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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 MENACHEM BINYAMIN :

⁴ ZIVOTOFSKY, BY HIS PARENTS :

5 AND GUARDIANS, ARI Z. AND :

6 NAOMI SIEGMAN ZIVOTOFSKY, :

7 Petitioner :

8 V. : No. 13-628.

9 JOHN KERRY, SECRETARY OF :

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10 STATE. :
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12 Washington, D.C.

13 Monday, November 3, 2014

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15 The above-entitled matter came on for oral
16 argument before the Supreme Court of the United States
17 at 10:04 a.m.

18 APPEARANCES:

19 ALYZA D. LEWIN, ESQ., Washington, D.C.; on behalf of
20 Petitioner.

21 DONALD B. VERRILLI, JR., Solicitor General, Department
22 of Justice, Washington, D.C.; on behalf of
23 Respondent.

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1 P R O C E E D I N G S

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first in Case 13-628, Zivotofsky versus Kerry.

5 Ms. Lewin.

6 ORAL ARGUMENT OF ALYZA LEWIN

7 ON BEHALF OF THE PETITIONER

8 MS. LEWIN: Mr. Chief Justice, and may it
9 please the Court:

10 How an American is identified in his or her
11 passport or U.S. Consular Report of Birth Abroad,
12 including the place of birth designation, does not
13 amount to formal recognition by the United States of
14 that designated location's sovereign status. This is
15 the principal reason why Congress's law authorizing
16 Jerusalem-born citizens to carry passports that say they
17 were born in Israel is a legitimate congressional
18 exercise of Congress's power to regulate foreign
19 commerce, naturaliza --

20 JUSTICE KENNEDY: Suppose that -- suppose
21 that the President and the Secretary of State put on the
22 passport the place of birth -- I've written it out --
23 the place of birth on this Jerusalem-born citizen's
24 passport has been listed as Israel at the holder's
25 request. This designation is neither an acknowledgment

1 nor a declaration by the Department of State or the
2 President of the United States that Jerusalem is within
3 the borders of the State of Israel.

4 Could the President, under existing statute,
5 and the Secretary of State, under existing statute, put
6 that statement on the passport?

7 MS. LEWIN: Yes, Your Honor, they could put
8 that statement on the passport. But we --

9 JUSTICE KAGAN: But if -- if -- if Congress
10 then passed a law saying that that statement had to come
11 off every passport, could Congress do that?

12 MS. LEWIN: Yes, Justice Kagan. The --
13 the -- we -- there's no restriction on the initial
14 granting of recognition by the President. But by the
15 same token, the Congress has the ability afterwards,
16 upon deliberation, to decide if they disagree with that
17 recognition.

18 But in the case that Justice Kennedy
19 suggested --

20 JUSTICE SOTOMAYOR: Has that ever happened?

21 MS. LEWIN: Yes.

22 JUSTICE SOTOMAYOR: In the history of the
23 United States where Congress after the President had
24 declared that it was not recognizing someone, has
25 Congress ever recognized it?

1 MS. LEWIN: Yes, Justice Sotomayor. In --
2 in 1898, Congress passed a joint resolution for the
3 recognition of the independence of the people of Cuba
4 over the initial opposition of President McKinley, and
5 that ended up recognizing the independence of Cuba.

6 JUSTICE KENNEDY: If you were careful to say
7 at the outset that this is not recognition, the court of
8 appeals decision, I think it was in the Judge Tabor
9 concurrence, said that both parties urge upon us that
10 they -- that the power of recognition is involved here
11 and Congress has done it. And then, of course, the
12 Attorney General takes -- takes the opposite position
13 that the -- that this, A, this is recognition and, B,
14 that's why it's void.

15 Did you change your position here, or am I
16 just misinterpreting the way this -- the court of
17 appeals discussed it?

18 MS. LEWIN: We've provided to the Court
19 alternative options for resolving this issue. Our
20 primary position, as I said at the outset, is that what
21 is written in this statute does not amount to a formal
22 recognition of sovereignty because the language of the
23 statute itself is very narrow.

24 It begins by saying that, for the purposes
25 of, for the narrow purposes of recording a place of

1 birth on a passport or a Consular Report of Birth
2 Abroad, that is where -- what this statute provides for.
3 It also does not state that in all circumstances you
4 have to list Israel as the place of birth. It is merely
5 giving the individual choice.

6 JUSTICE GINSBURG: The -- the -- does -- the
7 provision is part of a section, Section 214. And I
8 think you're trying to read G, and so it is
9 disassociated from the purpose that's expressed
10 throughout 214, that is, that Jerusalem is the capital
11 of Israel. Congress said that, and you -- you are
12 trying to deal with a piece of one section without
13 regard to the -- to the thrust of the whole provision,
14 that Congress has said we think Jerusalem is the capital
15 of Israel.

16 MS. LEWIN: Justice Ginsburg, the -- that is
17 correct. This section of the statute should be reviewed
18 and the constitutionality of it be determined on its
19 own. But the Court should look not at what Congress may
20 have intended by the entire section but, rather, what
21 this section actually did. And this section, as I said,
22 gives the individuals a choice and does not confer
23 formal recognition. There are benefits that come with
24 formal recognition.

25 JUSTICE BREYER: You say that. But the --

1 you say -- I've heard exactly what you said. And I
2 think that's certainly a reasonable position. You could
3 read this and say it doesn't really say anything about
4 recognizing anything.

5 But the Solicitor General of the United
6 States, after conferring with the State Department,
7 says, "Since Israel's founding, every President has
8 adhered to the position that the status of Jerusalem
9 should not be unilaterally determined by a party," and
10 he adds, "by requiring the President to contradict his
11 recognition position regarding Jerusalem in official
12 communications with foreign sovereigns, the section
13 unconstitutionally encroaches on the President's core
14 recognition authority."

15 So he has a different view. He thinks it is
16 our policy not to recognize Jerusalem as the capital,
17 which you apparently agree with, and he thinks that this
18 does have some tendency at least to suggest the
19 contrary.

20 Now, I'm a judge. I'm not a foreign affairs
21 expert. And when he tells me that, and they are foreign
22 affairs experts in the State Department, how can I say
23 that I'm right even if I agree with you, and they, who
24 are in charge of foreign affairs, are wrong when they
25 make those two statements, which certainly sound

1 plausible.

2 MS. LEWIN: Two points, Justice Breyer. The
3 first is that what goes on a -- on a passport as a place
4 of birth is not tantamount to recognizing foreign
5 sovereignty. Taiwan is a perfect example. The State
6 Department puts --

7 JUSTICE GINSBURG: I want -- and I must
8 interject at this point because you emphasize the Taiwan
9 example and it seems to me it's most distinguishable.
10 Taiwan and China maintained from the beginning there is
11 only one China, and so Taiwan is a place name. It's a
12 region. It's in no way recognizing, no -- there's no
13 question of recognition in the Taiwan example.

14 MS. LEWIN: That's correct, Justice
15 Ginsburg. So what you put on the passport does not
16 automatically confer recognition --

17 JUSTICE BREYER: No, no, to go back to my
18 question --

19 MS. LEWIN: But the question --

20 JUSTICE BREYER: -- which I'd like an answer
21 to. I don't think that Taiwan is a counterexample since
22 the policy of the State Department in that thing that's
23 FAM, which is the Foreign Affairs Manual, says pretty
24 clearly that if there's a dispute about the larger
25 power, i.e., China, you always can put in your passport

1 the smaller place of birth, like a city or I would think
2 here Taiwan. So I don't hear the Department or I guess
3 I'm saying the experts saying that the Taiwan example
4 conflicted with their policy.

