

No. 10-699

IN THE
Supreme Court of the United States

MENACHEM BINYAMIN ZIVOTOFSKY
BY HIS PARENTS AND GUARDIANS ARI Z. AND NAOMI SIEGMAN ZIVOTOFSKY,

Petitioner,

v.

HILLARY RODHAM CLINTON
SECRETARY OF STATE,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

**BRIEF OF *AMICUS CURIAE* OF THE AMERICAN ASSOCIATION OF JEWISH LAWYERS AND JURISTS
IN SUPPORT OF PETITIONER**

STEPHEN R. GREENWALD,
Counsel of Record
GARSON, SÉGAL, STEINMETZ, FLADGATE LLP
164 West 25th Street, Suite 11 R
New York, New York 10001
(212) 380-3623
sg@gs2law.com

ON THE BRIEF
MALVINA HALBERSTAM
P. RIVKA SCHOCHET
ROBERT GARSON
THOMAS SÉGAL

Attorneys for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
INTEREST OF <i>AMICUS CURIAE</i>	1
SUMMARY OF ARGUMENT	1
ARGUMENT	3
I. The President’s “Recognition Power” Cannot Validate State Department Regulations That Conflict with Legislation Adopted by Congress Under Its Constitutional Powers	3
II. Because the Secretary of State’s Authority over Passports Derives from and is Limited by Congressional Action, the Secretary Must Comply with the Explicit and Conditional Mandate of Section 214(d), upon Individual Request	9
III. In Enacting Section 214(d) Congress Imposed a Ministerial, Statutory and Conditional Obligation on the Secretary of State that Does Not Implicate Foreign Policy Matters	10
IV. Designation on a Passport Does Not Amount to a Foreign Policy Statement	12
V. The Secretary’s Compliance with Section 214(d) Will Not Create, Affect, nor Effect United States Foreign Policy	14
CONCLUSION	15

TABLE OF AUTHORITIES

Cases	<i>Page(s)</i>
<i>Am. Ins. Ass'n. v. Garamendi</i> , 539 U.S. 396, 415 (2003).....	6
<i>Banco Nacional de Cuba v. Farr</i> , 383 F.2d 166 (2d Cir. 1967).....	7
<i>Banco Nacional de Cuba v. Sabbatino</i> , 376 U.S. 398 (1964).....	6
<i>Dames & Moore v. Regan</i> , 453 U.S. 654 (1981).....	6
<i>Haig v. Agee</i> , 453 U.S. 280 (1981).....	9, 10, 11, 13
<i>Hamdan v. Rumsfeld</i> , 548 U.S. 557 (2006).....	7
<i>Jones v. United States</i> , 137 U.S. 202 (1890).....	7
<i>Kent v. Dulles</i> , 357 U.S. 116 (1958).....	9, 10
<i>Kobbe v. Price</i> , 14 Hun 55 (N.Y. 1878).....	13
<i>M.B.Z. v. Clinton</i> , 131 S. Ct. 2897 (2011).....	3
<i>Medellin v. Texas</i> , 552 U.S. 491 (2008).....	6
<i>Oetjen v. Cent. Leather Co.</i> , 246 U.S. 297 (1918).....	7
<i>Rose v. Himely</i> , 8 U.S. 241 (1808).....	7
<i>United States v. Belmont</i> , 301 U.S. 324 (1937).....	6

TABLE OF AUTHORITIES

Cases	Page(s)
<i>United States v. Curtiss-Wright Export Corp.</i> , 299 U.S. 304 (1936).....	5
<i>United States v. Palmer</i> , 616 U.S. 610 (1818).....	7
<i>United States v. Pink</i> , 315 U.S. 203 (1942).....	6
<i>Urtetiqui v. D'Arcy</i> , 34 U.S. 692 (1835).....	2, 12, 13
<i>United States v. Pluta</i> , 176 F3.d 43 (2d Cir. 2009).....	13
<i>William v. Suffolk Ins. Co.</i> , 38 U.S. 415 (1839).....	7
<i>Youngstown Sheet & Tube Co. v. Sawyer</i> , 343 U.S. 579 (1952).....	5, 6, 8
<i>Zemel v. Rusk</i> , 382 U.S. 1 (1965).....	10
<i>Zivotofsky v. Secretary of State</i> , 571 F.3d 1227 (D.C. Cir 2009).....	14
Constitutional Provisions	
U.S. Const. Amend. XIV, §5.....	9
U.S. Const. Art. I, § 1.....	11
U.S. Const. Art. I, § 8, cl. 4.....	9
U.S. Const. Art. I, § 8, cl. 18.....	9
U.S. Const. Art. II, § 1,.....	11
U.S. Const. Art. II, § 2.....	4

