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# Jerusalem in the Courts and on the Ground

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Articles

[Sam F. Halabi](#)<sup>a1</sup>

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### \*224 Introduction

Jerusalem is the capital city no one recognizes.<sup>1</sup> Deeply tied to each of the world's major monotheistic religions, access to its major spiritual sites has been protected by regimes as diverse in time and circumstance as the Ottoman Empire, the Western European powers occupying it either as colonizers or stewards, and the modern States of Israel and Jordan.<sup>2</sup> The critical role it plays for the world's religious adherents (together, Christians and Muslims account for roughly half the global population) explains its status under international law and the challenges modern governments face in reconciling effective Israeli control of the city with its regional and global significance. U.N. General Assembly Resolution 181 provided for the separation of the British Mandate of Palestine into Jewish and Arab states and carved out Jerusalem as a *corpus separatum* under the sovereignty of no state.<sup>3</sup> That policy effectively captures the foreign policies of most

states today, which not only refuse to acknowledge Israeli sovereignty over East Jerusalem, which it occupied, annexed and expanded in 1967, but also West Jerusalem, which it has held since shortly after its founding in 1948.<sup>4</sup>

Since Israel's establishment, the United States has acted consistently with Resolution 181 and its general vision for peacefully coexisting Arab and Jewish states in the land between the Mediterranean and the Jordan River, although the borders and character of those states have evolved over time.<sup>5</sup> The United States has similarly refused to prejudice Jerusalem. It recognizes no state's sovereignty over either West or East Jerusalem and maintains a consular presence there separate from the activities of the Ambassador to Israel located in Tel Aviv.<sup>6</sup> This Article \*225 argues that U.S. policy toward Israel/Palestine in general and Jerusalem in particular is changing to allow greater flexibility toward the political realities that may confront both the city and the countries that surround it. Analyzing presidential speeches on Jerusalem from Clinton to Obama as well as litigation embodying congressional-presidential disagreement over the city, this Article concludes that U.S. policy, while still technically adhering to the two-state solution, has openly if quietly acknowledged that the window for two states is closing if it has not closed already. If the Palestinian movement for self-determination changes from one sounding in international law and the language of sovereignty to one situated within the context of civil rights and equal treatment with Israelis, the United States may face, and is preparing to face, a single political entity with significant Arab and Jewish populations. Jerusalem is already a microcosm of this reality, with its Arab residents increasingly electing Israeli citizenship, voting in municipal elections, and integrating into Israeli institutions of higher education.

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Jerusalem, far more than conventional wisdom suggests, is fundamentally and essentially tied to the viability of the two-state solution. The city lies on the periphery of Israel proper and deep into territory surrounded by the borders of the West Bank.<sup>7</sup> One of Israel's \*226 most important West Bank settlements, Ma'ale Adumim, lies to the east of Jerusalem and Israel maintains concrete plans to link the two, effectively dissecting the West Bank. As a result, the question of Jerusalem really is the question of two states or one.

This Article analyzes presidential speeches and the pleadings of the U.S. Government in response to a lawsuit by Jerusalem-born U.S. citizen Menachem Zivotofsky seeking to have "Israel" listed in his U.S. passport rather than "Jerusalem" as U.S. law now requires. The picture that emerges is one of a growing flexibility in U.S. policy toward Israel/Palestine in general and Jerusalem in particular. That flexibility moves away from adherence to two states (and impliedly two capitals in Jerusalem) to one emphasizing various "kinds" of democracy that may characterize a future Israeli state.

Part I of this Article provides a brief summary of Jerusalem in the history of the Israeli/Palestinian conflict as well as U.S. law and policy toward Jerusalem. Part II provides a brief overview of the scholarly disagreement over how and under what circumstances the United States develops its foreign policy preferences focusing on interpretations of international law. Contesting the widespread view that foreign policy positions and interpretations of international law are traceable to responsible bureaucracies who act with a clear path to their desired outcome, Part II argues that U.S. foreign policy and legal positions are subject to intermittent but nevertheless influential legal pressures-what Rebecca Ingber describes as "interpretation catalysts"-that regularly force the United States to frame or re-frame foreign policy preferences. These catalysts include both presidential speeches and litigation over foreign policy positions. Part II analyzes two of these framing events: Presidential speeches from Clinton to Obama and pleadings filed in the long-running dispute between Menachem Zivotofsky and the U.S. Government over the designation in his passport. That litigation is, in effect, the latest round in the dispute between Congress and the President over Jerusalem's status under U.S. law. Part III applies insights from the analysis in Part II to current trends in the movement for Palestinian self-determination. Those trends demonstrate a shift in ideology from self-determination as a form of sovereignty under international law to self-

determination as civil rights and equality with Israeli citizens. As a result of these movements, I ultimately argue that U.S. policy is shifting in preparation for the window to two-states closing, if it has not closed already.<sup>8</sup>