5 JUSTICE SCALIA: China objected to that.
6 Did China not object to it?

7 JUSTICE BREYER: China may have done -- I
8 want an answer to this question --

9 MS. LEWIN: Yes, that is correct, Justice
10 Scalia.

11 JUSTICE BREYER: -- not whether China
12 objected or didn't object or so forth. I'm not
13 interested in that.

14 I'm interested in what we, as judges, do
15 when the State Department and those charged say those
16 other things were not contrary to our recognition
17 policy. That's what they think, and this is.

18 MS. LEWIN: So one last point on Taiwan --

19 JUSTICE BREYER: I'd like the first point.
20 What am I supposed to do in respect to that?

21 MS. LEWIN: Well, the first -- the first
22 point is that this -- what goes on the passport does not
23 confer the benefits of formal recognition of
24 sovereignty. This does not entitle the government, the
25 foreign government to bring cases in -- in our courts,

1 to the protection of sovereign immunity or to the act
2 of -- act of state doctrine. What goes on a passport,
3 therefore, does not amount to sovereign recognition.

4 JUSTICE SCALIA: Ms. Lewin, I -- I thought
5 your position was you couldn't care less if the State
6 Department thinks that this is going to interfere with
7 our relations with the Palestinians, that Congress is
8 entitled to do what it is authorized to do under the
9 Constitution, even when that contradicts -- let's assume
10 they can't recognize a country, but they can declare war
11 on a country, can't they --

12 MS. LEWIN: Yes.

13 JUSTICE SCALIA: -- that the State
14 Department has decided to recognize and -- and to be
15 friendly with?

16 MS. LEWIN: Yes, Justice Scalia.

17 JUSTICE SCALIA: Congress can do that.

18 MS. LEWIN: That is correct. Congress can
19 do that. And the test, if there is a conflict --

20 JUSTICE SCALIA: And you say can do the same
21 here. And -- and the fact that the State Department
22 doesn't like the fact that it makes the Palestinians
23 angry is irrelevant.

24 MS. LEWIN: Absolutely, Justice Scalia.
25 That is correct and --

1 JUSTICE BREYER: If you take that position,
2 which explains it, then what do you think of Justice
3 Story who writes in 1833 that, "The exercise of the
4 prerogative of acknowledging new nations and
5 ministers" -- and he makes clear that involves whether a
6 city or a region is part of a country, et cetera, he
7 says, it's an executive function. Some argue, as we --
8 I think we've just heard, that Congress could make that
9 decision, too, but that hasn't been decided. And he
10 concludes that, "A power so extensive in its reach over
11 our foreign relations could not properly be conferred on
12 any other than the Executive Department will admit of
13 little doubt."

14 MS. LEWIN: Justice --

15 JUSTICE BREYER: So he is saying, of course,
16 you have to have one person deciding such a thing, and
17 that has to be the Executive. That's 1833, pretty
18 knowledgeable about the founders' intent.

19 MS. LEWIN: But that is a rather extreme
20 position, number one, to suggest that the Executive
21 Branch would have not only the authority to recognize a
22 foreign government, but also at the State Department's
23 say-so, that automatically would end the question or any
24 review by any other branch. The -- the State Department
25 merely says that the power's influence upon --

1 JUSTICE SOTOMAYOR: But what -- there is
2 always review with the power of the purse, and there's
3 always review with not appointing an ambassador.
4 There -- there is review in a variety of alternative
5 ways by Congress. It just may not be the way you
6 prefer, that they could pass a resolution contradicting
7 that that would have any legal course.

8 MS. LEWIN: There -- well, there is review,
9 and even -- both to respond to Justice Sotomayor and
10 Justice Breyer, Justice Story and William Rawle both
11 recognize that authority of Congress to review.

12 Justice Story also said that, "If such
13 recognition is made, it's conclusive upon the nation
14 unless, indeed, it can be reversed by an act of Congress
15 repudiating it." And then he went further to say that,
16 "If the President refuses to recognize, then he said
17 Congress may, notwithstanding, solemnly acknowledge the
18 sovereignty of the nation or party."

19 CHIEF JUSTICE ROBERTS: I suppose -- I
20 suppose you could also say Hamilton in 1787 or whatever
21 it was trumped Story in 1830, right? I mean, he said
22 pretty much the exact opposite, that the recognition
23 provision was really just a trivial formality.

24 MS. LEWIN: Hamilton also switched his
25 position before he was in the administration and after

1 he was in the administration. What that would seem to
2 show, Mr. Chief Justice, is that it's not clear the
3 history --

4 JUSTICE SOTOMAYOR: Ms. Lewin --

5 JUSTICE SCALIA: In any case, this is not
6 your main point, is it? You're -- you're being either
7 forced into or willingly yield yourself to arguing
8 that -- against the proposition that if this is
9 recognition, it is invalid. But your main position is
10 this is not recognition; it just has an effect on -- on
11 the State Department's desire to -- to make nice with
12 the Palestinians, and your position is Congress has
13 no -- no compulsion to -- to follow that, assuming it
14 can't recognize.

15 MS. LEWIN: That is correct.

16 JUSTICE SCALIA: You don't claim that this
17 is recognition.

18 MS. LEWIN: We do not claim that this is
19 recognition. In fact, if there was a conflict --

20 JUSTICE SOTOMAYOR: If you ask -- one factual
21 matter I'd like. I see in the record that your
22 application for the passport asked for "Jerusalem,
23 Israel," but that was changed. Was it changed in
24 litigation? Was there an actual official request to
25 change it in your application?

1 MS. LEWIN: The initial request was made
2 purely because of a misunderstanding of what the law
3 initially required. And it was a common --

4 JUSTICE SOTOMAYOR: Answer my question. Did
5 you apply formally to have it changed or did you just
6 take this -- that position in litigation?

7 MS. LEWIN: The position was then
8 subsequently taken in litigation. But in subsequent
9 renewals of the passport, too, it has been just the
10 request of "Israel" be put on the passport, and it has
11 come back with "Jerusalem."

12 JUSTICE ALITO: May I ask you another --
13 another factual question? When Menachem was born, was
14 he issued a birth certificate by the Israeli
15 authorities?

16 MS. LEWIN: Yes.

17 JUSTICE ALITO: And the United States
18 recognizes that as -- as a lawful exercise of Israeli
19 authority, to issue a birth certificate for a child born
20 in Jerusalem?

21 MS. LEWIN: I believe they do, Your Honor.

22 JUSTICE ALITO: So what -- this is a
23 question I would ask the Solicitor General, but I don't
24 completely understand what the position of the United
25 States is regarding Israeli sovereignty over Jerusalem.

1 I understand it is the position of the United States
2 that Israel does not exercise full sovereignty over
3 Jerusalem, but in that -- in this instance, the issuance
4 of a birth certificate, and others I can think of, I
5 suspect the United States recognizes that Israel is
6 lawfully exercising attributes of sovereignty over the
7 territory of Jerusalem. Is that correct?

8 So if someone -- let's say an American
9 citizen committed a crime in Jerusalem, would the United
10 States take the position that the Israeli government has
11 no lawful authority to prosecute that person for the
12 crime?

