FORBIDDEN TERRITORY OR WELL-DEFINED BOUNDARIES? *M.B.Z. V. CLINTON* AND THE OVERZEALOUS APPLICATION OF THE POLITICAL QUESTION DOCTRINE

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I. INTRODUCTION

Few issues have perplexed world leaders more than the Israeli-Palestinian border dispute and, in particular, the question of who should lay claim to the city of Jerusalem. For many years, the United States and other nations have labored to achieve a peaceful resolution to this quandary, with little success to show for their efforts.[1] Caught in the midst of this fray is Menachem Zivotofsky, a young American citizen who asks only that his U.S. passport reflect his country of birth.[2] His request, as simple it may seem, has created a constitutional tug-of-war in which all three branches of the U.S. government are forced to debate their proper role in the dispute.

Although the issue of who should control Jerusalem is complicated and involves sensitive foreign policy concerns, the disposition of *M.B.Z. v. Clinton*[3] should pose no comparable difficulty for the Supreme Court. At its heart, the issue presented by this case is a separation of powers dispute with a clear answer. Congress passed a law ordering the President to perform a task involving policy

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1. *See generally* Isabel Kershner, *Israel Supports Proposal to Restart Mideast Talks*, N.Y. TIMES (Oct. 2, 2011), http://www.nytimes.com/2011/10/03/world/middleeast/israel-supports-proposal-to-restart-mideast-talks.html?sq=israel&st=cse&scp=3&pagewanted=print (highlighting some of the most recent developments in the Israeli-Palestinian border dispute, including the ongoing difficulty of determining the future of Jerusalem).

2. Zivotofsky v. Secretary of State, 571 F.3d 1227, 1229 (D.C. Cir. 2009), *cert. granted sub nom.* M.B.Z. v. Clinton, 131 S. Ct. 2897 (2011) (No. 10-699).

3. M.B.Z. v. Clinton, No. 10-699 (U.S. argued Nov. 7, 2011).

determinations over which the President has sole authority under the Constitution. Instead of holding the statute unconstitutional, however, the U.S. District Court for the District of Columbia decided it could not hear the case because of the "political question doctrine"—a doctrine that prohibits courts from calling into question decisions that are exclusively within the province of presidential or congressional power.[4] Political-question considerations are not necessary, however, for the Supreme Court to resolve this dispute. Because it has both the jurisdiction and the practical ability to decide this case, the Court should do so and should declare the statute unconstitutional. Moreover, the Court should take this opportunity to clarify the appropriate application of the political question doctrine so that lower courts do not dismiss cases as non-justiciable that they rightly ought to decide.

II. FACTUAL BACKGROUND

For over six decades, it has been the policy of the United States to express no official view on whether Jerusalem is part of Israel.[5] Although Israel has claimed Jerusalem as its capital since 1950 and has effectively controlled the city since the 1967 Six Day War, the issue remains contentious between Israelis and Palestinians.[6] In an effort to help both sides broker a broader peace agreement, the United States has chosen not to take a position on the issue until the two sides reach an amicable solution.[7] In compliance with this policy, when issuing passports and Consular Reports of Birth Abroad, the Department of State records a citizen's birthplace as "Jerusalem" rather than "Jerusalem, Israel."[8]

In 2002, however, Congress passed the Foreign Relations Authorization Act.[9] This legislation, specifically Section 214(d), directs the Secretary of State to "record the place of birth as Israel" on passports and Consular Reports of Birth Abroad for U.S. citizens born in Jerusalem if they so request.[10] President George W. Bush signed the

4. *Zivotofsky*, 571 F.3d at 1231–32.
5. *Id.* at 1228.
6. Brief for Appellee at 6–7, Zivotofsky v. Secretary of State, 444 F.3d 614 (D.C. Cir. 2006) (No. 04-5395).
7. *Id.*
8. *Zivotofsky*, 571 F.3d at 1228.
9. Foreign Relations Authorization Act, Fiscal Year 2003, 22 U.S.C.A. § 2652 (West 2006).
10. *Id.*

bill into law, but issued a signing statement explaining that he regarded Section 214 as advisory and in violation of the recognition power.[11] United States policy toward Israel, he explained, had not changed.[12]