**\*227 I. U.S. Policy Toward Jerusalem: An Overview**

Scholarly histories of the colonial, political, social, and geostrategic changes leading to the formation of a Zionist movement in Europe and its focus on Palestine as the site for the establishment of a Jewish state are arguably as conflicting and angry as the wars that ensued.<sup>9</sup> What may be safely stated is that Jerusalem's historical and religious importance made it an early and frequent flashpoint as European Jewish immigrants and the indigenous Arab population built mutual mistrust from the late nineteenth century and into the early twentieth. After the British government pledged its support for the establishment of a Jewish National Home in Palestine in 1917, both urban and rural Arab populations organized protests against the so-called "Balfour Declaration."<sup>10</sup> In 1920, riots broke out in Jerusalem's Old City which killed nine people and left hundreds injured.<sup>11</sup> Between 1921 and 1929, Jerusalem became the focal point of prominent Palestinians' efforts to lobby the British government to end liberal Jewish immigration policies as well as to articulate a Palestinian self-determination movement that differed from the larger pan-Arab movement prompted by the collapse of the Ottoman Empire.<sup>12</sup>

**\*228** The political spilled over to the religious. In the Old City of Jerusalem, the Western or Wailing Wall runs along the western edge of the Haram al-Sharif, or Temple Mount, an area believed in Islamic tradition to be the place where Muhammad ascended to heaven and in Judaism as the general location of the most important inner sanctuary of the First and Second Temples (in English generally rendered as "holy of holies" or "most holy place").<sup>13</sup> In Christian and Jewish traditions, the site is tied to Abraham's willingness, at God's request, to sacrifice his son Isaac (in Islamic tradition, Abraham and his son-whether it is Ismail or Isaac is not clear-share the decision to sacrifice and the location is thought to be closer to Mecca).<sup>14</sup>

Since 1187, the Temple Mount area has been administered by an Islamic trust (waqf).<sup>15</sup> Throughout the centuries, access to the Western Wall and the Temple Mount has been largely available to religious adherents who have been for the most part mutually tolerant with respect to worship practices. Beginning as early as 1925, Arab residents and worshippers started to perceive what would have historically been relatively minor actions like placing chairs or screens at the Western Wall as efforts to assert Jewish sovereignty over the site.<sup>16</sup> Between August 15, 1929 and August 19, 1929, Jews and Arabs undertook separate, politically charged marches on the Western Wall, asserting their sovereignty over it. Both Arabic and Hebrew language press published inflammatory flyers and leaflets accompanying the marches.<sup>17</sup> In the riots that ensued, 133 Jews and 116 Arabs were killed and 339 **\*229** Jews and 232 Arabs were injured.<sup>18</sup> While many tales emerged that reflected intercommunal sympathies (Jewish hospitals treated Arab victims while Arab neighbors hid and gave refuge to Jews), the riots opened an intractable fissure between Arab and Jewish communities that was to eventually manifest in open war.<sup>19</sup> After a far more widespread revolt by Palestinian Arabs in 1936, the British government introduced the first of many future proposals that aimed to divide mandatory Palestine into Arab and Jewish states (see map to left),<sup>20</sup> swap territory to accommodate demographic realities, and ensure that Jerusalem remained open and available to the millions of pilgrims who wished to visit it.<sup>21</sup>

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The Peel Commission Report was issued in 1937 and was deemed unworkable a year later by a separate commission because both Arabs and Jews rejected it.<sup>22</sup> In 1939, the British government reversed course and proposed a single state of Palestine with Arabs and Jews ruling in proportion to their populations as well as promising limitations on Jewish immigration. While the document was silent as to Jerusalem's status, it exhorted Arabs and Jews to cooperate "together to ensure peace . . . because their country is revered by many millions of Moslems, Jews and Christians throughout the world who pray for peace in Palestine and for the happiness of her people."<sup>23</sup> Zionist communities and increasingly well-armed militia groups forcefully opposed the proposal.<sup>24</sup> Between 1939 and 1946, World War II thinned an already inadequate British security presence, Jewish institutions (including the nascent Israeli military) became more developed, and the United Nations replaced the League of Nations as the forum in which the question of Palestine would be resolved.