13 MS. LEWIN: I do not believe so, Your Honor.
14 I believe that they would feel that the Israeli
15 government has the authority to prosecute that crime.

16 JUSTICE KAGAN: Ms. Lewin, if I can ask you,
17 if your primary position is that this is not a
18 recognition statute, can we talk a little bit about what
19 it is? I mean, why -- what -- what is the design, what
20 is the effect of this statute other than as something
21 that goes to recognition?

22 MS. LEWIN: This statute is a statute that
23 was created to give individuals the right to
24 self-identify as they choose that they were born in
25 Israel.

1 JUSTICE KAGAN: But the United States
2 Government does not usually give people that right to
3 self-identify in this way. In other words, I think this
4 was the Chief Justice's question in the first argument,
5 if you're an American citizen born in Northern Ireland,
6 you can't get the right to say Ireland. For that
7 matter, if you are an American citizen born in Jerusalem
8 today, you can't get the rights to say Palestine.

9 This is a very selective vanity plate law,
10 if we might call it that. And -- and it's selective
11 because Congress had, it appears to me, and it's
12 consistent with the rest of the statute, as Justice
13 Ginsburg said, a real view that this was the
14 self-identification it wanted. In other words, the
15 ability of American citizens to say yes, I was born in
16 Jerusalem, and that means I was born in Israel. That
17 and only that self-identification is allowed.

18 MS. LEWIN: This statute was rectifying a
19 misguided policy of the State Department which enabled
20 individuals born in Israel proper, whether in Tel Aviv
21 or in Haifa, who were opposed politically to the State
22 of Israel to remove that sovereign, to remove reference
23 to Israel from their passport, but it did not allow the
24 flip. It did not allow those who are born in Jerusalem
25 and who live under the sovereign government of Israel,

1 who wish to put Israel on their passport, to put Israel
2 on their passport.

3 JUSTICE GINSBURG: What about Palestinians
4 who were born in Jerusalem and want to have Palestine as
5 their place of birth? That -- that existed until 1948,
6 that option.

7 MS. LEWIN: Correct, Justice Ginsburg,
8 because at that point there was, before 1948, a
9 Palestine. So the -- the law was not going so far --

10 JUSTICE KAGAN: Now, people can --
11 Palestinians cannot -- American-born Palestinians cannot
12 do that. And that suggests that Congress had a view,
13 and the view was that Jerusalem was properly part of
14 Israel.

15 MS. LEWIN: And that is because this statute
16 was dealing with an existing sovereign that you either
17 remove from the passport or put on the passport. They
18 weren't complicating the situation by putting in
19 non-recognized sovereigns or other entities. They said
20 you either put it on or you take it off. We'll give you
21 the choice --

22 JUSTICE ALITO: If an American citizen is
23 born in Barcelona, Spain, is that citizen allowed, by
24 the State Department, to put Barcelona as place of
25 birth?

1 MS. LEWIN: If they wish to remove the
2 country of birth and list the smaller entity? Yes.

3 JUSTICE ALITO: And is that a -- is that a
4 vanity plate for people who believe in Catalan
5 independence?

6 MS. LEWIN: It is enabling an individual to
7 exercise their choice to self-identify as they choose,
8 yes.

9 JUSTICE KENNEDY: But, again, your
10 argument -- and you're consistent on this, your first
11 argument is that this is not recognition. Now, suppose
12 the State Department, and I think this is its position,
13 says this is recognition. If we defer to the State
14 Department's judgment, to the government's executive
15 judgment on that point, and the government said this is
16 recognition, and you say it isn't recognition, why
17 doesn't the government trump? If the government -- if
18 the Congress really wants to test its power, it can pass
19 a law saying you must recognize Israel as being the
20 legitimate government of Palestine, but it has not done
21 that. And since it has not done that, it seems to me
22 the government's argument trumps.

23 MS. LEWIN: Justice Kennedy, you are
24 correct. The way the balance of powers works is that
25 the Executive Branch has the right to recognize a

1 sovereign. However, if Congress deliberates, passes
2 legislation, and that legislation is signed into law,
3 then Congress's position trumps.

4 JUSTICE KENNEDY: But you -- but you say
5 that this isn't recognition. So the ultimate conflict
6 is not before us and -- and, therefore, the government's
7 policy, which says that this is recognition, should be
8 given deference and it trumps.

9 MS. LEWIN: Well, Your Honor, if it does not
10 amount to recognition, then Congress had the authority
11 to pass this legislation pursuant to its passport
12 authority.

13 JUSTICE SCALIA: I -- I guess there are
14 competing canons here. I mean, one is, I suppose, that
15 we listen to the State Department on matters of foreign
16 affairs, but I suppose another one is that we do not
17 hold a -- an act of Congress to be unconstitutional and
18 thereby ineffective. So that seems to me a draw,
19 doesn't it?

20 MS. LEWIN: Yes, Justice Scalia.

21 JUSTICE SCALIA: So the State Department
22 says this amounts to recognition, and Congress says
23 whether it does or not, we want -- we want this person
24 to be able to list Israel.

25 MS. LEWIN: That is correct. And since this

1 was signed into law by the President, the law right now
2 trumps whatever the Executive Branch may say.

3 JUSTICE KAGAN: Can I -- can I give you a
4 hypothetical, Ms. Lewin? Suppose that Congress passed a
5 law and this law said that the Secretary of State had to
6 send an official letter to all foreign ministers
7 whenever a U.S. citizen was born in Jerusalem, and that
8 official letter from the Secretary of State said -- says
9 just -- it announces that a new American has been born
10 in Israel. Would that be constitutional?

11 MS. LEWIN: Excuse me, this would be a law
12 passed?

13 JUSTICE KAGAN: This is a law passed by
14 Congress and it says every time a U.S. citizen is born
15 in Jerusalem, the Secretary of State has to send an
16 official letter to every other foreign minister saying
17 that a new American has been born in Israel.

18 MS. LEWIN: Yes, that would be
19 constitutional.

20 JUSTICE KAGAN: That would be
21 constitutional, even though the -- the Congress is
22 basically telling the Secretary of State to engage in a
23 certain kind of diplomatic communication with other
24 foreign countries.

25 MS. LEWIN: The description of the law that

1 you provide seems to be very similar to what a passport
2 does. A passport recognizes an individual as an
3 American citizen for purposes of communicating that
4 information to the foreign government.

5 JUSTICE KAGAN: Yes, exactly right. That
6 was going to be my point, that it was --

7 (Laughter).

8 JUSTICE KAGAN: -- that it was extremely
9 similar to what a passport does, that both are forms of
10 diplomatic communication, and that what we usually say
11 about diplomatic communication is that whatever
12 Congress's other foreign affairs powers are, the power
13 of diplomatic communication belongs to the President and
14 the President alone; that in that realm we only speak
15 with one voice.

16 And so I guess I have to sort of say that
17 that answer that you gave me, that this could -- that
18 Congress could say to the Secretary of State, here's the
19 diplomatic communication that you have to send to other
20 foreign ministers, seems, well, a little bit shocking.

21 MS. LEWIN: But recognizing an individual as
22 an American citizen facilitates the transfer and the
23 movement of American citizens across borders. This --
24 this passport, if it were to list Israel pursuant to
25 this law, would be indistinguishable from all the other

1 passports of individuals born in Tel Aviv or Haifa or
2 anywhere else in Israel. That passport would not, when
3 shown, be making any kind of political statement. It
4 would merely be identifying the individual by their
5 name, date of birth, place of birth, as all American
6 passports of individuals identify them.