TABLE OF AUTHORITIES

Page(s)

Statutes

8 U.S.C. § 1185.....	9, 10
22 U.S.C. § 211a.....	9
22 U.S.C. § 2370(e)(2).....	6
Act of August 18, 1856, 11 Stat. 52 (1856).....	9
Foreign Relations Authorization Act Fiscal Year 2003, Pub. L. No. 107-228, 116 Stat. 1350 (2002)	<i>passim</i>
Public Law No. 107-228, § 214(d)	<i>passim</i>
The Passport Act of 1926, 44 Stat. 887 (1926).....	9, 10, 11

Court Rules

Supreme Court Rule 37.6.....	1
------------------------------	---

Federal Rules of Evidence

Fed R. Evid. 902(1).....	13
--------------------------	----

Other Authorities

Alexander Hamilton, <i>Pacificus No. 1</i> (June 29, 1793), <i>reprinted in</i> THE PAPERS OF ALEXANDER HAMILTON 33, 41 (Harold C. Syrett et al. eds., 1969).....	4, 5
Alexander Hamilton, <i>THE FEDERALIST No. 69</i> (Mar. 14 1788).....	4

Brief of Appellee-Respondent, <i>M.B.Z. v. Clinton</i> , No. 10-699 (U.S. filed Mar. 25, 2011).....	12
--	----

TABLE OF AUTHORITIES

Page(s)

Other Authorities

David Gray Adler, <i>The President's Recognition Power</i> , in <i>THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY</i> , 133–157 (David Gray Adler and Larry N. George eds., 1996).....	4
David Gray Adler, <i>The President's Recognition Power: Ministerial or Discretionary?</i> , <i>Presidential Studies Quarterly</i> , 25: 267, 268, 278 (1995).....	4, 5
Department of State Website http://travel.state.gov/passport/about/about_894.html#pptmission (as consulted on July 19, 2011).....	11
Harold Hongju Koh, <i>Why the President Always Wins in Foreign Affairs</i> , in <i>THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY</i> , 158, 159 (David Gray Adler and Larry N. George eds., 1996).....	4
James Madison from <i>THE LETTERS OF PACIFICUS AND HELVIDIUS</i> , 76 (Robert Loss ed., 1976).....	5
Louis Henkin, <i>Foreign Affairs and the United States Constitution</i> , 37–38 (2d ed. Oxford Univ. Press 1996) (1972).....	4
RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 204 (1987).....	3
Robert J. Reinstein, <i>Recognition: A Case Study on the Original Understanding of Executive Power</i> , 47 <i>UNIV. OF RICH. L. REV.</i> 801 (2011).....	4, 8
U.S. Ambassador to the United Nations Philip C. Jessup, <i>Remarks at U.N. SCOR</i> , 383d mtg. at 9–11, Supp. No. 128, U.N. Doc. S/P.V. 383 (Dec. 2, 1948).....	3

INTEREST OF *AMICUS CURIAE*

With the consent of the parties, the American Association of Jewish Lawyers and Jurists (“AAJLJ”) submits this *amicus curiae* brief in support of the Petitioner.¹

The AAJLJ is a membership association of lawyers and jurists open to all members of the professions regardless of religion. It is an affiliate of the International Association of Jewish Lawyers and Jurists, which is based in Israel and was founded by the late Justice Arthur Goldberg of the United States Supreme Court and the late Justice Haim Cohen of the Supreme Court of Israel. The mission of the AAJLJ includes representation of the interests of the American Jewish community in regard to legal issues and controversies that implicate the interests of that community, such as the issues in this case. Also, a number of members of the AAJLJ are United States citizens who reside and/or were born in Jerusalem, and who would be directly affected by the outcome of the case.