In 1947, the British government announced its intention to terminate its mandate over Palestine and invited recommendations from the newly established United Nations. In response, the United Nations appointed a Special Committee on Palestine (UNSCOP) which presented a number of recommendations including partition, economic union, and a single federal state.<sup>25</sup> The final resolution, U.N. General Assembly Resolution 181, favored partition between Arab and Jewish states with Jerusalem designated as a corpus separatum under U.N. authority.

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Resolution 181 was adopted on November 29, 1947 and the British withdrew from Palestine on May 14, 1948.<sup>26</sup> Between these two dates Arab and Jewish sides fought an internal civil war in the mandate territory and afterwards, Arab forces from surrounding states invaded in an effort to prevent partition.<sup>27</sup> Although the new Israeli leadership technically accepted Resolution 181,<sup>28</sup> including Jerusalem's status, it undertook an organized campaign to empty West Jerusalem of its Arab inhabitants to (1) establish the capital of the new state there and (2) secure the route between Jerusalem and Tel Aviv, then and now Israel's most populous city.<sup>29</sup> While Jordan did not accept Resolution 181 (and therefore Jerusalem's international status), it colluded with the Israeli leadership to expropriate the bulk of the territories Resolution 181 designated for Palestinian Arabs.<sup>30</sup> The war left Jerusalem divided between Israel and Jordan, with the Old City and its major religious sites under Jordanian control.<sup>31</sup>

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<sup>322</sup> In 1967, Israel conquered all of Jerusalem and the West Bank, politically reunifying the city and obtaining control over the Temple Mount which it left under the stewardship of the Islamic waqf.<sup>33</sup> It offered Israeli citizenship to Arabs living in Jerusalem in 1967, most of whom rejected the offer.<sup>34</sup> They became so-called Jerusalem residents, neither citizens of Israel nor civilians subject to the same rules of occupation which applied to other Palestinian residents living in the West Bank.

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In 1980, Israel officially annexed East Jerusalem and the areas within the redrawn municipal boundary which included settlements built over the 1967 “Green Line.”<sup>36</sup> The U.N. Security Council declared \*233 the “Jerusalem Law” null and void and a violation of international law.<sup>37</sup> In 1993, Israel and the Palestinians agreed to settle the final status of Jerusalem and other matters by negotiation.<sup>38</sup>

U.S. Executive Branch policy from 1948 forward never recognized Israeli or Jordanian sovereignty over any part of Jerusalem.<sup>39</sup> In 1949, when Israel announced its intention to convene its parliament's first meeting in the part of Jerusalem it controlled, the United States refused to send a representative to attend, noting that the U.S. Government \*234 “cannot support any arrangement which would purport to authorize the establishment of Israeli . . . sovereignty over parts of the Jerusalem area.”<sup>40</sup> The United States similarly opposed the Jordanian effort to declare East Jerusalem its “second” capital (after Amman) in 1950.<sup>41</sup> The State Department established a formal diplomatic presence in Tel Aviv for relations with Israel and separate consular offices in Jerusalem.<sup>42</sup> Arab and Jewish U.S. citizens born within Jerusalem's 1948 municipal borders are designated as having been born in “Jerusalem” consistent with this non-recognition. Congress, however, became more active on the issue after the 1980 Jerusalem Law, both directly and indirectly seeking to have the city's status as Israel's capital formalized.<sup>43</sup> Several U.S. Presidents, including Ronald Reagan, George H.W. Bush, and William Clinton, have stated that Jerusalem should remain united and its final status should be determined by negotiation, implying that Israelis and Palestinians might both establish recognized capitals there and further implying that U.S. policy disfavors separation of the type experienced between 1948 and 1967.<sup>44</sup>

## II. Jerusalem Under U.S. Law

U.S. foreign policy positions including interpretations of international law are often depicted as the result of a deliberative process that originates within a fixed set of institutions like the Department of Defense, the Department of State, the Department of the Treasury, or other foreign policy bureaucracies.<sup>45</sup> There is correspondingly little \*235 agreement as to which of these constituencies, or the President, prevails when they disagree, but that disagreement focuses principally on internal factors within the foreign policy making and legal interpretation frameworks.<sup>46</sup>

The reality is more complex.<sup>47</sup> Foreign policy outcomes and legal interpretations are guided not only by the conscious construction of decision-making agencies and persons as well as constitutional constraints, but also by myriad social, psychological and structural frames.<sup>48</sup> Public statements by foreign policy decision-makers, for example, form real expectations for the speaker and those upon whom the speaker relies (like economic and military partners). So deviations, even minor ones, may facilitate major changes.<sup>49</sup> This explains in part how Clinton's 2000 parameters for Israeli-Palestinian peace could make explicit the U.S. objective of a state of “Palestine” without actually uttering that word, which George W. Bush was the first U.S. President to do.