7 CHIEF JUSTICE ROBERTS: So you would say in
8 Justice Kagan's hypothetical, maybe the letter that's
9 required to be sent to every foreign head of state would
10 be unconstitutional, but that doesn't mean that the
11 passport is, because the passport is used primarily for
12 purposes of identification, and it's only the letter
13 that makes it something else.

14 MS. LEWIN: Correct, Justice Roberts.

15 JUSTICE KAGAN: Well, if you say that --

16 CHIEF JUSTICE ROBERTS: Justice Kennedy.

17 JUSTICE KENNEDY: Do you want us to say in
18 our opinion that this is not a political declaration?

19 MS. LEWIN: This is not a political
20 declaration, that's correct, Justice Kennedy.

21 JUSTICE KENNEDY: Well, then, I'm not sure
22 why that Congress passed it, then.

23 MS. LEWIN: Congress passed it to give these
24 individuals the right to self-identify as they choose,
25 because individuals in general have that ability on

1 their passport to choose and designate --

2 JUSTICE SOTOMAYOR: I thought it was a
3 Federal crime to say that you were born in the United
4 States when you weren't on an official document. So
5 why -- why is it that it's okay for Congress to say
6 something that hasn't happened, meaning to say that
7 someone born in Jerusalem is actually born in Israel?
8 It's different than somebody who's born in -- in Taiwan
9 saying I was born in America.

10 MS. LEWIN: Since 19 --

11 JUSTICE SOTOMAYOR: I mean, they can
12 self-identify all they want, but can they do that?

13 MS. LEWIN: Yes. Since 1948, Israel has
14 acted as the sovereign over western Jerusalem where our
15 client was born, and since 1967 over the entire area of
16 Jerusalem. So -- so --

17 JUSTICE SOTOMAYOR: I know what it's done,
18 but has the U.S. recognized -- has any President since
19 1948 recognized Israel's sovereignty over that area?

20 MS. LEWIN: In a formal sense, no. But
21 allowing individuals to recognize that, that would not
22 be a false statement.

23 JUSTICE KAGAN: Ms. Lewin, may I just -- I
24 know your time is -- but if I might just go back to the
25 thought that the Chief Justice gave you that you agreed

1 with. Here's the way a passport begins. It begins,
2 "The Secretary of State of the United States of America
3 hereby requests all who it may concern to permit the
4 citizen," blah, blah, blah. That's what -- that's
5 the -- you know, the Secretary of State requests all of
6 these who are going to be looking at this passport.

7 And then in Haig v. Agee, we described a
8 passport as a letter of introduction in which the
9 issuing sovereign vouches for the bearer and requests
10 other sovereigns to aid the bearer. So this is, this
11 passport, it seems, both on what it says itself and on
12 what we've said about it, it's like a letter from the
13 Secretary of State. It's a communication.

14 MS. LEWIN: It is a communication merely to
15 facilitate this transfer of individuals as American
16 citizens, not to make public statements about where they
17 were born or where they're from or what countries the
18 United States recognizes.

19 If I may reserve the rest of my time.

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.
21 General Verrilli.

22 ORAL ARGUMENT OF DONALD B. VERRILLI, JR.

23 ON BEHALF OF THE RESPONDENT

24 GENERAL VERRILLI: Mr. Chief Justice, and
25 may it please the Court:

1 Let me get to the heart of the problem with
2 Section 214(d). Even if Section 214(d) does not
3 officially change or formally change the recognition
4 position of the United States, it tries to deny the
5 President the power to give effect to our official
6 recognition position by forcing Executive Branch
7 officials to issue official diplomatic communications
8 that contradict that position.

9 CHIEF JUSTICE ROBERTS: What -- what if
10 there were a law that said precisely pretty much what
11 you just said? The law says, okay, Mr. President, you
12 can recognize whoever you want, but if you recognize
13 this -- this country, this government, we're going to
14 treat it as if you hadn't recognized this government.
15 For all purposes of domestic law, we're going to
16 pretend -- we're going to operate on the assumption that
17 you have recognized this country.

18 GENERAL VERRILLI: I think there would be
19 limits to Congress's ability to do that. We think that
20 the recognition power that the President possesses
21 necessarily includes the power to give effect to
22 recognition decisions.

23 CHIEF JUSTICE ROBERTS: So -- so that law
24 would be unconstitutional?

25 GENERAL VERRILLI: To the extent it said for

1 all purposes, yes, because --

2 CHIEF JUSTICE ROBERTS: Well, isn't that
3 exactly what the Taiwan Relations Act says? What it
4 says is, "The absence of diplomatic recognition shall
5 not affect the application of the laws of the United
6 States with respect to Taiwan."

7 GENERAL VERRILLI: No, Mr. Chief Justice,
8 that's quite different. The Taiwan Relations Act was an
9 act that was an exercise of the necessary and proper
10 power to implement the President's foreign relations
11 judgment about how Taiwan should be treated.

12 CHIEF JUSTICE ROBERTS: Well, let's say the
13 President -- let's say the President did not want to
14 recognize Taiwan and Congress passes a law that says for
15 every purpose under American law, we will treat Taiwan
16 as if it had been recognized?

17 GENERAL VERRILLI: That might raise a
18 serious Constitution question, but that isn't the
19 situation that was -- it wasn't the case when it was
20 enacted, it's not the case now, and it's -- and it's
21 different from the current situation.

22 The fundamental problem with Section 214(d)
23 is that it purports to try to force the Executive Branch
24 to issue official diplomatic communications that
25 contradict the position of the United States.

1 JUSTICE ALITO: But is that really true?
2 Suppose -- could Congress pass a law saying that every
3 passport -- every passport issued to an American citizen
4 must list the place of birth, including country, and
5 that for this purpose, the country is the nation that
6 issued the birth certificate to that individual?
7 Could -- could Congress do that?

8 GENERAL VERRILLI: I -- I think that that --
9 that in a situation like that, the Court ought to defer
10 to the Executive Branch's judgment that the place of
11 birth listing can have significant diplomatic
12 consequences. We have had policies in place for decades
13 in this country that align place of birth designations
14 with our official recognition policy. The reason we do
15 that is because foreign sovereigns look to these
16 communications as indicative of where we stand on
17 what --

18 JUSTICE SCALIA: If it -- if it is within
19 Congress's -- if it is within Congress's power, what
20 difference does it make whether it antagonizes foreign
21 countries?

22 GENERAL VERRILLI: Well, there are certain
23 things that are within Congress's power that would
24 antagonize foreign countries that wouldn't raise a
25 separation of powers problem, of course, like a trade

1 embargo or a travel ban. But --

2 JUSTICE SCALIA: And this may be one of
3 them. So --

4 GENERAL VERRILLI: This is not one of them.

5 JUSTICE SCALIA: -- the mere fact that it
6 upsets foreign relations doesn't prove a thing.

7 GENERAL VERRILLI: No. The critical point,
8 Your Honor, is that what this statute does that those
9 other statutes don't do is it requires the Executive
10 Branch, the President himself and the Executive Branch
11 itself, to communicate a message that contradicts the
12 official recognition position of the United States,
13 undermining the President's credibility and preventing
14 the President from being able to speak with one voice
15 credibly.