As an advocate for the legitimate interests of Jewish American citizens, the AAJLJ believes that Congress’ grant in Section 214 (d) of the Foreign Relations Authorization Act to American citizens born in Jerusalem, such as Petitioner, of the right to designate Israel as his or her place of birth, is a constitutionally valid exercise of Congress’ long recognized power to regulate the issuance of passports, and that the Secretary of State’s power to establish rules and regulations related to passports, a power delegated to the Secretary by Congress, may not be exercised in a manner contrary to Congress’ mandate. Amicus also believes that Congress’ exercise of its power in this case does not impermissibly limit or interfere with the Executive branch’s power of recognition. Further, as a matter of fairness and equity, Section 214 (d) grants to citizens such as Petitioner rights consistent with other citizens who have been granted such rights by the Secretary of State in factually similar circumstances of place of birth.

¹ Pursuant to Supreme Court Rule 37.6, Amicus states that no counsel for a party authored this brief in whole or in part and that no person or entity other than Amicus, its members, and its counsel contributed monetarily to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

1. The President's "recognition power" cannot validate State Department regulations that conflict with legislation adopted by Congress under its constitutional powers.

2. The Constitutional authority to regulate passports resides in the legislative powers of the Congress. Congress properly exercised this power when it passed Section 214(d) of Public Law 107-228.

3. The Executive branch's rule-making power over passports is based on Congressional delegation; but any delegation of authority by Congress to the Secretary of State regarding the regulation of passports is to be narrowly construed.

4. A passport is merely a document permitting entry and exit by virtue of identifying the bearer. It is an administrative prerequisite for international travel. In essence, by passing Section 214(d), Congress legislated that an individual U.S. citizen, if born in Jerusalem, has the choice to identify one's birthplace as Israel on a passport.

5. The Secretary of State has incorrectly analyzed the documentary status given to a passport in *Urtetiqui v. D'Arcy*, 34 U.S. 692 (1935). A correct reading of *Urtetiqui*, ensuing case law and statutes that address the evidentiary status of passports demonstrates that a passport is not a political document. The cornerstone argument of the Secretary of State therefore fails, as a place of birth on a non-political document cannot be an Executive statement of foreign policy.

6. Congress did not impermissibly infringe the President's recognition power because compliance with Section 214(d) will result in no consistent foreign policy statement. The choice granted to the individual will result in a lack of consistency in the designation of Israel as place of birth and therefore no cohesive foreign policy line could be derived from recordations made on the face of some, but not all, passports.

ARGUMENT

I.

The President’s “Recognition Power” Cannot Validate State Department Regulations That Conflict with Legislation Adopted by Congress Under Its Constitutional Powers

In its grant of *certiorari* in *M.B.Z. v. Clinton*, 131 S. Ct. 2897 (2011), the Court directed the parties to brief and argue the question whether Section 214(d) of the Foreign Relations Authorization Act, which requires the Secretary of State to enter Israel on passports of United States citizens born in Jerusalem who so request, impermissibly infringes the President’s power to recognize foreign sovereigns. The simplest answer to that question is that it does not because Section 214(d) does not affect United States recognition of Israel. President Truman recognized Israel in 1948, immediately after Israel declared independence. The United States was the first State to do so. Recognition does not connote acceptance of specific borders, or even require that there be defined borders, as Phillip Jessup famously said when, as United States representative to the U.N., he spoke in support of Israel’s admission to that body. *See* U.S. Ambassador to the United Nations Philip C. Jessup, *Remarks at U.N. SCOR*, 383d mtg. at 9–11, Supp. No. 128, U.N. Doc. S/P.V. 383 (Dec. 2, 1948). The position that the statute does not involve recognition will no doubt be briefed more fully by petitioner and other *amici*. This *amicus* brief will address the broader question, whether the President’s recognition power can serve as a basis for State Department regulations that conflict with legislation adopted by Congress under its constitutional powers.

Although it has been stated by commentators, the Restatement of U.S. Foreign Relations Law, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 204 (1987), and in a number of judicial decisions, including decisions of this Court, that the President has the exclusive power of recognition, and even more broadly, the power to conduct foreign affairs, the Constitution does not explicitly vest these powers in the President. Indeed, there is no mention in the Constitution of recognition or of foreign affairs.

