

No. 10-699

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In The  
**Supreme Court of the United States**

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

*Petitioner,*

v.

HILLARY RODHAM CLINTON, Secretary of State,

*Respondent.*

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

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**BRIEF *AMICUS CURIAE* OF THE LAWFARE  
PROJECT IN SUPPORT OF PETITIONER**

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## INTEREST OF THE *AMICUS*

This brief is respectfully submitted on behalf of *amicus curiae* The Lawfare Project, a not-for-profit corporation organized under the law of Washington D.C. and based in New York, whose mission is to expose and counter “lawfare” – the abuse of legal procedures to advance undemocratic and/or terroristic goals.<sup>1</sup> The Lawfare Project publishes papers, engages in research projects, and assists in legal proceedings as part of its suite of activities.

One of the principal uses of lawfare – and therefore one of the principal targets of The Lawfare Project’s efforts – is the effort by enemies of the State of Israel to delegitimize Israel and impair its ability to defend itself. An essential element of this campaign is the practice of wrongfully attempting to subject Israel to legal censure or legal disadvantage on a basis not applied to other nations – not even nations that engage in the direct support of terrorism and that violate accepted international norms as a matter of government policy.

The Lawfare Project respectfully submits this brief to assist the Court in deciding the second of the two issues to be heard on this petition – whether

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<sup>1</sup> The parties have consented to the submission of this brief, and their letters of consent have been filed with the Clerk of this Court in accordance with Rule 37.3(a). Pursuant to Rule 37.6, this brief was not written in whole or in part by counsel for any party, and no party made any monetary contribution intended to fund the creation or submission of the brief.

Section 214(d) is unconstitutional because it supposedly infringes on the President's allegedly exclusive power to recognize foreign governments. We believe our focus on lawfare as the strategic manipulation of legal process, and specifically our knowledge of legal proceedings involving Israel gives us background and experience that makes our views on this question useful to the Court. While we agree with Petitioner and with the concurring Circuit Judge below that there is no merit to the "political question" defense asserted by Respondent, we confine our submission to the Section 214(d) issue.

As detailed herein, The Lawfare Project respectfully submits that there is no legal basis for the novel and extensive claim of executive branch exclusivity being made by Respondent. The right and power of Congress to legislate with respect to the issuance of passports is well-established, and its exercise in this case does not transgress any Constitutional limit. The Court should reverse the decisions below, and direct the District Court to issue the requested writ of mandamus identifying Petitioner's birthplace as Israel.



### **STATEMENT OF FACTS**

On May 15, 1948, the United States recognized the State of Israel on a "de facto" basis and on January 31, 1949 recognized it on a "de jure" basis. The "Israel" that was granted recognition comprised the territory shown on the map at App. 1. As is evident,

that “Israel” included a substantial portion of the city of Jerusalem – in conventional terminology, so much of Jerusalem as lies west of the so-called “Green Line.” This is the demarcation line set forth in agreements entered into between February and July 1949 by the State of Israel and its Arab enemies at the conclusion of the war they had launched against the fledgling state following the United States’ de facto recognition.

At all times since President Truman recognized the State of Israel, the United States has continued to recognize the State. It has never withdrawn that recognition. At all times, the State of Israel has included the territory west of the Green Line, over which Israel has exercised exclusive control.

To the knowledge of The Lawfare Project there is no country that, while recognizing Israel, disputes that Israel includes that portion of Jerusalem that lies west of the Green Line. In all of the legal proceedings involving Israel with which The Lawfare Project is familiar – many of which attack the supposed illegality of Israeli “occupation” of various areas – to our knowledge there has never been a single one that contends that Israel is illegally “occupying” that portion of Jerusalem that lies west of the Green Line. Whether Jerusalem is or is not the lawful capital of Israel – an issue not presented by this case – it is simply an undeniable physical fact that the territory west of the Green Line has at all relevant times been within the boundaries of Israel and under its exclusive and unquestioned control.

In 2002, Congress passed and on September 30 of that year the President signed into law Section 214 of Public Law No. 107-228. The first three subsections of Section 214 relate to the location of the United States Embassy in Jerusalem. These subsections are not at issue in this case. Subsection (d), the provision involved here, directed the Passport Office of the Department of State to issue passports to American citizens born in Jerusalem that identify, as the citizen's place of birth, "Israel," if so requested by the citizen. The President's signature was accompanied by a so-called "signing statement" which made no specific reference to Subsection (d) but which stated generally that the statute "impermissibly interferes" with the President's foreign affairs authority, including his power to "determine the terms on which recognition is given to foreign governments." Obviously, the President could have vetoed the legislation that supposedly denigrated his constitutional powers, but chose not to do so.

On October 17, 2002, Petitioner Zivotofsky was born in Shaare Tzedek hospital in Jerusalem, Israel. As is evident from the accompanying map, the hospital is located far west of the Green Line, in territory that has always been part of Israel, and which the State of Israel has at all times controlled since the United States' recognition of that State.