16 JUSTICE KENNEDY: But why couldn't you have
17 a disclaimer of the kind that I've explained to the
18 Petitioners' counsel. She said that would be perfectly
19 lawful, for you to say it's not the position of the
20 State Department, this is not an indication that Israel
21 is -- has jurisdiction over Jerusalem.

22 GENERAL VERRILLI: Your Honor --

23 JUSTICE KENNEDY: Why wouldn't that solve
24 the problem?

25 GENERAL VERRILLI: It doesn't solve the

1 problem because the issuance of the disclaimer is a
2 credibility hit. It undermines the credibility of the
3 President because what is -- think about what it's
4 actually saying. What it's actually saying in this
5 context is yes, we're issuing thousands of passports
6 that identify persons born in Jerusalem as being born in
7 Israel; yes, the Congress of the United States required
8 that; but pay no attention to it really; it doesn't have
9 any bearing on recognition.

10 CHIEF JUSTICE ROBERTS: If it had -- if it
11 were such a big deal, why did the Chief Executive at the
12 time sign it?

13 GENERAL VERRILLI: Well, the Chief Executive
14 issued a signing statement which really was, in effect,
15 a disclaimer, in 2002. President Bush's statement said
16 in 2002, this does not change our official recognition
17 policy and we're going to treat it as advisory, and that
18 did not have the effect of --

19 CHIEF JUSTICE ROBERTS: So we should give no
20 weight to the fact that the Chief Executive signed the
21 law that he is now saying has such a dramatic -- that
22 his successor, but I gather the position is the same --
23 is now saying has such deleterious effects on American
24 foreign policy? Well, as a general matter, does that
25 have any consequence at all?

1 GENERAL VERRILLI: No. I mean, I think this
2 Court held -- I think this Court held in Myers that the
3 fact that one President signed a law into -- signed a
4 law that violated separation of powers doesn't have any
5 effect.

6 CHIEF JUSTICE ROBERTS: Oh, no. I know, I'm
7 not suggesting it does, although that's a separate
8 question. But it does go to the credibility of the
9 assertion that this is going to have such dramatic
10 effects on American foreign policy.

11 GENERAL VERRILLI: I don't think that -- I
12 think the credibility of the assertion is proven by
13 history. With all due respect, Mr. Chief Justice, even
14 though President Bush issued that statement which said
15 this didn't change the policy of the United States and
16 that we weren't going to enforce it because he was
17 treating it as advisory, the consequences that ensued in
18 the Middle East in October of 2002 were that there were
19 mass demonstrations in Jerusalem, thousands of people in
20 the streets, some turning violent. The Palestinian
21 parliament met and voted for the first time to declare
22 Jerusalem the capital of the Palestinian state, No
23 longer forbearing on that issue. And if you look at
24 pages --

25 CHIEF JUSTICE ROBERTS: But that's partly

1 because the Executive Branch made such a big deal out of
2 it. I mean, they issue a statement saying, this is
3 unconstitutional and all that. They could easily have
4 said, this is no big deal, they're just letting whoever
5 is born there pick the name they want to put on --

6 GENERAL VERRILLI: With all due respect,
7 Your Honor --

8 CHIEF JUSTICE ROBERTS: -- nothing to see
9 here, move on, and we're proving that by going ahead and
10 signing it. And over the -- over the intervening
11 course, the executive has litigated this. It's a
12 self-fulfilling prophecy that it's going to be such a
13 huge deal.

14 GENERAL VERRILLI: Mr. Chief Justice, with
15 all due respect, I think on this question that you're
16 asking me, this is a place where the Court should accord
17 deference to the judgments of the Executive Branch and
18 the State Department, in particular. If the State
19 Department had thought, if the executive had thought
20 that it could solve the diplomatic problem by minimizing
21 the effect of this provision, pretending as though it
22 wasn't going to have this effect, certainly they would
23 have followed that course.

24 JUSTICE SCALIA: Not necessarily.

25 JUSTICE SOTOMAYOR: What they're asking you

1 to do is to look -- they're asking the government to
2 lie.

3 GENERAL VERRILLI: I think that --

4 JUSTICE SOTOMAYOR: I'm not -- that's
5 exactly what you're saying the government should -- the
6 executive department should not do.

7 GENERAL VERRILLI: I do think the problem
8 here is that the executive made a considered judgment in
9 2002 that this couldn't sensibly be handled that way.
10 That's --

11 JUSTICE BREYER: So how are we --

12 CHIEF JUSTICE ROBERTS: What if it just says
13 "Disputed," parentheses after it, "Disputed"? Then I
14 gather they wouldn't be lying. They would be telling
15 the truth.

16 GENERAL VERRILLI: Well, I don't know. I
17 mean, a couple things about that. First, Your Honor,
18 that would have the effect of identifying the passports
19 that were issued to people born in Jerusalem on the --
20 because that would be the reason to put it on. But
21 beyond that, it isn't disputed as a matter of the
22 official position of the United States. The position of
23 the United States --

24 CHIEF JUSTICE ROBERTS: Well, it's disputed
25 as a matter of the government of the United States.

1 Part of the government says this -- well, actually, no,
2 I mean, Congress is not saying under my hypothetical,
3 this is Israel. It's saying there's a dispute about it,
4 which I would think is about as true a statement as you
5 can make.

6 GENERAL VERRILLI: Well, there's a dispute
7 certainly among the parties of the region, but I think
8 the whole premise of Petitioner's argument here is that
9 within the government of the United States there isn't a
10 dispute over the recognition issue.

11 JUSTICE BREYER: Can you help me with this
12 same question? How should we approach it generally?
13 That is to say, I can think of instances where a similar
14 statute is serving nothing other than administrative
15 matters -- the passport should be red or something --
16 and I can think of instances where it causes a lot of
17 trouble. But I can think of instances like this one,
18 and I could and you could easily replicate this
19 controversy with Israel in our imaginations, similar
20 controversy with Donetsk and the Ukraine, where we make
21 some agreement with Russia and something similar comes
22 up, or with Iran, and pretend that -- remember that
23 Russia once invaded the northern part of Iran. And all
24 over the world there can be similar kinds of problems
25 where it's debatable what the words of the passport

1 actually mean or how they will be taken by others and
2 what others will think they mean.

3 Now, how do we, who know little about it,
4 determine, when it gets into the realm, that we should
5 stay out of it and let the President and the
6 Constitution gives him that power or should -- some
7 think we should always intervene, perhaps some never.
8 What in your mind is the right standard? How do we
9 decide?

10 GENERAL VERRILLI: I do think this Court,
11 the last time the case was here, said that ultimately it
12 was up to the Court to judge the constitutionality of
13 the statute. Of course, we accept that. But in doing
14 so, we believe it is quite important that the Executive
15 Branch get deference on judgments of precisely the kind
16 that Your Honor has identified. This statute is a very
17 rare passport statute. There really isn't any other
18 passport statute like this one that purports to
19 interject an issue of recognition policy into the
20 content of passports.

21 JUSTICE SCALIA: General Verrilli, if we
22 agree with the Petitioner, we do not have to confront
23 the constitutional question whether the President has
24 exclusive power over recognition. If we agree with you,
25 we are going to have to grapple with that constitutional

1 question, right? So maybe you want to talk about it.