In October of the same year, Menachem Zivotofsky was born in Jerusalem as a U.S. citizen.[13] His mother, also a U.S. citizen, asked that his passport and Consular Report of Birth Abroad list his birthplace as "Jerusalem, Israel."[14] In accordance with State Department policy, the Embassy refused, listing his birthplace only as "Jerusalem."[15] In 2003, Zivotofsky, through his parents, filed an action for declaratory and injunctive relief, requesting that the Department of State list Israel as his place of birth.[16] The U.S. District Court for the District of Columbia dismissed his claim for lack of standing—since he could use his passport regardless of how it listed his place of birth—and because it presented a non-justiciable political question.[17] The court ruled that Zivotofsky's desired outcome would require it to recognize Jerusalem as part of Israel, which would be an impermissible infringement on the Executive's exclusive power to recognize foreign sovereigns.[18]

On appeal, the U.S. Court of Appeals for the District of Columbia reversed the district court's decision on standing, ruling instead that Section 214 of the Foreign Relations Authorization Act conferred upon Zivotofsky a statutory right to have his passport list his birthplace as "Israel."[19] The court of appeals then remanded the case to the district court to develop a more complete record and to determine whether Section 214 is mandatory or advisory.[20] On remand, the district court ruled once more that the issue before it posed a non-justiciable political question and dismissed the case for lack of subject matter jurisdiction.[21] On appeal, a three-judge panel of the court of appeals affirmed the district court's ruling.[22] In June of

11. *Zivotofsky*, 571 F.3d at 1229. The "recognition power" refers to the President's power to recognize foreign nations, derived from Article II of the U.S. Constitution and discussed *infra* Part II.B.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.* at 1229–30.
19. *Id.* at 1230.
20. *Id.*
21. *Id.*
22. *Id.* at 1228.

2010, the court of appeals denied rehearing of the case en banc.[23]

III. LEGAL BACKGROUND

A. The Political Question Doctrine

The political question doctrine finds its roots in the separation of powers principles envisioned in *Marbury v. Madison*,[24] but the modern doctrine is based primarily upon the reasoning and test set forth in *Baker v. Carr*.[25] In *Baker*, the Supreme Court considered whether the constitutionality of a state statute allocating legislative representation among its counties presented a non-justiciable political question.[26] What emerged was a six-factor test that directs courts to consider whether the issue at hand presents:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing a 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 from multifarious pronouncements by various departments on one question.[27]

By articulating this test, the Court sought to identify cases that courts *could* hear (i.e., where jurisdiction is properly established) but *should not* hear because of the inappropriateness of the subject matter given the proper role and abilities of the Judiciary.[28] The Court explained that the presence of any one of these factors could preclude a court's hearing of a case, but explained that there is a difference between "political questions" and "political cases."[29] Cases ought not be dismissed as non-justiciable simply because the subject matter is

23. Zivotofsky v. Secretary of State, 610 F.3d 84, 84 (D.C. Cir. 2010).

24. *See* Marbury v. Madison, 5 U.S. 137, 170 (1803) (explaining that the Constitution gives the political branches the sole discretion to make some determinations and that these are not reviewable by courts).

25. 369 U.S. 186 (1962).

26. *Id.* at 189.

27. *Id.* at 217.

28. *See id.* at 198 (explaining the difference between lack of jurisdiction and non-justiciability).

29. *Id.* at 217.

political in nature, but rather because of the "impossibility of resolution" by judicial means.[30] Employing this reasoning, the Court found that the case before it was justiciable because it posed none of the problems the Court identified, because the plaintiffs could properly bring suit under the Fourteenth Amendment, and because judicially manageable standards were available for the resolution of the case.[31]

The distinction between political questions and political cases is highlighted in *Japan Whaling Association v. American Cetacean Society*.[32] In that case, the Court was asked to determine whether, based on federal legislation and international whaling agreements, the Secretary of Commerce should find Japan in violation of those agreements and make proper notifications to the President.[33] The petitioners argued that the issue before the Court was a non-justiciable political question because it involved foreign relations considerations that are best left to the Executive.[34] The Court disagreed and explained that "not every matter touching on politics is a political question."[35] Furthermore, the political question doctrine only prohibits the Judiciary from making "policy choices and value determinations constitutionally committed for resolution" by the other branches.[36] The Court decided, however, that it needed only to interpret executive agreements and congressional legislation—tasks that the Court is well equipped, and indeed designed, to accomplish—and thus declined to apply the framework in *Baker*.[37] In so doing, the Court sought to distinguish between issues with genuine political *questions*—which courts are not equipped to decide—and issues with merely political *consequences*—which courts can and should resolve.

