’s claim of entitlement to his preferred wording on his passport and CRBA turns on the proper interpretation of Section 214(d) of the Foreign Relations Authorizations Act, Fiscal Year 2003. That Section provides 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 [of State] shall, upon the request of the citizen or the citizen’s legal guardian, record the place of birth as Israel.

Pub. L. 107-228, 116 Stat. 1366 (Sept. 30, 2002). If construed as mandatory, the provision would impermissibly intrude on the President’s exclusive constitutional powers as discussed earlier. *See* Part I, *supra*. Thus, the President has directed the Executive Branch to interpret that provision as advisory, and the Secretary accordingly has denied Plaintiff’s requested birthplace designation. *See* Dolan Decl. Ex. 1 (Def. Interrogatory Response No. 5); *see also* Dolan Decl.

Ex. 3. Several doctrines of judicial restraint support upholding that decision. Accordingly, Plaintiff's claim fails on the merits as well.

**A. The Doctrine of Constitutional Avoidance Compels This Court to Construe Section 214(d) as Advisory.**

By construing Section 214(d) as permissive instead of mandatory, this Court avoids reaching the constitutionality of that enactment. It is a “fundamental rule of judicial restraint” that courts should “not reach constitutional questions in advance of the necessity of deciding them.” *Three Affiliated Tribes of Fort Berthold Reservation v. World Eng'g*, 467 U.S. 138, 157 (1984). This rule, as announced in *Ashwander v. TVA*, provides that “[t]he Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.” *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). The Supreme Court has repeatedly reaffirmed this principle of constitutional adjudication. *See, e.g., Spector Motor Serv. v. McLaughlin*, 323 U.S. 101, 105 (1944) (“If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.”); *Escambia v. McMillan*, 466 U.S. 48, 51 (1984) (“It is a well established principle governing the prudent exercise of this Court’s jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case.”); *Public Citizen v. Department of Justice*, 491 U.S. 440, 465-66 (1989) (“When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that [the] Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.”)

(citations omitted)). Courts therefore should “not lightly assume that Congress intended to . . . usurp power constitutionally forbidden it.” *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (citing *Grenada County Supervisors v. Brogden*, 112 U.S. 261, 269 (1884)). Applying that principle here, this Court should uphold the Executive’s interpretation of Section 214(d).<sup>5</sup> Otherwise, that provision would not pass constitutional muster.

As already discussed, the President’s power to recognize sovereigns is exclusive. *See, e.g., Americans United for Separation of Church & State v. Reagan*, 786 F.2d 194, 202 (3d Cir. 1986) (concluding that the Constitution contains a “textually demonstrable commitment [of power to the President] with respect to recognition of foreign states [as o]nly the President has the power to ‘receive Ambassadors and other public Ministers’ . . . [and] to appoint ambassadors, other public ministers, and consuls [with] the advice and consent of the Senate” (citations omitted)). Attendant with that power is the Executive’s exclusive authority to issue and regulate U.S. passports. *See* 22 U.S.C. § 211a (recognizing authority of Secretary of State to grant, issue and verify passports and expressly noting that, except as authorized by the Secretary, “*no other person shall grant, issue, or verify such passports*” (emphasis added)). “The history of passport controls since the earliest days of the Republic shows congressional recognition of Executive authority to withhold passports on the basis of substantial reasons of national security and foreign

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<sup>5</sup> Section 214(d)’s use of the term “shall” does not dictate a different result. *See Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 434 (1995) (despite use of “shall” twice in statute purporting to deem the United States as the party defendant upon certification by the Attorney General, the Supreme Court refused to read statute as mandatory based on “traditional understandings and basic principles”). Such construction is warranted here where a mandatory usage would render the provision unconstitutional.

policy. . . . From the outset, Congress 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.” *Agee*, 453 U.S. at 293-94. Thus a permissive interpretation of Section 214(d) is consistent with longstanding congressional practice. Since this Court should not lightly conclude that Congress through Section 214(d) intended to abandon that practice, this Court should uphold the Executive’s permissive construction of that provision.

**B. The Rule Against Implied Repeals Supports the Executive’s Construction of Section 214(d) as Advisory.**

A mandatory construction of Section 214(d) would effect an implied partial repeal of 22 U.S.C. § 211a and 22 U.S.C. § 2656, which authorize the Secretary to issue passports and conduct the management of foreign affairs as directed by the President. Implied repeals, however, are strongly disfavored. *See Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 190 (1978); *see also Federal Trade Comm’n v. Ken Roberts Co.*, 276 F.3d 583, 592 (D.C. Cir. 2001) (“Both the Supreme Court and this court have observed that implied repeals of one statute (or a provision in one statute) by another are ‘not favored.’”) (citing *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976) (quoting *United States v. United Continental Tuna Corp.*, 425 U.S. 164, 168 (1976)); *Galliano v. United States Postal Serv.*, 836 F.2d 1362, 1369 (D.C. Cir. 1988) (noting that implied repeals are “strongly disfavored”). “[U]nless the intent of the legislature to repeal the prior statute is ‘clear and manifest,’ courts have a duty . . . to regard each as effective.” *Horizon Lines v. United States*, 414 F. Supp. 2d 46, 59 (D.D.C. 2006) (quoting *J.E.M. AG Supply, Inc. v. Pioneer HiBred Int’l, Inc.*, 534 U.S. 124, 143 (2001)). Courts, moreover, “must [] assume that Congress legislates with knowledge of former related statutes, . .