2 GENERAL VERRILLI: Well, let me -- I'm
3 delighted to talk about it, but before I do, let me
4 actually address that. I don't think you necessarily
5 have to address the question of exclusive power to rule
6 for us, and here's why: I think that, given the
7 petitioner's position that 214(d) does not change
8 recognition, the official recognition position of the
9 United States, and the Senate amicus brief saying it
10 doesn't change official recognition position of the
11 United States, then that's a given, that the official
12 recognition position of the United States is that we are
13 not recognizing any nation's sovereignty over Jerusalem
14 at this point until the parties work it out.

15 With that as a given, the separation of
16 powers problem with Section 214(d) is that it forces the
17 Executive Branch to engage in diplomatic communications
18 that contradict our official recognition position and
19 undermine the President's credibility, and that --

20 JUSTICE SCALIA: But if it does, then their
21 argument is going to be it does amount to a -- if it
22 does contradict it, then Congress is making its own
23 judgment about recognition. You have to confront that.
24 Are they entitled to do that? I don't see how you can
25 avoid that question.

1 GENERAL VERRILLI: Well, I'm happy to
2 address it. I will address it now, but I do think that
3 you can decide the question on the ground I just decided
4 without ultimately resolving that question.

5 JUSTICE KENNEDY: Couldn't you say that, at
6 a minimum, the Petitioner has conceded that it is not
7 clear that this is recognition?

8 GENERAL VERRILLI: Yes, that's certainly the
9 case and, therefore, we take as a given that the
10 President's position on recognition, which is the same
11 as the position every President going back to Truman, is
12 the official position of the United States and the
13 executive is being forced to issue diplomatic
14 communications that contradict it.

15 JUSTICE GINSBURG: General Verrilli, it is
16 -- the requirement of place of birth on the passport,
17 that doesn't come from the Congress. That comes from
18 the executive, right?

19 GENERAL VERRILLI: That's correct. There's
20 a longstanding policy there.

21 JUSTICE GINSBURG: And I thought that the
22 purpose of birthplace identified by the government, by
23 the executive, is to identify the person and not -- it's
24 not something that the President or the executive
25 required out of a foreign policy concern. The purpose

1 of it was to identify the individual; isn't that right?

2 GENERAL VERRILLI: Yes, that is its primary
3 purpose. But even though that's its primary function
4 within the passport, it has the effect of raising
5 diplomatic foreign policy issues about our recognition
6 position, and that is why we have had in place official
7 policies in the Foreign Affairs Manual going back to the
8 early 1960s that align decisions of place of birth with
9 our recognition policy. And in fact, before they were
10 formalized in the manual, they stretch all the way back
11 to World War II. It's just inevitable that foreign
12 sovereigns are going to react to that, that the way in
13 which we -- the information that we put in that --

14 JUSTICE SOTOMAYOR: This is a pretty rough
15 way to identify someone. I mean, there are hundreds of
16 John Smith's in the United States.

17 GENERAL VERRILLI: That's true, Justice
18 Sotomayor, but, you know -- and this question about
19 whether place of birth designations are necessary on
20 passports is actually one that Congress asked the
21 Comptroller General to study back several decades ago
22 and there were a series of studies made, and the
23 conclusion of those studies, which you can find in the
24 current version of the Foreign Affairs Manual, not the
25 one in the joint appendix, but the one on the State

1 Department's web site, is that you really have to have
2 them for two reasons. And the first is that very often
3 foreign nations require place of birth information to
4 let you travel to that nation, so it's going to be
5 highly inconvenient if it's not in the passport.

6 And second, law enforcement and
7 counterterrorism officials were quite concerned that
8 passports were going to become less effective in their
9 efforts if you removed the place of birth designation.

10 JUSTICE ALITO: Can I ask you the question I
11 asked Ms. Lewin. What exactly is the position of the
12 executive regarding Israel's exercise of sovereign
13 powers in Jerusalem? Is it the case that it is the
14 position of the executive that Israel cannot lawfully
15 exercise any sovereign powers within Jerusalem?

16 GENERAL VERRILLI: The position of the
17 executive is that we recognize, as a practical matter,
18 the authority of Israel over West Jerusalem. With
19 respect to the rest of Jerusalem, the issue is far more
20 complicated. It might well be, as a practical matter,
21 although I confess I don't specifically know the answer
22 to the question you asked Ms. Lewin about the status of
23 the birth certificate issued there, it might well be
24 that, as a practical matter, we would accept it as
25 evidence of birth. Of course we would also issue --

1 JUSTICE ALITO: Well, it must have been
2 accepted as evidence of birth or the passport would
3 never have been issued.

4 GENERAL VERRILLI: Well, we do have the
5 consular notification of birth.

6 JUSTICE ALITO: I thought you had to provide
7 a birth certificate --

8 GENERAL VERRILLI: Right.

9 JUSTICE ALITO: -- in order to get that.

10 GENERAL VERRILLI: Well, that's right. But
11 as a practical matter, I don't think one can infer
12 anything about our recognition policy from that. We're
13 recognizing practical reality.

14 I do think, for example, Your Honor, if we
15 were to start issuing passports to people born in the
16 Crimea tomorrow that identified Russia as the country of
17 birth, that would carry obvious implications for our
18 foreign policy position, and it would contradict the
19 foreign policy position in a way that could be quite
20 deleterious.

21 CHIEF JUSTICE ROBERTS: Let's say there's
22 a -- that passports are printed in Country A, not the
23 United States, and there's a printing plant there, and
24 Congress passes a law saying, no, you must have the
25 passports printed in Country B because we don't think

1 you should recognize Country A. Does that interfere
2 with the President's recognition power?

3 GENERAL VERRILLI: Well, I'm trying -- try
4 to give you a precise answer to that. If the statute
5 said they may not -- passports may not be printed in
6 Country A because the United States does not recognize
7 Country A, that would be --

8 CHIEF JUSTICE ROBERTS: Because Congress
9 wished the President would not recognize Country A. So
10 in response to that, we're directing that passports that
11 are now printed in Country A be printed in Country B.

12 GENERAL VERRILLI: That would be a harder
13 case than this one, I think, because it doesn't as
14 clearly implicate the President's ability to give effect
15 to recognition power. And one reason it doesn't is
16 because that doesn't affect the content of the
17 diplomatic communication in the way that Section 214(d)
18 does.

19 CHIEF JUSTICE ROBERTS: I thought your
20 position was that the President has the exclusive right
21 to decide what interferes with his recognition power.

22 GENERAL VERRILLI: No, I think that the
23 President has the right to give effect to his
24 recognition power, and Congress cannot try to command
25 the Executive Branch to act in a manner itself that

1 contradicts the President's recognition decision because
2 that prevents the President from giving effect to that
3 decision. And we do think, to go back to Your Honor's
4 question, that it is an exclusive power with the
5 President.

6 It is -- after all, recognition is not
7 lawmaking. It is an executive function. And one would,
8 therefore, expect that it'd be assigned to the Executive
9 by the Constitution and not to the Congress. And
10 when --

11 JUSTICE SCALIA: War making is an executive
12 function, too.

13 GENERAL VERRILLI: But with respect to --
14 with respect to the executive functions around
15 recognition, when Congress wanted the -- excuse me, when
16 the framers wanted the Congress to play a role and the
17 Constitution envisions a role for the framers in those
18 executive functions, it's prescribed. Article II gives
19 the Senate a role in confirming ambassadors, it gives
20 the Senate a role in advice and consent for treaties.
21 And there isn't anything in Article II as a structural
22 matter that gives the Congress -- the Senate or the
23 Congress a comparable role with respect to recognition
24 decisions.