More recently, the Court considered *Nixon v. United States*,[38] one of only two cases since *Baker* in which the Court found an issue to be a non-justiciable political question.[39] The Court was asked to consider

30. *Id.*
31. *Id.* at 226.
32. 478 U.S. 221 (1986).
33. *Id.* at 228–30.
34. *Id.* at 229.
35. *Id.*
36. *Id.* at 230.
37. *Id.*
38. 506 U.S. 224 (1993).
39. *See generally id.*; Gilligan v. Morgan, 413 U.S. 1 (1973) (holding that whether the Ohio National Guard employed proper procedures for training and equipping its soldiers presented a non-justiciable political question). Judge Edwards, in his concurring opinion in *Zivotofsky*,

whether the Senate conducted a proper impeachment proceeding for a federal judge.[40] This question, the Court determined, was non-justiciable primarily because Article I of the Constitution grants Congress the "sole" power to conduct impeachments.[41] Thus, deciding the adequacy of the Senate's impeachment procedures would necessarily require the Court to make determinations that are explicitly reserved for Congress.[42] In reaching this conclusion, the Court found it necessary to "interpret the text in question and determine whether and to what extent the issue [was] textually committed."[43] Having decided that the issue was explicitly reserved to another branch by the Constitution, the Court concluded that judicial review was inappropriate in this instance and, in doing so, laid out the appropriate textual commitment analysis for lower courts to employ.[44]

B. The Recognition Power

The recognition power finds its origins in Article II, Section 3 of the Constitution, which grants the President the power to "receive Ambassadors and other public ministers" from foreign nations.[45] The Supreme Court has interpreted this to mean that "[p]olitical recognition is exclusively a function of the Executive."[46] The Court has long held that the President has the power to decide the "sovereignty of any island or country."[47] This power does not just include the ability to decide which governments to recognize, but also the ability to "determine the policy which is to govern the question of recognition."[48] Congress, too, has traditionally acknowledged the President's power to recognize foreign governments.[49] The extent to

asserts that the scarcity of these holdings is a reflection of the narrowness of the political question doctrine. *See* Zivotofsky v. Secretary of State, 571 F.3d 1227, 1236–37 (D.C. Cir. 2009) (Edwards, J., concurring), *cert. granted sub nom.* M.B.Z. v. Clinton, 131 S. Ct. 2897 (2011) (No. 10-699) ("The political question doctrine is purposely very narrow in scope."). Additionally, it is perhaps unsurprising that the Court would be reluctant to deny itself the power to hear a case.

40. *Nixon*, 506 U.S. at 226.

41. *Id.* at 230–31.

42. *Id.* at 231.

43. *Id.* at 228.

44. *Id.* at 238.

45. U.S. CONST. art. II, § 3. This provision is typically referred to as the "Recognition Clause."

46. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 410 (1964).

47. Williams v. Suffolk Ins. Co., 38 U.S. 415, 420 (1839) (holding that the President had the sole authority to decide what country exercised sovereignty over the Falkland Islands).

48. United States v. Pink, 315 U.S. 203, 229 (1942).

49. *See* Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power of Foreign Affairs*, 111 YALE L.J. 231, 312–13 (2001) (explaining that Congress never questioned President

which the recognition power applies to passports is less certain, though the Court has held that a passport is a "letter of introduction" from one sovereign to another and that the President has traditionally had authority over the issuance and revocation of passports.[50]

IV. HOLDING

In July of 2009, the U.S. Court of Appeals for the District of Columbia affirmed the district court's ruling that Zivotofsky's claim posed a non-justiciable political question.[51] The court began its inquiry by identifying the issue before it.[52] Because Zivotofsky asked the court to "instruct the Executive to comply with Section 214(d)" and issue a new passport, the court framed the question presented as "whether the State Department can lawfully refuse to record his place of birth as 'Israel.'"[53]