Rebecca Ingber has elaborated upon a particular set of these frames which she labels “interpretation catalysts.”<sup>50</sup> According to her analysis, foreign policy preferences and legal interpretations are not only inherited and shaped from one administration to the next, but also influenced by exogenous events which require the President and executives

surrounding bureaucracies to “consider, determine, and assert, whether publicly or not, a position on a matter of legal interpretation.”<sup>51</sup> These events include, inter alia, a legal position asserted in the course of litigation, the formation of the President's position in a speech or other announcement, or periodic reporting requirements imposed under human rights treaties.<sup>52</sup> With respect to Jerusalem, two of these interpretation “catalysts” have prompted \*236 identifiable if subtle changes in U.S. policy toward Jerusalem: (1) Litigation between the Executive and a Jerusalem-born U.S. citizen, Menachem Zivotofsky, to have “Israel” listed as the place of birth in his passport and (2) Presidential speeches from Clinton to Obama.

#### **A. Congress and the President on Jerusalem from Clinton to Obama**

The Zivotofsky litigation is the most recent manifestation of a long-running disagreement between Congress and the President over the status of Jerusalem under both U.S. and international law.<sup>53</sup> Congress's position on Jerusalem took its strongest form with the Jerusalem Embassy Act of 1995, although there were several precursors that failed because Congress could not agree on a statutory strategy.<sup>54</sup> In 1983, Senator Daniel Patrick Moynihan introduced legislation which would have required the U.S. embassy in Israel to be moved from Tel Aviv to Jerusalem. The Secretary of State, George Shultz, in a letter to the Chairman of the Committee on Foreign Affairs, objected to this legislation on the grounds that it interfered with the President's authority to recognize foreign governments at his discretion.<sup>55</sup> Subsequent statements by the administration affirmed this position<sup>56</sup> and criticized the bill on the grounds that it would undermine the United States' ability to aid in the peace process,<sup>57</sup> and that peace could come about only through negotiations.<sup>58</sup>

In 1990, President George H.W. Bush stated publicly that the Israeli government should establish no new settlements in East Jerusalem.<sup>59</sup> In response to this statement, Congress passed Senate Concurrent \*237 Resolution 106.<sup>60</sup> This resolution, which passed overwhelmingly in the House of Representatives,<sup>61</sup> stated Congress's position that Jerusalem is and should remain the capital of Israel.<sup>62</sup> The President, during a meeting with Jerusalem's mayor, indicated that the city's final status should be determined by negotiations.<sup>63</sup> In 1992, Congress passed Senate Concurrent Resolution 113. This resolution largely reiterated the stance of Congress presented in the previous resolution.<sup>64</sup> Despite the similarities, this resolution did not elicit any appreciable response from President Bush or his administration.

The Jerusalem Embassy Act,<sup>65</sup> enacted in 1995, was the first movement in Congress which garnered sufficient support to impose statutorily binding language based on at least some constitutional authority.<sup>66</sup> Not only did the Act call for recognizing Jerusalem as Israel's capital, it also ordered that a new embassy in Jerusalem should be established no later than May 31 of 1999.<sup>67</sup> The law included a provision authorizing the President to waive that part of the law in the name of U.S. national interests. The waiver allows the President to postpone moving the embassy to protect national security.<sup>68</sup> President Clinton opposed the law on the basis that it prejudiced the U.S. stand on Jerusalem and subverted his constitutional authority.<sup>69</sup> Despite his public opposition to the bill, Clinton did not veto it, stating that it would most likely be overridden by Congress. The President did make clear that he would utilize the waiver to prevent relocation of the embassy.<sup>70</sup>

\*238 During the George W. Bush administration, Congress enacted the Foreign Relations Authorization Act, Fiscal Year 2003<sup>71</sup> which included a section addressing U.S. policy toward Jerusalem. This section included four primary mandates: (1) to immediately relocate the embassy in Israel from Tel Aviv to Jerusalem in compliance with the Jerusalem



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Embassy Act of 1995,<sup>72</sup> (2) to limit funding for the U.S. consulate in Jerusalem unless it is placed under the control of the Ambassador to Israel, (3) to limit funding for publication of government documents which do not list Jerusalem as the capital of Israel, and (4) to allow U.S. citizens born in Jerusalem to have “Jerusalem, Israel” listed as their place of birth on passports.<sup>73</sup> Section 215 ordered reports to be provided to Congress regarding the U.S. efforts to encourage increased diplomatic relations between Israel and other countries.<sup>74</sup>