25 JUSTICE ALITO: If I think that -- that

1 Congress generally -- that Congress has the authority
2 under the Constitution to require identification
3 information in passports and to specify the
4 identification information that's included, if I -- if I
5 believe that, then the effect of your argument, I guess,
6 is that something that Congress can do is
7 unconstitutional if it affects the recognition power --
8 the President's recognition authority in -- in some way.
9 Is that the -- is that --

10 GENERAL VERRILLI: No, our position is
11 narrower. I think all you need to decide to decide this
12 case in the government's favor here is that what
13 Congress can't do is use the authority it has to
14 regulate passports, and we acknowledge this, as we did in our
15 brief, that Congress has authority to regulate
16 passports. It can't use that authority to command the
17 Executive Branch to issue diplomatic communication that
18 contradicts the government's official position on
19 recognition. And that we would say --

20 JUSTICE KENNEDY: I don't -- I don't like
21 to, you know, just keep going back to the same thing.
22 It seems to me that you could draft a statement that
23 actually furthers your position. This passport does not
24 indicate that the government of the United States and
25 the Secretary of State recognize that Israel has

1 sovereign jurisdiction over Israel, and you'd actually
2 be making your case.

3 GENERAL VERRILLI: I appreciate the appeal
4 of that idea, Justice Kennedy, but the problem with it
5 is that the need to make that statement doesn't further
6 the diplomatic interest of the United States --

7 JUSTICE GINSBURG: Ms. Lewin answered, I
8 think quite candidly --

9 JUSTICE KENNEDY: But it doesn't further --
10 why doesn't it further it?

11 GENERAL VERRILLI: Because the very need to
12 make the statement calls the credibility of the
13 President's representation of our recognition position
14 into question. And the reason --

15 CHIEF JUSTICE ROBERTS: But just like the
16 signing statement.

17 GENERAL VERRILLI: Excuse me, Mr. Chief
18 Justice.

19 CHIEF JUSTICE ROBERTS: Just like the
20 signing statement, which said precisely what
21 Justice Kennedy suggested, that the Executive could do
22 at this point.

23 GENERAL VERRILLI: Right. And it did not
24 have and I -- but I think that's the point. The
25 a -- signing statement was in the nature of a disclaimer

1 and it did not prevent the damage to the credibility of
2 the United States.

3 JUSTICE GINSBURG: General Verrilli, I think
4 the answer to the question that Ms. Lewin gave was that
5 she said yes, the Executive could put that on the
6 passport. But she also said Congress could then pass a
7 law saying, this is antithetical to our view, and that
8 doesn't have to be put on the passport. On the passport
9 is just birthplace, Israel, period. Congress could pass
10 that into law and counter whatever the President does.

11 GENERAL VERRILLI: And I do think that's the
12 necessary implication of the Petitioner's argument here,
13 not only that Congress could forbid a disclaimer, but
14 Congress could require that the --

15 JUSTICE KENNEDY: But that law isn't in
16 front of us.

17 GENERAL VERRILLI: But -- but were the --
18 were the Court to uphold the constitutionality of the
19 law that is in front of you, it seems to me the
20 necessary implication of that would be that Congress
21 could prevent a disclaimer, it could require not just
22 that Israel be listed but Jerusalem, Israel be listed
23 on -- on a country of birth, and it seems to me that
24 those are very serious interferences with the
25 President's --

1 JUSTICE SOTOMAYOR: General, if I'm
2 understanding your narrow holding, just so that we can
3 underscore it, what you're saying is that Congress can't
4 compel speech by the President with respect to foreign
5 relations.

6 GENERAL VERRILLI: I would put it a little
7 more narrowly, Your Honor, that Congress cannot compel
8 the Executive to issue diplomatic communications that
9 contradict the official position of the United States on
10 a matter of recognition. I think that's all -- that's
11 the question before the Court in this case.

12 JUSTICE SCALIA: Well, you see, I -- I pick
13 up this passport, and it says place of birth, Israel.
14 Do I know whether this person was born in Jerusalem or
15 in -- in Haifa?

16 GENERAL VERRILLI: No, you don't. But
17 the --

18 JUSTICE SCALIA: So how does it -- how does
19 it advertise to the world that -- that the President is
20 contradicting himself? All you know is that the person
21 was born in Israel. It could have been anywhere in
22 Israel.

23 GENERAL VERRILLI: The world knows that we
24 will issue thousands of passports to people born in
25 Jerusalem identifying them as born in Israel, and the

1 world knows that we will be doing that because the
2 Congress of the United States required it. And those
3 actions under --

4 JUSTICE SCALIA: But it is not a
5 communication contained in the passport itself, is it?
6 You're just saying that -- that this -- this piece of
7 legislation advertises to the world what the situation
8 will be, but -- but you're not compelling the President
9 to -- to say that this individual was born in Jerusalem
10 and we're going to say he was born in Israel, because
11 you can't tell that from the passport.

12 GENERAL VERRILLI: You're requiring the
13 President to make statements thousands of times that
14 contradict the official recognition position of the
15 United States. Now, it is true that -- that a border
16 guard in a -- in a country where a person is traveling
17 won't know whether this particular passport is one of
18 them, I suppose, unless they ask for place of birth
19 information -- city of birth information. But unless
20 they ask that, they won't know with the particular
21 passport.

22 But what everyone will know, what foreign
23 sovereigns will know, what the parties in this region
24 will know is that thousands of times the Executive
25 Branch is issuing passports that contradict our official

1 recognition position with respect to persons born in
2 Jerusalem.

3 JUSTICE SOTOMAYOR: General, in -- general,
4 when I travel abroad and come back to the United States
5 or when I go to a foreign country and they're stamping
6 my passport, do they have forms that require you to
7 identify the city?

8 GENERAL VERRILLI: I'm not aware that they
9 do, Your Honor. I don't know the answer to that. I'm
10 not aware that they do.

11 JUSTICE SCALIA: I know that some of them
12 do. I know that some of them do.

13 GENERAL VERRILLI: Well, they may well, Your
14 Honor. But I do -- but I do think the essential problem
15 here with -- with what 214 does is that it tells the
16 Executive to communicate a message that the Executive
17 believes contradicts our position and undermines the
18 President's credibility as our sole spokesman in matters
19 of diplomacy. And there is not an issue on which the
20 President's credibility could be more important than the
21 question of the status of Jerusalem.

22 The question of the status of Jerusalem is
23 the most vexing and volatile and difficult diplomatic
24 issue that this nation has faced for decades. It goes
25 all the way back to President Truman. And the fact of

1 the matter is that the parties in the region, the
2 nations in the region, and frankly people around the
3 world and governments around the world scrutinize every
4 word that comes out of the United States Government and
5 every action that the United States Government takes in
6 order to see whether we can continue to be trusted as an
7 honest broker who could stand apart from this conflict
8 and help bring it to resolution.