The court concluded that granting Zivotofsky's request would require it to review a decision made pursuant to the President's exclusive recognition power, which it is forbidden to do.[54] The decision whether to denote Zivotofsky's place of birth as "Israel" implicated a myriad of foreign policy decisions that amounted to choosing whether Israel's sovereignty extends to Jerusalem.[55] Because the power to recognize foreign governments is granted exclusively to the President by the Constitution, his exercise of that power is not subject to review by the courts.[56] Zivotofsky, the court decided, was asking it to do just that.[57] By ordering the Department of State to issue Zivotofsky an amended passport, the court would "directly contravene the President's policy" and "call into question the President's exercise of the recognition power."[58]

Zivotofsky argued that it was not necessary to invoke the political question doctrine because Congress had already determined the status of Jerusalem and the court needed only to enforce a federal

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Washington's decisions over which countries to recognize).

50. Haig v. Agee, 453 U.S. 280, 292–94 (1981).

51. Zivotofsky v. Secretary of State, 571 F.3d 1227, 1228 (D.C. Cir. 2009), *cert. granted sub nom.* M.B.Z. v. Clinton, 131 S. Ct. 2897 (2011) (No. 10-699).

52. *Id.* at 1230.

53. *Id.*

54. *Id.* at 1231.

55. *Id.* at 1231–32.

56. *Id.* at 1231.

57. *Id.* at 1232.

58. *Id.*

statute.[59] The court asserted, however, that it was required to begin its inquiry with the political-question analysis because it is a jurisdictional analysis that must precede any consideration of the case on the merits—thus, the court believed that it could not even reach the question of whether it could enforce the statute.[60] That Zivotofsky's claim was based on a statutory challenge to the President's exercise of power was "of no moment" to the court, which did not want "to be the first court to hold that a statutory challenge to executive action trumps the analysis in *Baker* and *Nixon* and renders the political question doctrine inapplicable."[61] Instead, the court concluded that considering the merits of the case at all would require it to make decisions reserved to the Executive and it declined to do so.[62]

Senior Circuit Judge Edwards's concurring opinion took a very different view of the case. The judge agreed with the majority that the decision whether to include "Israel" on Zivotofsky's passport was an exercise of the President's recognition power and thus not reviewable by courts.[63] The judge differed, however, on the precise issue before the court. Judge Edwards pointed to the important distinction between lack of jurisdiction and non-justiciability—in the former, immediate dismissal is required because the court does not have the power to hear the case, whereas in the latter, "consideration of the cause is not wholly and immediately foreclosed" because "the [c]ourt's inquiry necessarily proceeds to the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined."[64]

The judge explained that, because Zivotofsky had standing to bring his claim and properly invoked the court's statutory jurisdiction, the real issue before the court was whether Section 214(d) of the

59. *Id.*
60. *Id.*
61. *Id.* at 1233.
62. *Id.* at 1232–33.
63. *Id.* at 1243 (Edwards, J., concurring).
64. *Id.* at 1236 (quoting Baker v. Carr, 369 U.S. 186, 198 (1962)). The majority acknowledged Judge Edwards's distinction between jurisdiction and justiciability as "interesting," and acknowledged that *Baker* makes the same distinction, but ultimately chose not to "grapple" with it "because it makes no practical difference in the outcome of the case." *Id.* at 1233 n.3 (majority opinion). In either situation, the majority believed that it was required to dismiss the suit outright. *Id.* Judge Edwards's assertion is simply that making this distinction allows the court to consider the constitutional validity of the enactment, where a dismissal for lack of jurisdiction would not. *Id.* at 1236–37 (Edwards, J., concurring).