The President's most prominent response to these sections was made public in his signing statement.<sup>75</sup> He declared that he would interpret Section 214 to be advisory and that it interfered with his constitutional authority to conduct foreign relations on behalf of the United States.<sup>76</sup> President Bush, like President Clinton, also continued to exercise the national security waiver found in the Jerusalem Embassy Act of 1995<sup>77</sup> throughout his term in office.<sup>78</sup> Consistent with Clinton's opinion regarding Section 214, President Bush also stated that Section 215 would be subject to his authority to withhold, as a security matter, foreign affairs information from Congress at his discretion.<sup>79</sup>

Throughout President Obama's term, Congress has introduced three \*239 bills aimed at forcing the President to recognize Jerusalem as the capital of Israel. These bills include the Jerusalem Embassy and Recognition Act of 2009,<sup>80</sup> the Jerusalem Embassy and Recognition Act of 2011,<sup>81</sup> and the Jerusalem Embassy and Recognition Act of 2013.<sup>82</sup> All three of these bills have repeated the congressional position stated in the Jerusalem Embassy Act of 1995 with one key distinction.<sup>83</sup> All three of the Jerusalem Embassy and Recognition Acts include a clause to amend the 1995 act by revoking the presidential waiver.<sup>84</sup> There has been little to no reaction from the Obama administration to these proposals.

Despite his lack of response to the Jerusalem Embassy and Recognition Acts, President Obama has continued, like President Clinton and President Bush, to exercise the presidential waiver found in the Jerusalem Embassy Act.<sup>85</sup> As with the George W. Bush administration, the Department of Justice and the State Department under President Obama have also responded to a lawsuit brought by the parents of Menachem Zivotofsky based on the Foreign Relations Authorization Act, Fiscal Year 2003.<sup>86</sup> Zivotofsky seeks to have his place of birth listed as “Jerusalem, Israel” or “Israel” on his passport, rather than simply “Jerusalem.”<sup>87</sup> The litigation has hinted at a growing flexibility in U.S. law and policy toward a final solution to the Israeli-Palestinian conflict.<sup>88</sup>

## B. The Zivotofsky Litigation

Section 214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003 states that “for 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 shall, upon request of the citizen or the citizen's legal guardian, record the place of birth as Israel.”<sup>89</sup> On October 17, 2002, Menachem Benyamin Zivotofsky was born in Shaare Zedek Medical Center, a hospital located within \*240 Jerusalem's 1948 borders to American parents, making him a U.S. citizen.<sup>90</sup> Zivotofsky's parents filed an application for a U.S. passport and a consular report of birth abroad (CRBA) requesting that his place of birth be listed as “Jerusalem, Israel.”<sup>91</sup> Based on the policy set forth in its Foreign Affairs Manual, which codified long-standing Executive Branch policy,<sup>92</sup> the State Department denied Zivotofsky's request and issued a passport and a CRBA listing “Jerusalem” as the place of birth.<sup>93</sup>



## 1. Initial Proceedings: Standing

Zivotofsky filed his claim in the U.S. District Court for the District of Columbia in September 2003.<sup>94</sup> The Zivotofskys sought a declaratory judgment against the Secretary and an injunction ordering the Secretary to issue a CRBA and a passport listing “Jerusalem, Israel” as the place of birth and ordering embassies to comply with Section 214(d).<sup>95</sup> The Secretary of State, then Colin Powell, asserted that the case was non-justiciable both because the Zivotofskys had suffered no actual injury (the designation did not impede his ability to travel) and because the dispute over Jerusalem was a political question and therefore beyond the constitutional competence of federal courts to adjudicate.<sup>96</sup> The U.S. \*241 Government also relied on President Bush's signing statement in support of the argument that Section 214(d) was an unconstitutional encroachment on Executive authority.<sup>97</sup> U.S. District Court Judge Gladys Kessler ultimately agreed that the plaintiffs lacked standing and that the case was a non-judiciable political question constitutionally allocated to Congress and the President for resolution.<sup>98</sup> As a non-justiciable dispute, Judge Kessler did not reach the underlying issue of Congress's attempt to regulate Jerusalem's status.<sup>99</sup>

The Secretary's motion was fundamentally tied to the Bush Administration's vision for a two-state solution to the Israeli-Palestinian conflict:

President Bush, in a June 24, 2002 speech, outlined the United States vision for a settlement of the conflict consistent with U.N. Resolutions 242 and 338. The President called for a new Palestinian leadership and voiced support, under certain conditions, for the “creation of a Palestinian state whose borders and certain aspects of its sovereignty will be provisional until resolved as part of a final settlement in the Middle East.” . . . the status of Jerusalem will be addressed in Phase III, during Permanent Status Negotiations.<sup>100</sup>