9 And there is no doubt that Section 214(d),
10 when it was enacted, had a serious adverse effect
11 calling our credibility into question. You can just
12 look at the statements from foreign parties that are in
13 the Joint Appendix and the State Department communiqué
14 at pages 231 to 233. You can look at contemporaneous
15 press accounts from that time, and it seems to me
16 without -- of course, if we were required to implement
17 this, we would do everything we could to try to mitigate
18 the problem. But it seems to me that the right -- it is
19 quite important for this Court to understand that there
20 is a very serious risk that that harm to our credibility
21 as an honest broker on this very serious vexing issue
22 could be called into serious question --

23 JUSTICE ALITO: Why would that be so? No
24 matter how this Court decides, everyone will know what
25 the position of the President is. Everyone will know

1 what Congress thought when they passed this legislation.
2 Whatever we do, that's not going to be changed, and our
3 decision isn't going to be based on any view that we may
4 have about whether Jerusalem should be regarded as part
5 of Israel or the capital of Israel.

6 So why will there be any effect on foreign
7 policy except by people who will misunderstand the
8 situation, either -- either because they really don't
9 understand it or they will exploit it in some way?

10 GENERAL VERRILLI: I've got -- I've got at
11 least two points to make about that if I could. First,
12 it's not a misperception. It's an accurate perception.
13 One looks at 214 as a whole, not just 214(d). What
14 214(d) -- what 214 does is try to force the Executive
15 Branch to take a series of steps that no nation would
16 take if it did not recognize the sovereignty of Israel
17 over Jerusalem, and that nations would only take if they
18 did recognize the sovereignty --

19 JUSTICE ALITO: But Congress did that, so
20 nothing that we do is going to change that or change
21 what Congress thought.

22 GENERAL VERRILLI: I think that's, with all
23 due respect, too easy an assumption, Your Honor. The
24 difference between when this statute was enacted -- and
25 it did give rise to very serious problems that we had to

1 work very hard to try to get under control. The
2 difference between then and now, there's two very
3 important differences, and they lead to a very important
4 conclusion.

5 The first important difference is it won't
6 be one branch of the United States Government saying
7 that this should happen. It will be two branches of the
8 United States Government saying it should happen. It
9 won't be that we will -- that this statute will have
10 been enacted, but it won't be enforced. It will be
11 enforced.

12 And the consequence of those two things
13 together is that the credibility of the executive -- the
14 credibility of the President on this fundamental
15 question of where the United States stands on the status
16 of Jerusalem until the parties work it out will
17 inevitably and seriously be called into question and
18 into doubt.

19 Foreign governments, foreign peoples will
20 not be able to have complete confidence that the
21 position that the President announces on behalf of the
22 United States is, in fact, the position of the United
23 States.

24 That is exactly why Section 214 violates the
25 separation of powers, even if you conclude that Congress

1 might have some residual power, which we obviously
2 strongly disagree with. The official position of the
3 United States is that Jerusalem, we don't recognize any
4 nation's sovereignty over Jerusalem until the parties
5 have worked that issue out on their own.

6 And what this -- what this statute does if
7 it was enforced will undermine the credibility of our --
8 of the President's ability to maintain that critically
9 important diplomatic position as we move forward.

10 Thank you.

11 CHIEF JUSTICE ROBERTS: Thank you, General.

12 Ms. Lewin, you have four minutes remaining.

13 REBUTTAL ARGUMENT OF ALYZA D. LEWIN

14 ON BEHALF OF THE PETITIONER

15 MS. LEWIN: Thank you, Your Honor. Just a
16 couple of points. Justice Sotomayor, this is not
17 requesting that the government lie on a passport. As
18 the Solicitor General said, this is just recognizing a
19 practical reality that Israel is exercising --

20 JUSTICE SOTOMAYOR: No, it's not. It's the
21 place of birth. If you say Israel, you believe that --
22 you're saying that you believe that person was born in
23 Israel.

24 MS. LEWIN: Yes. Well, seven years prior to
25 the passage of this legislation, Congress passed the

1 Jerusalem Embassy Act, and in the Senate brief it's
2 actually referred -- amicus brief, it's referred to in
3 Footnote 10, which had required that the embassy be
4 moved to Jerusalem and provided the President with a
5 waiver --

6 JUSTICE SOTOMAYOR: And there was a
7 waiver -- and there was a waiver provided and every
8 President has exercised the waiver.

9 MS. LEWIN: So this would be, though,
10 recognizing, as was said before, that there is a
11 disagreement, but not --

12 JUSTICE SOTOMAYOR: How could you tell me
13 it's not a lie? You, the United States, are being asked
14 to put on the passport that you believe the place of
15 birth of this individual is Israel, and the
16 government -- and the executive has said, no, we don't
17 think it was Israel, we think it was Jerusalem.

18 MS. LEWIN: But the speech is the speech of
19 the individual who has self-identified.

20 JUSTICE SOTOMAYOR: But the individual is
21 not the one issuing the passport. It's the government.
22 The document says. This is a diplomatic exchange
23 between sovereigns.

24 MS. LEWIN: But we are permitting that
25 speech when it comes to West Bank, Gaza Strip, a host of

1 others. We're recognizing and allowing that speech.

2 JUSTICE KAGAN: I take it, Ms. Lewin, when
3 you say the West Bank, I take it you think that Congress
4 could pass the identical statute with respect to a child
5 born in Hebron, say.

6 MS. LEWIN: Saying that --

7 JUSTICE KAGAN: That that, too, is Israel?

8 MS. LEWIN: Correct.

9 JUSTICE KAGAN: Yes. Okay.

10 MS. LEWIN: We are providing two alternative
11 arguments, Justice Kagan: One saying that this is does
12 not amount to recognition; or if the Court decides to
13 reach the separation of powers question and views this
14 as somehow implicating the recognition clause, that at
15 this point the law passed by Congress would trump the
16 President. Allowing the State Department's say-so to
17 control because it's an expert in foreign relations
18 would be abdicating an independent function and would
19 turn the President into an autocrat whose word controls.

20 We suggest that this is analogous, the
21 recognition power, is analogous to the President's
22 authority to enter into executive agreements to resolve
23 foreign claims, and that just as though that is not an
24 explicit authorization provided to the President, it's
25 also not exclusive, and the agreements entered into by

1 the President cannot contradict or run counter to the
2 express will of Congress.

3 With regard to the international response to
4 this, the consequences, first of all, described by the
5 Solicitor General are grossly exaggerated. And what the
6 world knows could be the -- first of all, the United
7 States State Department could make clear in their
8 statements, as they did with Taiwan, that this does not
9 change the United States' policy with regard to the
10 sovereignty over Jerusalem.

11 And because the passports would be
12 indistinguishable from those who are born elsewhere,
13 there's no continuing statement. While this may
14 initially have some impact, over time, and I propose a
15 short time, particularly if the United States makes that
16 statement, this will become a nonissue because there's
17 no continuing --

18 JUSTICE KAGAN: Can I say that this seems a
19 particularly unfortunate week to be making this kind of,
20 "oh, it's no big deal" argument. I mean, history
21 suggests that everything is a big deal with respect to
22 the status of Jerusalem. And right now Jerusalem is a
23 tinderbox because of issues about the status of and
24 access to a particularly holy site there. And so sort
25 of everything matters, doesn't it?

1 MS. LEWIN: Well, the -- it is a sensitive
2 issue, but to suggest that what will go on a passport as
3 a place of birth is going to implicate or make it worse,
4 there's no evidence of that.

5 Thank you.

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.
7 The case is submitted.

8 (Whereupon, at 11:03 a.m., the case in the
9 above-entitled matter was submitted.)

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