Foreign Relations Authorization Act is a constitutionally valid enactment.[65] Because he agreed with the district court and the majority that the recognition power belongs exclusively to the Executive, Judge Edwards viewed it as "inescapable" that Section 214(d) violates the Constitution, and that Zivotofsky's case should be dismissed for want of a viable cause of action rather than for want of justiciability.[66]

V. ARGUMENTS

A. The Petitioner's Arguments

In his brief to the Supreme Court, Zivotofsky advances two primary arguments: first, that the case is not barred by the political question doctrine, and second, that the statute is a constitutionally valid enactment. First, Zivotofsky claims that the political question doctrine does not bar the Court from hearing this case because he "seeks only the enforcement of the very straight-forward command of Section 214(d)."[67] He argues that the doctrine only prohibits courts from hearing cases that require determinations "beyond the competence of judges" or that ask courts to make policy considerations that are not "legal in nature."[68] These sorts of considerations, Zivotofsky argues, are not required in this case because Congress has already made the necessary policy determinations by enacting Section 214(d).[69] The political-question analysis set forth in *Baker*, he explains, is not necessary when the other branches have already decided the political issues at hand.[70] Here the Court is not making independent political determinations, but is tasked only with deciding whether Congress has the authority under the Constitution to enact this legislation.[71] This is a separation of powers issue of the kind that the Court is more than able to hear and decide.[72]

65. *Id.* at 1234 (Edwards, J., concurring).
66. *Id.* at 1245.
67. Brief for Petitioner at 25, M.B.Z. v. Clinton, No. 10-699 (U.S. June 29, 2011).
68. *Id.* at 27 (quoting Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 (1986)).
69. *Id.* at 29.
70. *Id.*
71. *Id.* at 29–30.
72. *Id.*

Zivotofsky also argues that the relevant precedent in this case is *Japan Whaling Association* rather than *Baker*.[73] He points out that, in *Japan Whaling Association*, the Court chose not to apply the framework in *Baker* because "the central issue depended on construction of a federal statute."[74] In that case, the Court noted that interpreting federal legislation "is a recurring and accepted task for the federal courts," which Zivotofsky argues the Court should undertake in this case.[75]

Second, Zivotofsky argues that Section 214(d) is a constitutionally valid enactment. In support of this proposition, he claims that the Recognition Clause does not necessarily give the President the exclusive power to recognize foreign governments and that, even if it does, it certainly does not give him the power to determine the status of particular cities or territories.[76] Instead, Zivotofsky argues that the President only has the power to conduct foreign policy in compliance with or in the absence of congressional legislation.[77] Where Congress has spoken on a matter, the President must comply with its directives.[78] Finally, Zivotofsky argues that no meaningful harm will come of the Court's enforcement of Section 214(d) because the Department of State's dire predictions of the effects on U.S. foreign policy are overstated.[79] If any foreign criticism does result from enforcement, he explains, it will be because "the Department of State has magnified the issue and issued a self-fulfilling prophecy" of unrest in the Arab world.[80]

B. The Respondent's Arguments

In her brief to the Court, the Secretary argues first that the recognition power can only be exercised by the President, and second, that Zivotofsky's suit presents a non-justiciable political question. Regarding the recognition power, the Secretary argues that it belongs exclusively to the President and that it includes both the ability to recognize foreign governments and to formulate the policy that

73. *Id.* at 30.
74. *Id.* at 31.
75. *Id.* (quoting Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 (1986)).
76. *Id.* at 34.
77. *Id.* at 35.
78. *Id.*
79. *Id.*
80. *Id.*

governs the issue of recognition.[81] Relying on Supreme Court precedent, she explains that this power extends to passports because they are effectively "instrument[s] of diplomacy" insofar as they are a form of official communication between governments.[82] The Secretary concedes that Congress may regulate passports to an extent "that is necessary and proper to implement its own enumerated foreign-affairs powers," but not to the extent that it constrains the President's ability to conduct diplomacy.[83] The current U.S. passport policy with regard to Jerusalem is a function of the President's recognition power because the decision of how to describe a place in U.S. passports "operates as an official statement of whether the United States recognizes a state's sovereignty over a territorial area."[84]

