Office of the Attorney General

Washington, D.C. 20530

March 21, 2011

Mr. Morgan Frankel
Senate Legal Counsel
United States Senate
Washington, DC 20510

Re: M.B.Z., By His Parents and Guardians Ari Z. Zivotofsky, et ux. v. Hillary Rodham Clinton, Secretary of State, No. 10-699 (S. Ct.)

Dear Mr. Frankel:

Consistent with 28 U.S.C. 530D, I am writing to you concerning a case involving Section 214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, 116 Stat. 1350. Section 214(d) provides that, "[f]or purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary [of State] shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel."

The Constitution grants to the Executive Branch exclusive power to decide, for purposes of United States law, "which nation has sovereignty over disputed territory." *Baker* v. *Carr*, 369 U.S. 186, 212 (1962); see *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 410 (1964); *Williams* v. *Suffolk Ins. Co.*, 38 U.S. (13 Pet.) 415, 420 (1839). It accordingly has been the Executive Branch's longstanding position that the President has exclusive authority to determine which state, if any, has sovereignty over Jerusalem. See, *e.g.*, *Bill to Relocate United States Embassy From Tel Aviv to Jerusalem*, 19 Op. O.L.C. 123 (1995). And since the Truman Administration, it has been a central position of United States foreign policy not to recognize any country as having sovereignty over Jerusalem. Consistent with this longstanding policy and with the Executive Branch's exclusive authority to recognize foreign states, President Bush issued a formal statement upon signing the bill that if the direction in Section 214 is "construed as mandatory rather than advisory, [it] would impermissibly interfere with the President's constitutional authority to formulate the position of the United States, speak for the Nation in international affairs, and determine the terms on which recognition is given to foreign states." 38 Weekly Comp. of Pres. Docs. 1658 (Sept. 30, 2002). The President also stated that "U.S. policy regarding Jerusalem has not changed." *Ibid.*

In September 2003, after the State Department issued a passport recording "Jerusalem" as the place of birth of Ari Zivotofsky, a United States citizen born in Jerusalem, Zivotofsky's parents brought this suit on his behalf, seeking an order requiring the Secretary of State to record "Jerusalem, Israel" on their son's passport. Subsequently, during the course of the litigation, the plaintiff modified that request to seek the recordation of "Israel" as the place of birth. Throughout this litigation, the Department of Justice primarily has argued that the case presents a

non-justiciable political question because the decision how to record the place of birth of a U.S. citizen born in Jerusalem is exclusively committed to the Executive Branch by the Constitution. In the alternative, the Department of Justice has argued that Section 214(d) should be read as advisory, not mandatory. The Department further contended that if the provision was read as mandatory, Section 214(d) would be an unconstitutional infringement on the President's exclusive authority to recognize foreign states.

In 2009, a panel of the United States Court of Appeals for the District of Columbia Circuit unanimously agreed that the President has sole authority under the Constitution to determine whether to recognize any foreign state as having sovereignty over Jerusalem. *Zivotofsky* v. *Secretary of State*, 571 F.3d 1227 (D.C. Cir. 2009). The majority agreed with the Department of Justice that, as a result, the case presented a non-justiciable political question. See *id.* at 1232. In a concurring opinion, Judge Edwards explained that he would have found the case justiciable, but would have affirmed the district court's dismissal because Section 214(d) unconstitutionally "intrudes on the President's exclusive power to recognize foreign sovereigns." *Id.* at 1245. The D.C. Circuit denied en banc review, and the plaintiff filed a petition for a writ of certiorari, which is now pending before the Supreme Court.

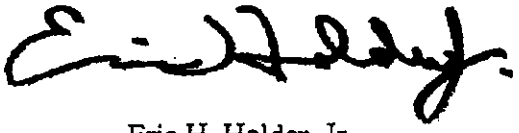
The President's signing statement took the position that if Section 214 was construed as mandatory, it would impermissibly interfere with the President's constitutional authorities. That position concerning provisions such as Section 214(d) of Pub. L. No. 107-228 has been repeatedly reiterated since then. See, *e.g.*, Statement on Signing the Consolidated Appropriations Act, 2008, 43 Weekly Comp. of Pres. Docs. 1638 (Dec. 26, 2007); Statement on Signing the Science, State, Justice, Commerce, and Related Agencies Appropriations Act, 2006, 41 Weekly Comp. of Pres. Docs. 1764 (Nov. 22, 2005); *Statement of Administration Policy, S. 600—Foreign Relations Authorization Act, Fiscal Year 2006 and 2007* (Apr. 5, 2005); Statement on Signing the Consolidated Appropriations Act, 2005, 40 Weekly Comp. of Pres. Docs. 2924 (Dec. 8, 2004); *Statement of Administration Policy, H.R. 1950—Foreign Relations Authorization Act, Fiscal Years 2004 and 2005* (July 15, 2003). And several Members of Congress have filed amicus briefs at various stages of the *Zivotofsky* litigation, including in the Supreme Court.

It thus seems evident that Congress has been aware of the Executive's position concerning Section 214(d). Nonetheless, I am writing to advise you that, consistent with the Department's longstanding litigation position regarding this statute, the Department of Justice intends to oppose the pending petition for a writ of certiorari in the *Zivotofsky* case. The Department's primary position remains that the political question doctrine renders the case non-justiciable, and that the court of appeals therefore correctly disposed of that issue. But it also continues to be the Department's position that if this case is justiciable, then—as Judge Edwards concluded in his concurring opinion—Section 214(d) impermissibly intrudes on the President's constitutional authorities. That position is consistent with President Bush's signing statement and the other materials cited above, as well as the continued practice of the State Department of issuing passports recording "Jerusalem" as the place of birth of United States citizens born in

Jerusalem. Neither of the courts below construed Section 214(d) as advisory only. The Department of Justice did not renew that argument in its response to the petition for rehearing en banc in the court of appeals, and the Executive Branch is no longer relying on that argument.

The brief in opposition is due to be filed with the Supreme Court on March 25, 2011. Please do not hesitate to contact this office if you would like additional information regarding this or any other matter.

Sincerely,



Eric H. Holder, Jr.
Attorney General

Enclosure