Petitioner is the son of United States citizens and is entitled to the issuance of a United States passport. In accordance with Section 214(d), Petitioner's parents asked that the passport list "Israel" as his place

of birth. However, in violation of Section 214(d), the Passport Office of the Department of State refused to identify Petitioner's place of birth on his United States passport as "Israel." Suit was brought on Petitioner's behalf by his parents to compel the issuance of a passport that conformed to the statute.

In both the District Court and the Court of Appeals for the District of Columbia Circuit, Respondent argued, and the suit was dismissed on the ground, that the case involved a non-justiciable "political question." In the Court of Appeals, Circuit Judge Edwards concurred in the dismissal, while disagreeing that the political question doctrine barred relief, on the basis that Section 214(d) unconstitutionally infringed on the President's "recognition" power.

Petitioner sought review by this Court, arguing in its petition that the political question doctrine was inapplicable for a number of reasons and the Presidential "signing statement" did not excuse the State Department's refusal to obey the statute. On May 2, 2011, this Court granted the petition. Accompanying the grant was a direction by the Court that, in addition to the political question issue, the parties should brief the constitutional issue whether Section 214(d) "impermissibly infringes on the President's power to recognize foreign sovereigns."



## SUMMARY OF ARGUMENT

As detailed herein, The Lawfare Project respectfully submits that there is no legal basis for the novel and extensive claim of executive branch exclusivity being made by Respondent. The right and power of Congress to legislate with respect to the issuance of passports is well-established, and its exercise in this case does not transgress any Constitutional limit. The Department of State cannot refuse to honor that legislation. Section 214(d) does not infringe upon the Recognition power or any exclusive power of the President. Nor can a “signing statement” accomplish what amounts to an unconstitutional line item veto. Though cloaked in the language of constitutional prerogative and foreign affairs necessity, at heart this case revolves around simple discrimination against a very specific class of U.S. citizens, and *amicus* respectfully submits that this Court should grant relief to Petitioner.



**ARGUMENT****THE CLAIM THAT SECTION 214(d) IS UNCONSTITUTIONAL IS WITHOUT MERIT**

With respect to Section 214(d), *amicus* respectfully submits that this case involves a simple issue of Congressional power that the Respondent, for reasons not readily fathomable, has sought to cloak in unnecessary complexity. The issue, at heart, is whether Congress can legislate with respect to the form, issuance and content of passports and, if it can, whether the Department of State can refuse to honor that legislation. *Amicus* believes that the answers are, respectively, “yes” and “no.”

*First*, passports are a creation of Congressional enactments and the cases are literally legion in which Congressional enactments respecting the issuance of passports have been upheld by this and other courts. E.g., *Regan v. Wald*, 468 U.S. 222 (1984); *Haig v. Agee*, 453 U.S. 280 (1981); *Zemel v. Rusk*, 381 U.S. 1 (1965). To our knowledge, there is no case in which the government has ever before even contended that Congress cannot legislate with respect to the issuance of passports, much less succeeded in voiding such enactments on the basis that they infringe executive branch prerogatives. Respondent’s depiction of a passport as being some sort of political statement on behalf of the United States that sets forth Presidential foreign policy positions is an absurd bit of rhetorical excess, without any basis in fact or law. In particular, the claim that the manner in which the “place of

birth” line on a passport gets filled out implicates Presidential diplomatic prerogatives flies in the face of the evidence adduced by Respondent’s own witnesses. As Petitioner’s brief shows in detail, that information is included on a passport for purposes of identifying the passport holder, not to set forth a foreign policy position.

*Second*, Judge Edwards below, and the Respondent here, argues that the President’s exercise of the Recognition power deprives Congress of its otherwise undoubted power to legislate with respect to passports. But this assertion of Executive branch primacy is pure *ipse dixit*. Congress legislates all the time with respect to countries the President has recognized and commits the United States to positions that limit and burden the President’s ability to deal with them.

To take just a few examples from the same part of the world as Israel, Congress has adopted Nonproliferation Acts relating to Iran and Syria, the Syria Accountability Acts, and the International Religious Freedom Act as well as its amendments. Indeed, the limitations and burdens these statutes impose on the President dwarf any burden that Section 214(d) might be claimed to impose on his dealings with Israel and its neighbors. Yet, as noted, until this case the Government has never suggested that, for that reason, they are unenforceable.