. and will expressly designate the provisions whose application it wishes to suspend, rather than leave that consequence to the uncertainties of implication compounded by the vagaries of judicial construction.” *Horizon Lines*, 414 F. Supp. 2d at 59 (quoting *United States v. Hsia*, 176 F.3d 517, 525 (D.C. Cir. 1999)); *see also Navegar, Inc. v. United States*, 192 F.3d 1050, 1063 (D.C. Cir. 1999) (noting that the reason for the rule against implied repeals “is that Congress is normally expected to be aware of its previous enactments and to provide clear statement of repeal if it intends to do so”). Thus, related statutes should be harmonized where possible. *See Louisiana Pub. Serv. Comm’n v. Federal Comm. Comm’n*, 476 U.S. 355, 370 (1986) (“we are guided by the familiar rule of construction that, where possible, provisions of a statute should be read so as not to create a conflict”).

The Executive’s construction of Section 214(d) as permissive properly harmonizes that provision with pre-existing federal enactments regarding U.S. passport authorities and the Secretary’s responsibilities in the management of foreign affairs. Such prior enactments make clear the Secretary’s exclusive authority in the area of passport issuance and obligation to conduct foreign affairs as directed by the President. *See, e.g.*, 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 . . . and no other person shall grant, issue, or verify such passports.”); 22 U.S.C. § 2656 (“The Secretary of State shall perform such duties as shall from time to time be enjoined on or intrusted to him by the President relative to . . . such other matters respecting foreign affairs as the President of the United States shall assign to the department, and he shall conduct the business of the department in such manner as the President shall direct.”). Neither 22 U.S.C. § 211a nor 22 U.S.C. § 2656 is mentioned in Section 214(d). Nor does that Section otherwise

reflect the requisite clear and manifest intent for this Court to construe Section 214(d) as effecting a repeal of the Secretary's authority as to passport issuance or the management of foreign affairs. The Executive's permissive construction of Section 214(d) avoids a repeal of that authority by implication. Thus, the Court should uphold that construction and enter judgment in the Secretary's favor.

**C. Judicial Deference to Executive Decisions in the Realm of Foreign Affairs Compels Upholding the Interpretation of Section 214(d) as Advisory.**

The Executive's permissive reading of Section 214(d) is entitled to deference. Courts traditionally have afforded deference to the President in matters of foreign policy. *See, Regan v. Wald*, 468 U.S. 222, 243 (1984) (noting "the traditional deference to executive judgment '[i]n this vast external realm'" of foreign affairs (citations omitted)); *Flatow v. Islamic Republic of Iran*, 76 F. Supp. 2d 16, 26 (D.D.C. 1999) (noting deference afforded the President in matters of foreign policy); *Karn v. Department of State*, 925 F. Supp. 1, 7 (D.D.C. 1996) (same); *e.g., Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982) (regarding the meaning attributed to treaty between United States and Japan, "the meaning attributed . . . by the Government . . . is entitled to great weight" (citation omitted)). Such deference recognizes that the "President is the constitutional representative of the United States with regard to foreign nations . . . [and] if, in the maintenance of our international relations, embarrassment – perhaps serious embarrassment – is to be avoided and success for our aims achieved, congressional legislation . . . must often accord to the President a degree of discretion and freedom from statutory restriction." *Curtiss-Wright*, 299 U.S. at 319-20. Affording that deference here, this Court should uphold the Executive's permissive construction of Section 214(d), as a mandatory



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

MENACHEM BINYAMIN ZIVOTOFSKY, by )  
his parents and guardians, ARI Z. and NAOMI )  
SIEGMAN ZIVOTOFSKY )  
HaShoshan 10-A )  
Nofei Aviv )  
Beit Shemesh, Israel 99590 )  
) )  
Plaintiffs, )  
) )  
v. )  
) )  
SECRETARY OF STATE )  
United States Department of State )  
2201 C Street, N.W. )  
Washington, DC 20520 )  
) )  
Defendant. )  
\_\_\_\_\_ )

Case No. 1:03CV01921-GK

**PROPOSED ORDER**

Upon consideration of Defendant’s Renewed Motion to Dismiss or in the Alternative for Judgment as a Matter of Law, the opposition thereto, and the complete record in this case, it is hereby

ORDERED that Defendant’s motion is GRANTED, and this action is dismissed with prejudice for lack of jurisdiction.

SO ORDERED.

Dated: \_\_\_\_\_

\_\_\_\_\_  
HON. GLADYS KESSLER  
UNITED STATES DISTRICT JUDGE