The Constitution does provide for the exercise of a number of powers that involve the relations of the United States with other States. However, each of these powers is vested either in Congress or in the President acting *with* the advice and consent of the Senate. None is vested in the President alone. Congress has the power to declare war, to regulate foreign commerce and immigration and naturalization, and to define and punish piracy and other offences against the law of nations. The President has the power to

make treaties and to appoint ambassadors, but both require the advice and consent of the Senate. See Harold Hongju Koh, *Why the President Always Wins in Foreign Affairs*, in *THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY*, 158, 159 (David Gray Adler and Larry N. George eds., 1996) (“Article I gives Congress almost all the enumerated powers over foreign affairs and Article II gives the President almost none....”).

Nowhere does the Constitution vest any power involving foreign affairs exclusively in the executive. The only function of the President touching on relations with other States referred to in the Constitution that does not require Senate advice and consent is *receiving* ambassadors. This was clearly not intended as a grant of power.

Receiving ambassadors is not in section two of Article II, which states “He shall have the *power* to...,” but in section three, which states, “He shall receive ambassadors and other public ministers...,” with no mention of “power.” U.S. Const., Art. II, § 2 (emphasis added); See Louis Henkin, *Foreign Affairs and the United States Constitution*, 37–38 (2d ed. 1996). Had the provision on receiving ambassadors been intended as a grant of power, it would have been logical to include it in section two, i.e. section two would have provided: “He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur; he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors...; and he shall receive Ambassadors.” The drafters of the Constitution did not do so. Receiving ambassadors was not viewed as an exercise of power; it was considered a ministerial function. See Robert J. Reinstein, *Recognition: A Case Study on the Original Understanding of Executive Power*, 47 *UNIV. OF RICH. L. REV.* 801 (2010); David Gray Adler, *The President’s Recognition Power*, in *THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY*, 133–157 (David Gray Adler and Larry N. George eds., 1996); David Gray Adler, *The President’s Recognition Power: Ministerial or Discretionary?*, *Presidential Studies Quarterly*, 25: 267, 268 (1995) (“the reception of ambassadors was understood as a routine, mechanical function, an almost dutiful act devoid of discretion...”). Hamilton, Madison, and Jefferson all interpreted the recognition clause not as a source of power but as a ministerial and ceremonial function. (Id.) Thus, Hamilton wrote with respect to the President’s receiving ambassadors, “It is a circumstance that will be *without consequence* in the administration of the government.” *THE FEDERALIST* No. 69 (Alexander Hamilton) (the real character of the executive) (emphasis added).² Madison wrote:

...little if anything more was intended by the clause,

²Hamilton took a contrary position in the debates over the Neutrality Act. See Alexander Hamilton, *Pacificus No. 1* (June 29, 1793), reprinted in *THE PAPERS OF ALEXANDER HAMILTON* 33, 41 (Harold C. Syrett et al. eds., 1969).

than to provide for a particular mode of communication, almost grown into a right among modern nations; by pointing out the department of the government most proper for the ceremony of admitting public ministers, of examining their credentials, and of authenticating their title to privileges annexed to their character by the law of nations....That being the apparent design of the Constitution, it would be highly improper to magnify the function into an important prerogative, even where no rights of other departments could be affected by it.

David Gray Adler, *The President's Recognition Power: Ministerial or Discretionary?*, *Presidential Studies Quarterly*, 25: 267, 278 (1995) (quoting Madison from *THE LETTERS OF PACIFICUS AND HELVIDIUS*, 76 (Robert Loss ed., 1976)).

Several decisions of this Court refer to the President's power of recognition, or even more broadly, the power to conduct foreign affairs. However, none of these cases involved a conflict between Congress and the President. The broadest assertion of executive power over foreign affairs is in *United States v. Curtiss-Wright Export Co.*, 299 U.S. 304 (1936). Justice Sutherland, writing for the Court, stated:

[T]he President alone has the power to speak or listen as a representative of the nation. He *makes* treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it....The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.

Id. at 319 (original emphasis) (internal quotations omitted). However, in that case, there was no conflict between the power of Congress and that of the President. On the contrary, Congress delegated power to the President and the question before the Court was whether that delegation was constitutional. Under Justice Jackson's analysis in *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952), this is the strongest case for the exercise of executive power because the President is acting with Congress. As Justice Jackson stated:

When the President acts pursuant to an express or implied authorization of Congress, his authority is

at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate....If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power....

Youngstown, 343 U.S. at 635–636.