The Secretary argues further that because Zivotofsky's suit asks the Court to call into question the Executive's exercise of the recognition power, the Court must not adjudicate the question in the first place.[85] In particular, the Secretary points out that the first *Baker* factor calls for an analysis of the extent to which the Constitution commits the issue before the Court to a determination by another branch.[86] If the Court finds that such a commitment is present and that Zivotofsky's requested relief therefore requires the Court to review a determination that is committed to another branch, the proper course of action is to dismiss the suit.[87] It makes no difference that Zivotofsky sued based on a statutory right because "Congress cannot, by creating a statutory right, confer on the courts the authority to decide a question that the Constitution commits to the Executive."[88] A non-justiciable political question does not suddenly become justiciable because Congress has put forth legislation on the matter; rather, it is the type of relief the plaintiff requests that must drive a court's initial analysis.[89] In the Secretary's view, whether a case presents a political question is "a threshold issue of justiciability" and must be decided before the Court determines whether the plaintiff is entitled to relief.[90]

81. Brief for Respondent at 29, M.B.Z. v. Clinton, No. 10-699 (U.S. Sept. 23, 2011).
82. *Id.* at 31 (citing Haig v. Agee, 453 U.S. 280, 292–93 (1981)).
83. *Id.*
84. *Id.* at 38.
85. *Id.* at 42–43.
86. *Id.* at 42.
87. *Id.* at 46.
88. *Id.*
89. *Id.* at 44.
90. *Id.* at 52–53.

Although the Secretary would have the Court dismiss the suit outright as non-justiciable, she does propose that the Court should, in the alternative, strike down Section 214(d) as unconstitutional because it impermissibly infringes on the President's recognition power.[91] The Secretary explains that the legislation "seeks to obtain reversal of the Executive's longstanding recognition policy regarding Jerusalem"—something the Constitution does not permit Congress to do.[92]

VI. OUTCOME AND ANALYSIS

When the Supreme Court decides *M.B.Z. v. Clinton*, it likely will—and more importantly should—conclude first that the political question doctrine is not applicable to the case, and second, that Section 214(d) is an unconstitutional infringement of the Executive's recognition power. The political question doctrine prevents federal courts from deciding issues they are not equipped to decide—that is, instances where judicial relief is impractical or inappropriate. Courts are equipped, however, to decide issues of constitutional interpretation and to resolve disputes over the separation of powers, and the Supreme Court ought to do so in this case. Furthermore, the Court ought to offer some guidance to the lower courts as to the appropriate application of the political question doctrine.

A. The Issue Before the Court

The issue properly before the Court is "[w]hether Section 214(d) . . . impermissibly infringes on the President's power to recognize foreign sovereigns."[93] Exploring the historical understanding of the recognition power and Supreme Court precedent demonstrates not only that the power to recognize foreign governments belongs exclusively to the President, but also that this power extends to any official action taken in furtherance of that power.

First, the Executive's power to recognize foreign governments is perhaps best understood in the context in which the federal government first chose to allocate it. In the early days of the Republic, Congress never questioned President Washington's decisions about which governments to recognize.[94] In fact, President Washington never

91. *Id.*
92. *Id.* at 53–54.
93. M.B.Z. v. Clinton, 131 S. Ct. 2897 (2011) (No. 10-699).
94. *See* Prakash & Ramsey, *supra* note 49, at 312–13 ("Congress never purported to tell

consulted Congress when determining whether to recognize the new French Republic, in part because his cabinet unanimously agreed that it was unnecessary.[95] Thus, President Washington's actions and Congress's acquiescence in the field of foreign relations suggest the power to recognize foreign governments was intended to reside with the Executive.[96]

Second, Supreme Court precedent on the recognition power, developed throughout the Court's history, reflects this early understanding of the power. The Court has not only held that this power belongs exclusively to the President,[97] but also that it extends to decisions about territory that another country claims to control.[98] Perhaps more importantly, the Court has held that the Executive has the power to "determine the policy which is to govern the question of recognition,"[99] indicating that the recognition power is not limited to recognizing or not recognizing foreign sovereigns, but also includes the ability to formulate broad policies that are employed in furtherance of that power. Moreover, the Court has held that passports are a form of official communication between sovereigns, constituting a "letter of introduction" from one government to another.[100] This indicates that passports are more than just travel documents and can be considered a function of broader executive policies.