Following the District Court's decision, Zivotofsky appealed.<sup>101</sup> Between the decision of the District Court and his appeal, Zivotofsky amended his claim to request that his passport read “Israel” rather than “Jerusalem, Israel,”<sup>102</sup> arguing that listing only “Israel” would make his passport indistinguishable from that of any person born in an undisputed \*242 part of Israel.<sup>103</sup> In his brief, the Secretary did not distinguish between “Israel” and “Jerusalem, Israel,” contending that listing “Israel” would still present a political question because it implicated recognition of Israeli sovereignty over Jerusalem.<sup>104</sup> As before, he argued that Section 214(d) encroached upon Executive authority and should either be read as advisory or unconstitutional.<sup>105</sup> The U.S. Court of Appeals for the District of Columbia determined that Congress may create an individual right by enacting a statute, creating an injury that otherwise would not have existed, effectively rejecting Judge Kessler's standing determination.<sup>106</sup> Because of Zivotofsky's amendment to his claim, the Court of Appeals concluded that Judge Kessler had not resolved the political question issue.<sup>107</sup> As such, the court remanded the case for discovery on the amended claim.<sup>108</sup>

The U.S. Government again tied its position on Jerusalem to the resolution of the Israeli-Palestinian conflict noting that “Israel's claim to sovereignty over Jerusalem is highly contested. The Palestinian Authority claims ‘East Jerusalem as the capital of the future state of Palestine.’”<sup>109</sup>

## 2. Secondary Proceedings: Political Question

Following discovery, the Secretary (then Condoleezza Rice) expanded the political question argument.<sup>110</sup> Consistent with previous pleadings, the Secretary first argued that decisions of foreign policy are \*243 constitutionally committed to Congress and the Executive,<sup>111</sup> and this issue could not be separated from U.S. foreign policy regarding Israel.<sup>112</sup> She also argued that because the court would be required to make an initial policy determination about U.S. foreign policy in order to resolve this case,<sup>113</sup> it would require an initial policy determination of a kind clearly for non-judicial discretion and there were no manageable judicial standards to resolve the claim.<sup>114</sup> Next, the Secretary argued that deciding the case would express a lack of respect for the executive branch<sup>115</sup> by calling into question the President's policy of official neutrality toward Israel's sovereignty over Jerusalem.<sup>116</sup> She also contended that there was a need to adhere to a political decision already made<sup>117</sup> because a change in U.S. policy regarding Jerusalem would harm foreign relations with Arab nations.<sup>118</sup> For the same reasons, deciding the case could result in embarrassment from differing pronouncements by multiple branches on the same issue.<sup>119</sup> Based on these factors, the District Court granted the Secretary's motion to dismiss on political question grounds.<sup>120</sup>

In the alternative, the Secretary contended that the case would fail on the merits<sup>121</sup> based on three doctrines: the doctrine of constitutional avoidance,<sup>122</sup> the rule against implied repeals,<sup>123</sup> and the tradition of judicial deference to the executive branch on foreign affairs matters.<sup>124</sup> Because the court granted the motion for summary judgment based on the political question doctrine, it did not consider these arguments.<sup>125</sup>

In its appellate brief before the D.C. Circuit, the government repeated the connection between Jerusalem and the two-state solution: "The United States has remained committed to promoting a final and permanent resolution of these core issues, including the status of Jerusalem, with the support of the international community, in order to achieve the goal of two democratic states, Israel and Palestine, living \*244 side-by-side in peace and security."<sup>126</sup> Indeed, the brief quoted at length from President George W. Bush's July 16, 2007 speech:

negotiations must resolve difficult questions and uphold clear principles. They must ensure that Israel is secure. They must guarantee that a Palestinian state is viable and contiguous. And they must lead to a territorial settlement, with mutually agreed borders reflecting previous lines and current realities, and mutually agreed adjustments. America is prepared to lead discussions to address these issues, but they must be resolved by Palestinians and Israelis, themselves. Resolving these issues would help show Palestinians a clear way forward. And ultimately, it could lead to a final peace in the Middle East - a permanent end to the conflict, and an agreement on all the issues, including refugees and Jerusalem.<sup>127</sup>