In *United States v. Belmont*, 301 U.S. 324 (1937), and *United States v. Pink*, 315 U.S. 203 (1942), the Court sustained the President’s power to settle claims in conjunction with United States recognition of the Soviet Union. Here, again, there was no conflict with Congress. The conflict was with a state law. The Court stated in *Belmont*:

[The] complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states. In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. As to such purposes the state of New York does not exist.

Belmont, 301 U.S. at 331 (internal citation omitted). Congress has long delegated to the President, either explicitly or implicitly, the power to settle claims against foreign States. See *Medellin v. Texas*, 552 U.S. 491, 531 (2008) (“making executive agreements to settle claims of American nationals against foreign governments is a particularly long-standing practice”) (quoting *Am. Ins. Ass. v. Garamendi*, 539 U.S. 396, 415 (2003)); *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

In dicta in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), Justice Harlan stated that “political recognition is exclusively a function of the Executive.” *Sabbatino*, 376 U.S. at 410. That case, also, did not involve any conflict between Congress and the executive. Rather, it involved application of the “act of state” doctrine to enforce a Cuban law even though it violated international law. The Court reasoned that failure to apply the Cuban law might embarrass the executive in the conduct of foreign affairs. However, when, following that decision, Congress adopted legislation (the Hickenlooper Amendment, 22 U.S.C. 2370(e)(2)) providing that the act of state doctrine should not be applied if the foreign act violates international law, the Court of Appeals applied it in that very case. *Banco Nacional de Cuba v. Farr*, 383 F.2d 166 (2d Cir. 1967). No one suggested that the

legislation unconstitutionally infringed the President's power of recognition or the power to conduct foreign affairs. *William v. Suffolk Ins. Co.*, 38 U.S. 415 (1839), held that the President's determination that certain territory was part of a State was binding on the court. However, here too, there was no conflict between the President and Congress.

Other decisions of this Court, including one by Justice Marshall, considered decisions concerning recognition to be for the President and Congress. Thus, Marshall stated that decisions concerning recognition "belong more properly to those who can declare what the law shall be...than to that tribunal whose power as well as duty is confined to the application of the rule which the legislature may prescribe for it." *United States v. Palmer*, 616 U.S. 610, 643 (1818). In *Oetjen v. Cent. Leather Co.*, 246 U.S. 297 (1918), the Court stated "Who is the sovereign, de jure or de facto, of a territory is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens and subjects of that government," *Oetjen*, 246 U.S. at 302 (quoting *Jones v. United States*, 137 U.S. 202, 214 (1890)). See also, *Rose v. Himely*, 8 U.S. 241, 272 (1808).

Perhaps the strongest recent statement of broad executive power in foreign affairs, specifically referring to the President's "power to recognize foreign governments," is in Justice Thomas' dissenting opinion in *Hamdan v. Rumsfeld*, 548 U.S. 557, 679 (2006). Justice Thomas made clear, however, that this broad executive power exists only when Congress fails to act. He said:

Congress, to be sure, has a substantial and essential role in both foreign affairs and national security. But Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take or every possible situation in which he might act, and [s]uch failure of Congress...does not, especially...in the areas of foreign policy and national security, imply congressional disapproval of action taken by the Executive.

Id. (internal quotations omitted).

Notwithstanding dicta in decisions of this Court referring to the President's broad power over foreign affairs and to his power of recognition as exclusive, this Court has never held that the President's power of recognition cannot be limited by Congress exercising its constitutional powers. Where

Executive action conflicts with Congressional action, the power of the President is at its lowest. In the words of Justice Jackson:

When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can only rely upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.

Youngstown, 343 U.S. at 637. Surely, the President’s “power to recognize foreign sovereigns,” not even mentioned in the Constitution, derived from the words “he shall receive ambassadors,” viewed as ministerial by the founding fathers, described by Hamilton as “without consequence in the administration of the government,” minus the power of Congress to regulate immigration and naturalization and commerce with foreign nations, is not sufficient to invalidate a statute adopted by Congress specifying how to record the birthplace of American citizens on passports and Consular Reports of Birth Abroad.