In light of these past decisions, the outcome of this issue seems clear. If the President has the power to decide how to recognize particular territories and the ability to formulate policy in furtherance of that power, it follows logically that he may decide whether to name a territory as part of a foreign country in official diplomatic documents. It is counterintuitive to suppose that the President has the power to proclaim that Jerusalem is not part of Israel but can then be required to refer to the city in passports and other official documents as "Israel." This would almost certainly frustrate the President's ability to exercise the recognition power and to formulate coherent

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Washington which countries to recognize.").

95. *Id.* at 312.

96. *See id.* at 312–13 ("Washington's actions reflect a consensus shared by Washington, his cabinet, and Congress.").

97. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 410 (1964) (stating that "[p]olitical recognition is exclusively a function of the Executive").

98. Williams v. Suffolk Ins. Co., 38 U.S. 415, 420 (1839).

99. United States v. Pink, 315 U.S. 203, 229 (1942).

100. Haig v. Agee, 453 U.S. 280, 292–93 (1981).

foreign policy.[101] Thus, under current jurisprudence, the Supreme Court is likely to hold that Section 214(d) impermissibly infringes on the President's recognition power.

B. Justiciability

In *Baker*, the Court took care to distinguish between a court's lack of power to hear a case for want of jurisdiction and a court's inability to decide the issues before it for want of judicially manageable standards.[102] In the present controversy, the Court has both the power to hear the case and judicially manageable standards for resolving it. The case requires the Court to examine a federal statute that has given Petitioner standing and to determine if that statute is a constitutionally sound enactment. Courts are both familiar with and well equipped to undertake these tasks.[103] In *Japan Whaling Association*, the Court explained that federal courts ought to decide issues properly before them so long as they are not asked to "formulate national policies" or "develop standards for matters not legal in nature."[104] The Court need not make these kinds of policy considerations in this case because the political branches have already completed that task. The Court need only interpret the Constitution to determine which of the branches has the authority to decide this issue.

C. Misapplication of the Political Question Doctrine

Thus, the Court has the ability, both jurisdictionally and practically, to decide the separation of powers issue before it. The court below determined, however, that it was barred from doing so by the first strand of the *Baker* test—that is, because the relief requested by Zivotofsky would require the court to pass judgment on a decision that the Constitution commits to the exclusive judgment of the

101. *See* Calvin Massey, *M.B.Z. v. Clinton: Whither Jerusalem?* 6 CHARLESTON L. REV. 87, 103 (asserting that allowing Congress to dictate how the President ought to treat disputed territory would be "a cumbersome, inefficient, and awkward method of conducting foreign relations").

102. *See* Baker v. Carr, 369 U.S. 186, 198 (1962) (differentiating between lack of jurisdiction and non-justiciability).

103. *See* Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 (1986) ("[U]nder the Constitution, one of the Judiciary's characteristic roles is to interpret statutes."); Lin v. United States, 561 F.3d 502, 506 (D.C. Cir. 2009) (characterizing statutory interpretation as a "familiar task" for courts); Nixon v. United States, 506 U.S. 224, 238 (1993) (explaining that courts have the power "to review either legislative or executive action that transgresses identifiable textual limits").

104. *Japan Whaling Ass'n*, 478 U.S. at 230.

President.[105] The court acknowledged the existence of the statute that had given Zivotofsky the ability to bring his suit in the first place, but determined the legislation did not make its hearing of the case any more appropriate.[106] It is precisely this statute, though, that not only gives the Judiciary the power to hear this case, but in fact necessitates it doing so. Although the Supreme Court may not challenge constitutionally designated presidential decisions, it may prevent another branch from infringing on the President's power.[107]

This proposition is highlighted in a 1976 article by Professor Louis Henkin critiquing the political question doctrine.[108] Arguing for a more restrained doctrine (or, rather, the abolition of it), Professor Henkin noted several "jurisprudential lines which are sometimes confused with the 'political question doctrine' but which essentially have nothing to do with it."[109] Among these are situations in which "[t]he act complained of [is] within the power conferred upon the political branches of the federal government by the Constitution" and is either "law binding on the courts" or "not prohibited to [the branches] explicitly or by any warranted inference from the Constitution."[110] In these cases, Professor Henkin explains:

> [T]he court does not refuse judicial review; it exercises it. It is not dismissing the case or the issue as nonjusticiable; it adjudicates it. It is not refusing to pass on the power of the political branches; it passes upon it, only to affirm that they had the power which had been challenged and that nothing in the Constitution prohibited the particular exercise of it.[111]

Such is the case here. The Court is not obligated to refuse adjudication of Zivotofsky's claim because he questioned the President's exclusive decision-making power. The Court may adjudicate the claim and then decide precisely that: the President has the exclusive authority to recognize foreign nations and he exercised that power within the bounds the Constitution. In so doing, the Court

105. Zivotofsky v. Secretary of State, 571 F.3d 1227, 1231 (D.C. Cir. 2009), *cert. granted sub nom.* M.B.Z. v. Clinton, 131 S. Ct. 2897 (2011) (No. 10-699).

106. *Id.* at 1233.

107. *See Baker*, 369 U.S. at 211 ("Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed . . . is a responsibility of this Court as ultimate interpreter of the Constitution.").

108. Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597 (1976).

109. *Id.* at 606.

110. *Id.*

111. *Id.*

may also decide that Congress has enacted legislation that infringes upon the President's constitutionally endowed powers and declare that legislation unconstitutional. This outcome, no doubt, is not the relief that Zivotofsky envisioned when he brought his suit, but courts are not required to dispose of cases in precisely the manner that plaintiffs request.

Although some have advocated for a more expansive use of the political question doctrine, even their arguments do not necessarily contemplate its use in cases like the one before the Court. Professor Rachel Barkow, for example, argues that the restriction of the doctrine in recent years has led the Court to hear cases better left to the constitutional interpretation of the other branches.[112] Citing *Bush v. Gore*[113] in particular, she suggests the Court has made itself the sole interpreter of the Constitution,[114] which is something the Founders did not intend.[115] Even under this line of reasoning, though, Zivotofsky's case is still properly justiciable. Professor Barkow essentially advocates for a return to an early understanding of the Court's power, when judicial review was rarely exercised because the Judiciary was more willing to defer to the constitutional interpretations of the other branches.[116] She notes, however, that even in those days, it was well within the Court's responsibility to "determine how much interpretive room a constitutional delegation of power gave the branch receiving that power" and to "declar[e] the boundaries" within which the political branches have room to make their own interpretations.[117]

Determining appropriate constitutional boundaries is precisely what the Court has been called upon to do in this case. Zivotofsky's claim does not reach the bounds of the political question doctrine because it does not require the Court to make constitutional determinations reserved to other branches. Instead, his claim requires

112. *See* Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 241 (2002) (explaining that, while constitutional interpretation was once a coordinate task amongst the branches, the Court has now put itself at the top of a hierarchy of interpretive power).

113. 531 U.S. 98 (2000).

114. *See* Barkow, *supra* note 112, at 336 ("The current Court appears to believe that it alone provides the final answer to almost all constitutional questions, while the interpretations of the other branches are to be accepted at the Court's discretion.").

115. *See id.* at 246–48 (noting that Alexander Hamilton recognized that the resolution of some questions is best left to the political branches).

116. *See id.* at 250–51 (explaining that, at the time of the Marshall Court, "[j]udicial review involved a spectrum of broad deference to the political branches").

117. *Id.* at 252.

the Court to decide the boundaries of the recognition power and, more specifically, to decide which branch is permitted to exercise it. The unwillingness of the D.C. Circuit to perform this task thus demonstrates an overzealous application of a very limited doctrine and an unnecessary ceding of power.

VII. CONCLUSION

Since the earliest days of the Republic, it has been "emphatically the province and duty of the Judicial Department to say what the law is."[118] Here, the Court has been asked to resolve a dispute between the branches about the powers granted to them by the Constitution.[119] It should do just that, and take the opportunity to clarify an important yet easily misapplied doctrine.

118. Marbury v. Madison, 5 U.S. 137, 177 (1803).

119. *See* Brief of Congressmember Anthony Weiner as *Amicus Curiae* in Support of Petitioners at 19, M.B.Z. v. Clinton, No. 10-699 (U.S. Dec. 29, 2010) (requesting that the Court use this case to resolve a dispute between Congress and the President and "to straighten out the confused and misguided doctrine and practice revealed" by the case).