None of the cases cited by Judge Edwards below substantiates that claim of Presidential exclusivity. Most of the cases he cites have to do with whether *states* may impose restrictions on, or otherwise affect, the actions of foreign sovereigns – not whether a co-equal political branch of the federal government may do so.<sup>2</sup> Indeed, a number of the cases he cites actually refer to the deference owing to foreign relations actions of the political branches – plural – of the federal government, references that can hardly be squared with the bold claim of executive exclusivity advanced here.<sup>3</sup>

*Third*, the claim of an infringement upon the Recognition power is particularly meritless on the facts of this case. The United States through the passage of no fewer than 12 presidencies has recognized Israel and the portion of Jerusalem in which

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<sup>2</sup> *Banco Nacional De Cuba v. Sabbatino*, 376 U.S. 398 (1964) and *United States v. Pink*, 315 U.S. 203 (1942) involved claims brought under New York State law. *Baker v. Carr*, 369 U.S. 186 (1962), did not involve foreign relations at all, but whether a Tennessee statute violated the Fourteenth Amendment to the Constitution. Though not cited by Judge Edwards, see also *United States v. Belmont*, 301 U.S. 324 (1937) and *Guaranty Trust Co. of N.Y. v. United States*, 304 U.S. 126 (1938).

<sup>3</sup> *Banco Nacional De Cuba v. Sabbatino*, 376 U.S. at 412, *Vermilya-Brown Co., Inc. v. Connell*, 335 U.S. 377, 380 (1948); *Williams v. Suffolk Insurance Co.*, 38 U.S. 415, 421 (1839). In a further case not cited by Judge Edwards, this Court held that a recognition of sovereignty, whether *de facto* or *de jure*, is to be determined by the legislative and executive departments. *Jones v. United States*, 137 U.S. 202, 212 (1890).

Petitioner was born is part of the “Israel” which it has recognized.<sup>4</sup> Section 214(d) is entirely *consistent* with the exercise of the Recognition power for well over half a century, not in conflict with it. As far as we are aware, it is unprecedented for the government to argue that a supposed presidential power is being unconstitutionally infringed by legislation that, in fact, simply gives effect to prior executive action by presidents of both parties decade after decade.

Assuming, contrary to fact, that there is any bona fide dispute about Israel’s sovereignty west of the Green Line – except as it may be raised by nations who dispute the legality of Israel’s existence at all – the United States has for 60 years taken the position that that territory is Israeli. Again, this issue is to be distinguished from the question whether Jerusalem is Israel’s capital, a subject on which Section 214(d) does not speak. All Section 214(d) requires is that, if so requested, the State Department state on a passport what is true in fact and in accord with the President’s exercise of the Recognition power – that the place where the Shaare Tzedek lies is in “Israel.”

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<sup>4</sup> Although peace plans proposed by the United States have varied as to the nature of Israeli land concessions, even the maximalist plans have been predicated on territory lying outside the pre-1967 boundaries, and do not affect that part of Jerusalem in which Petitioner was born.

*Fourth*, the unprecedented nature of the constitutional claim being made here is even more striking when it is remembered that Section 214(d) was not only passed by Congress but signed into law rather than vetoed by the President. There is no prior case we are aware of in which the government has disputed the constitutionality of a Congressional enactment signed into law by the President on executive prerogative grounds – given that the executive can protect its own alleged prerogatives by using the veto power. Past cases in which claims of executive privilege were raised such as *United States v. Nixon*<sup>5</sup> and *Clinton v. Jones*<sup>6</sup> involved disputes between the President and the Department of Justice or the judicial branch.

That a so-called “signing statement” was filed at the time of signature of this particular statute counts for nothing. Such statements have no legal significance whatsoever – except, perhaps, as they represent an attempt to make an end-run around this Court’s decision in *Clinton v. City of New York*,<sup>7</sup> holding that the President has no constitutional power to issue a so-called “line-item” veto even were Congress to permit such an act. Moreover, the particular signing statement issued here said nothing about Section 214(d), and more plausibly related to the first three subsections of Section 214 rather than

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<sup>5</sup> 418 U.S. 683 (1974).

<sup>6</sup> 520 U.S. 681 (1997).

<sup>7</sup> 524 U.S. 417 (1998).

to Subsection (d). *Amicus* joins in the cogent presentation by Petitioner in his brief on this point.

*Finally*, the claim that the Constitution bars enforcement of Section 214(d) runs afoul of the evidence shown in Petitioner’s brief that the State Department has allowed U.S. passport holders who object to having “Israel” shown as their place of birth to either leave that line blank or even to write in the names of “places” that aren’t even countries – like “Palestine” or the “West Bank.” Only a U.S. citizen who wants to have “Israel” identified as his or her place of birth is prohibited from doing so. This is a clear instance of anti-Israel lawfare directed by elements within the United States government against its own citizens. The idea that the Constitution forbids Congress from remedying this gross discrimination on religious and political grounds is an argument that should make its proponent blush.



## CONCLUSION

For the preceding reasons, The Lawfare Project respectfully submits that granting relief to Petitioner would be fully in accord with the Constitution and this Court’s own precedent, would not impermissibly enlarge the scope of Congressional power, and would not circumscribe or otherwise adversely affect the President’s exercise of his powers under the Constitution or those powers duly delegated by Congress. Finally, the President signed the statute into law; an

otherwise unconstitutional line item may not become Constitutional by fiat in the form of an extralegal signing statement.

Petitioner should never have been subjected by his government to the litigation obstacle course of this case. The mandamus petition he requested should be issued.

Respectfully submitted,

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App. 1