A comprehensive review of the documents pertaining to the Constitutional Convention, the ratification debates and other documents of that period, has convinced one commentator that “the evidence...refute[s] any positive assertion that those who participated in the construction of the Constitution understood that the President was being vested with the recognition power.” Robert J. Reinstein, *Recognition: A Case Study on the Original Understanding of Executive Power*, 47 UNIV. OF RICH. L. REV. 801, 819 (2010). Whether the founders intended to vest the recognition power in the President or not, the recognition of foreign states and governments by the President is now a long-standing practice. It is not intended to suggest that the Court hold that practice unconstitutional; only that State Department regulations not to include “Israel” on passports and Consular Reports of Births Abroad, despite legislation that requires it do to do so, cannot be sustained on the basis of the President’s recognition power.

II.

Because the Secretary of State’s Authority over Passports Derives

**from and is Limited by Congressional Action, the Secretary Must
Comply with the Explicit and Conditional Mandate of Section 214(d),
upon Individual Request**

It is clear that the ultimate constitutional authority to regulate passports resides in the legislative powers of the Congress. *See* U.S. Const., Art. 1, §1, §8, cl. 4 and cl. 18; *see also* Fourteenth Amendment, §5, with reference to §1. Congress properly exercised this power when it passed Section 214(d) of Public Law 107-228.

The Secretary of State derives her authority over passports from the Passport Act of 1926, 44 Stat. 887 (1926). Congress granted the Secretary of State the authority to issue passports by providing that:

The Secretary of State may grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by diplomatic representatives of the United States.... under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue, or verify such passports.

22 U.S.C. § 211a, Authority to grant, issue, and verify passports (1976 ed., Supp. IV).³ The Executive branch's rule-making power over passports is an expression of Congressional delegation. Similarly, it was not until after Congressional passage of the Nationality Act of 1952, 8 U.S.C. 1185, that a valid passport generally was required to enter or exit the United States.

The ultimate authority of Congress over the issuance of passports is further supported by the case law. In the seminal case of *Kent v. Dulles*, 357 U.S. 116 (1958), this Court recognized the individual right to a passport as fundamental to an American citizen's right to travel, a liberty right under the Fifth Amendment of the U.S. Constitution. Therefore, this Court held that if such right is to be regulated by the State Department, such regulation must be subject to the lawmaking function of Congress. *Id.* at 129 (lacking explicit act of Congress, the Secretary exceeded his authorized passport powers by denying passport based on individual's Communist affiliation). *See also*, *Haig v. Agee*, 453 U.S. 280, 290 (1981), where this Court assumed Congress's ultimate authority over the State Department's ability to revoke a passport

³ This language is unchanged from its original in 1926. It has been in use since the first Passport Act of 1856 was amended in 1874 to replace the phrase "shall be authorized to" with "may." Rev. Stat. § 4075. *See Haig v Agee, infra*, at footnotes 18, 26, and accompanying text for a detailed history of the relationship between Congress and the Secretary of State with respect to passports.

under the Passport Act of 1926.

Moreover, any delegation of authority by Congress to the Secretary of State regarding the regulation of passports is to be narrowly construed. *Kent* at 129. This limited delegation of power was upheld in *Zemel v. Rusk*, 382 U.S. 1 (1965), with respect to area restrictions, and specifically restriction on travel to Cuba, finding a historical basis of “administrative practice sufficiently substantial and consistent to warrant the conclusion that Congress had implicitly approved it,” distinguishing the facts from those in *Kent*. *Zemel* at 13, *citing Kent* at 127. The Court also noted that the Secretary of State’s position in *Kent* was based on the characteristics of the individual applicant, where *Zemel* involved “considerations affecting all citizens.” *Zemel* at 13.

Although this Court, in *Zemel*, upheld the Secretary of State’s statutory authority to refuse to validate a passport for travel to Cuba, it did so on grounds that support Petitioner in this case. *Zemel* held that Congress, in the Passport Act of 1926, did not grant the Executive completely unrestricted freedom of action. Instead, it sanctioned only those passport restrictions which could be fairly argued were adopted or implicitly approved by Congress in light of prior administrative practice. *Id.* at 17-18. Here, there is no question as to Congress’ intent. Congress has explicitly mandated action by the Secretary of State under Section 214(d). Accordingly, it is the Secretary’s duty to comply with the statutory provision enacted by Congress.

III.