The Court of Appeals affirmed the District Court's dismissal based on the political question doctrine and did not consider the merits of the case.<sup>128</sup> In a concurring opinion, Justice Edwards stated that he would reach the merits and find § 214(d) to be unconstitutional.<sup>129</sup> He contended that this case was justiciable because it is within the power of the court to interpret and determine the legality of a statute.<sup>130</sup> He framed the issue differently than the majority: did "enacting § 214(d) . . . impermissibly intrud[e] on the President's exclusive power to recognize foreign sovereigns"?<sup>131</sup> In answer to this question, Justice Edwards first stated that the Constitution gives the President exclusive power to recognize foreign sovereigns,<sup>132</sup> and the President's passport policy in this case is an extension of that power.<sup>133</sup> Because § 214(d) uses

the term “shall,” but it is not used in § 214(a), Congress intended for the § 214(d) to be mandatory.<sup>134</sup> As such, Justice Edwards maintained that § 214(d) must be found unconstitutional.<sup>135</sup>

### **\*245 3. The U.S. Supreme Court Reverses**

The Supreme Court granted certiorari on May 2, 2011.<sup>136</sup> Eight justices rejected lower courts' finding that the political question doctrine barred adjudication and remanded to the D.C. Circuit to decide whether section 214(d) was a constitutional exercise of Congress's authority to regulate the contents of passports, or whether it impermissibly encroached on the President's Article II authority to recognize foreign governments.<sup>137</sup>

The U.S. Supreme Court determined that, while there may be a constitutional commitment to the President to recognize foreign sovereigns, the Court has the authority to determine the constitutionality of a statute.<sup>138</sup> In addition, the Court concluded that because the dispute ultimately raised an issue of statutory interpretation, federal courts enjoyed a number of manageable standards for resolving the question.<sup>139</sup>

Justice Sotomayor concurred, but implied that the Court should have applied more rigorous inquiry to the issue and further questioned the Court's conclusion that statutes generally fall outside the political question doctrine's reach.<sup>140</sup> Justice Alito concurred as well, emphasizing that both Congress and the President enjoy authority over the contents of passports.<sup>141</sup>

Justice Breyer dissented, listing four reasons the dispute fell outside federal courts' competence to resolve.<sup>142</sup> First, the case involved foreign affairs, an area over which the judiciary was not intended to participate.<sup>143</sup> Second, evaluating the constitutionality of § 214(d) could require the Court to evaluate foreign policy decisions.<sup>144</sup> Third, Zivotofsky's interest in receiving a judgment was not great enough to constitute interference with the political branches.<sup>145</sup> Finally, the Executive and Legislative branches have methods to work out foreign policy issues without interference from the judiciary.<sup>146</sup>

More importantly for purposes of interpreting the U.S. position on Jerusalem, the U.S. Government's brief before the U.S. Supreme Court **\*246** marked a departure from the strict two-state view set forth in the lower court proceedings. Not only did the Government explicitly reject Palestinian authority over the West Bank and Gaza, it reminded the court of the historical U.S. position that Jerusalem should be under international control. “The Executive similarly does not recognize Palestinian claims to current sovereignty in Jerusalem, the West Bank, or the Gaza Strip, pending the outcome of these negotiations.”<sup>147</sup> It repeated its uncertainty over the West Bank and Gaza again later in the brief.<sup>148</sup> “Jerusalem should be accorded special and separate treatment from the rest of Palestine and should be placed under international control.”<sup>149</sup>

### **4. The D.C. Circuit Declares Section 214(d) Unconstitutional**

On remand, the parties' arguments focused on the President's Article II authority to receive ambassadors,<sup>150</sup> and, by extension, the authority to recognize foreign sovereigns.<sup>151</sup> By attempting to alter U.S. foreign policy with regard to

Jerusalem's status, the Secretary argued, Congress had unconstitutionally interfered with the President's authority.<sup>152</sup> The D.C. Circuit agreed, largely adopting Judge Edward's concurrence in the political question litigation.

The D.C. Circuit relied on a wealth of historical data suggesting that the Legislative Branch had previously deferred to the President's judgment when recognizing foreign governments.<sup>153</sup> Beginning with President Washington, it found that Congress did not make recognition decisions even in 1793.<sup>154</sup> The court also noted that Congress historically would not recognize the existence of a state without executive recognition.<sup>155</sup> The D.C. Circuit further ruled that Congress does not enjoy exclusive control over passport matters,<sup>156</sup> and that passport contents must be informed by the Executive's foreign policy authority.<sup>157</sup> Because § 214(d) directly conflicts with the Executive's \*247 foreign policy,<sup>158</sup> the court invalidated the statute on constitutional grounds.<sup>159</sup>

With what could only be described as consistent litigation losses for the Government and the increasing presence of members of Congress in amici supporting the Zivotofskys as well as the strategic attempt to persuade certain members of the Court, it is understandable that the government's brief before the U.S. Supreme Court made far more extensive reference to the Executive's recognition power. But even given that, there was no obvious reason to include the West Bank and Gaza as territories similarly lacking a recognized sovereign, and by extension, similarly undefined political futures.