In Enacting Section 214(d) Congress Imposed a Ministerial, Statutory and Conditional Obligation on the Secretary of State that Does Not Implicate Foreign Policy Matters

This case does not involve a weighty question of foreign policy relating to national sovereignty. As the Court in *Kent* noted, the primary function of a passport lies not in conferring upon a citizen diplomatic protection, but rather in its importance in controlling a person’s exit out of the country. *Kent* at p. 129. This travel function of a passport was also emphasized by the Court in *Agee*:

Most important for present purposes, the only means by which an American can lawfully leave the country or return to it ... is with a passport. *See* 8 U.S.C. § 1185(b) (1976 ed., Supp. IV). As a travel control document, a passport is both proof of identity and proof of allegiance to the United States.

Agee, supra, 453 U.S. at 293. The State Department itself recognizes the functional nature of a passport on its website:

A U.S. passport is your key to international travel. When presented abroad, it is a request to foreign governments to permit you to travel or temporarily reside in their territories and access all lawful, local aid and protection. It allows you access to U.S. Consular services and assistance while abroad. Most importantly, it allows you to re-enter the United States upon your return home.

See http://travel.state.gov/passport/about/about_894.html#pptomission (as consulted on July 19, 2011).

A passport is merely a document permitting entry and exit by virtue of identifying the bearer. It is an administrative prerequisite for international travel. In essence, by passing Section 214(d), Congress legislated that an individual U.S. citizen has the **choice** to identify one's birthplace as Israel on a passport, if born in Jerusalem. This case involves the limited question of whether Congress can grant a citizen of the United States the statutory right to choose to record on a passport the **country** of birth as Israel when a United States citizen is born in Jerusalem. Congress, the source of authority over passports, says, "yes."

Moreover, Congress has spoken loudly and clearly, as it may do under its constitutional powers, notwithstanding the broad rulemaking authority Congress granted to the Secretary of State in the 1926 Passport Act. In Section 214(d), Congress merely exercised its proper lawmaking function.

Viewed in this light, it is clear that Congress has the authority to grant a U.S. citizen born in Jerusalem *the option* to request that the Secretary of State list the country of birth as Israel and *require* that the Secretary of State comply. The optional nature of the statute results in a passport that is clearly an expression of individual action, not diplomatic or foreign policy doctrine. Moreover, the Secretary's compliance is merely ministerial, statutory, and conditional upon request. It should not be confused with the larger issues governing foreign policy matters.

Article I, Section 1, vests "All legislative Powers" in the Congress. Article II, Section 1, vests the "executive Power" in the President to execute the instructions of Congress, which retains the exclusive power to make the laws. If the Constitution's separation of powers is to control here, as it should, Congress' power to make laws regulating passports should be upheld. It is undisputed that the Secretary's power over passports derives directly from the delegation contained in Congressional Acts, and that Congress has set forth express direction to the Secretary regarding passports in Section 214(d). Accordingly, this statute represents the proper lawmaking function of Congress.

IV.

Designation on a Passport Does Not Amount to a Foreign Policy Statement

The nature of a passport as either a political document or merely a public document with no political meaning is at the heart of this case. If a passport holds no political status, then it cannot contain a statement of foreign policy. Respondent's Brief in opposition to petition for certiorari recognizes this point stating, "The designation in a passport of a foreign state as a person's place of birth is thus a public statement that the United States recognizes the foreign state's sovereignty over the place where the United States citizen was born." Brief of Appellee-Respondent, *M.B.Z. v. Clinton*, No. 10-699 at 9 (U.S. filed Mar. 25, 2011).

The Respondent's argument begs the conclusion that if this court holds that a passport is not a political document, then, ipso facto, it cannot be deemed to contain a statement of foreign policy.

Both the arguments of the Secretary of State and the concurring opinion of Edwards, J., in the Court of Appeals fail to account properly for the historical and linguistic contexts of the dicta of Justice Thompson in *Urtetiqui v. D'Arcy*, 34 U.S. 692 (1835), where the notion of a passport as a political document first emerged. In *Urtetiqui*, this Court held that a passport is of limited evidentiary value due to the lack of any legislatively enacted regulatory structure surrounding its issuance.

"There is no law of the United States, in any manner regulating the issuing of passports, or directing upon what evidence it may be done, or declaring their legal effect. It is understood, as matter of practice, that some evidence of citizenship is required, by the secretary of state, before issuing a passport. This, however, is entirely discretionary with him."

Id. at 699. This Court in *Urtetiqui* consequently sought to grant the passport a designation as a matter of law for evidentiary purposes and the closest hole into which the misshapen peg seemed to fit in that particular sense was a political one.

This Court described a passport as:

a document, which, from its nature and object, is addressed to foreign powers; purporting only to be a request, that the bearer of it may pass safely and

freely; and is to be considered rather in the character of a political document, by which the bearer is recognised, in foreign countries, as an American citizen; and which, by usage and the law of nations, is received as evidence of the fact. But this is a very different light, from that in which it is to be viewed in a court of justice, where the inquiry is, as to the fact of citizenship. It is a mere *ex parte* certificate.

Id. at 699. Justice Thompson minimized the importance of a passport as evidence, given the lack of rigor in its issuance, and in circumscribing its limited evidentiary value he categorized a passport as a political document but did not bestow upon it any elevated status. This is far removed from the position afforded to the passport by the Secretary of State based upon a partial reading of *Urtetiqui*.

Given the full context of this Court’s decision in *Urtetiqui*, reliance on that case for the proposition that a passport is a political document in the strong sense asserted by the Secretary of State is misplaced. *Urtetiqui* reflected and relied upon the judicial distaste in *Kobbe v. Price*, 14 Hun 55 (N.Y. 1878), for passports as evidentiary proof of their contents due to their self-certified nature. In *Kobbe*, a passport was held to have been properly rejected on the ground that, although an official document, it was made up of statements from the defendant himself, as cited more recently in *U.S. v. Pluta* 176 F3.d 43, 61 (2d Cir. 2009).

Even following the various legislative enactments regarding passports, this Court in *Haig v. Agee*, 453 U.S. 280, 292 (1981), characterized the status of a passport in the weak, not strong, sense stating only that, “[a] passport is, in a sense, a letter of introduction” and accepted that, since travel control legislation, the added characteristics permit the document to act as proof of identity. Arguably, in the light of the legislative controls, a United States passport should be recognized simply as a domestic public document according to the Federal Rules of Evidence (Fed. R. Evid. 902(1)) and not as a political document.

V.

The Secretary’s Compliance with Section 214(d) Will Not Create, Affect, nor Effect United States Foreign Policy

Even were this Court to hold that a passport has the status of a political document, rather than a public document, Section 214(d) results in no cohesive policy statement as to the status of Jerusalem. Had Section

214(d) been drafted differently, mandating that on every occasion where Jerusalem is designated as the city of birth the passport must state Israel as part of the place of birth, then the Executive Branch's recognition power arguably might have been offended. However, Congress specifically included a conditional element in the designation process, vesting the choice as to whether to include Israel as the place of birth with the individual seeking a passport. This structure has two major effects; first, any mandatory language of the Act is tempered by the conditionality of the individual's choice and, second, the lack of uniform recordation of place of birth defeats any argument that the designation of Israel in some, but not all, passports where Jerusalem was the place of birth can be construed as a statement of U.S. foreign policy. For this latter proposition to apply, consistency in recordation would be required.

The Court of Appeals placed undue weight on the imperative nature of the word "shall" in holding that "[g]iven the mandatory terms of the statute, it can hardly be doubted that Section 214(d) intrudes on the President's recognition power." *Zivotofsky v. Secretary of State* 571 F.3d at 1244 (D.C. Cir. 2009). The Court of Appeals failed to take into account that the drafted terms also anticipate the converse; namely, that in circumstances where a request to designate Israel is *not* exercised by the citizen, the place of birth is *not* recorded as Israel.

At its very core, the elective nature of the individual right granted undermines claims that a foreign policy position is being foisted upon the Executive, as there will be no uniformity in application. Some passports may state "Israel" while others may simply state "Jerusalem," thereby preserving the neutral stance of the United States.

CONCLUSION

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

Respectfully Submitted,

STEPHEN R. GREENWALD,

Counsel of Record

GARSON, SÉGAL, STEINMETZ, FLADGATE LLP

164 West 25th Street, Suite 11 R

New York, New York 10001

(212) 380-3623

sg@gs2law.com

August 4, 2011

ON THE BRIEF

MALVINA HALBERSTAM

P. RIVKA SCHOCHET

ROBERT GARSON

THOMAS SÉGAL

Attorneys for Amicus Curiae