In the opening pages of its brief, the Government reasserted that “the Executive does not officially recognize Palestinian claims to current sovereignty in Jerusalem, the West Bank, or the Gaza Strip, pending the outcome of these negotiations”<sup>160</sup> and that “[s]ince the creation of the State of Israel in 1948, the status and borders of Jerusalem have been a matter of controversy and disagreement between Israel, the Palestinian people, and Israel's Arab neighbors.”<sup>161</sup> “People born in Jerusalem, the West Bank or Gaza today are not allowed to record Palestine on their passports any more than they are allowed to record Israel.”<sup>162</sup>

### C. Presidential Speeches Since Clinton

It is possible that the transition in the government's pleadings in Zivotofsky—from a specifically two-state view to an amorphous and undefined political entity which may or may not include Jerusalem, the West Bank and Gaza—are purely coincidental, shaped by the need to respond to the changing constellation of law firms, lawyers, and amici in the case, or a function of the increasing role of the State Department as the case moved to the U.S. Supreme Court and implicated the Executive's powers in a more direct and threatening way. Yet these changes in the government's pleadings were accompanied by noticeable shifts in the direction of presidential speeches as well. In 2009, President Obama's first speech on the Israeli-Palestinian conflict repeated Clinton's and Bush's position that the solution involved two secure states. In 2011, he ruffled feathers by stating explicitly that the borders of the two states should be drawn along the 1967 lines, a statement which implicated the division of Jerusalem. By 2013, Obama \*248 had loosened this language, referring to Israel's decision that “only [Israel] can determine what kind of democracy [it] will have” and quoting Ariel Sharon that “it is impossible to have a Jewish, democratic state at the same time to control all of Eretz Israel. If we insist on fulfilling the dream in its entirety, we are liable to lose it all.”

#### 1. William J. Clinton

President Clinton oversaw the crest of the feasibility of the two-state solution between 1993, when Israel and the PLO signed the Oslo Accords on the White House lawn, and 2000, when the specific terms of a final agreement appeared in

documents drafted at Taba, Egypt.<sup>163</sup> For most of his presidency, then, Clinton's speeches focused earlier on praising the Oslo Accords, their drafters, and their intended implementers, and later on encouraging both sides to return to Oslo's principles. The Oslo process began breaking down in 1998, and Clinton's speeches reflected increased urgency at salvaging the Oslo framework which emphasized Palestinian self-rule in discrete areas until final status negotiations could conclude. Indeed, in a pair of speeches delivered to the Israeli and Palestinian governments in December 1998, Clinton appeared to acknowledge the impending collapse of Oslo. To the Palestinian National Council he remarked:

I want the people of Israel to know that for many Palestinians, 5 years after Oslo, the benefits of this process remain remote, that for too many Palestinians lives are hard, jobs are scarce, prospects are uncertain, and personal grief is great. I know that tremendous pain remains as a result of losses suffered from violence, the separation of families, the restrictions on the movement of people and goods. I understand your concerns about settlement activity, land confiscation, and home demolitions.<sup>164</sup>

To the Israelis:

Of course, there have been setbacks, more misunderstandings, more disagreements, more provocations, more acts of violence. You feel Palestinians should prove in word and deed that their intentions have actually changed, as you redeploy from land on \*249 which tears and blood have been shed, and you are right to feel that.<sup>165</sup>

President Clinton's final official speech on the conflict took place at the Israeli Policy Forum on January 7, 2001.<sup>166</sup> He delivered the speech nearly six months into the second Palestinian intifada, a result of the failed final status talks concluded at Taba.<sup>167</sup> The speech was emphatic as to two states as the solution to the conflict.<sup>168</sup> Clinton put forth five parameters intended to bring the two parties closer to a permanent settlement.<sup>169</sup> First, there must be a sovereign Palestinian state including Gaza and most of the West Bank.<sup>170</sup> Second, Palestinian refugees must be provided with a permanent place to live, either in a new Palestinian homeland or elsewhere in the world, and they should be compensated by the international community.<sup>171</sup> Third, Israel must have guarantees of security which should be enforced by an "international presence" in the Jordan Valley.<sup>172</sup> Fourth, Jerusalem, because of its importance to both parties,<sup>173</sup> should be "open and undivided" and act as the capital for both states.<sup>174</sup> Clinton indicated that the Arab portions of Jerusalem should belong to the Palestinians and the Jewish portions should belong to Israel.<sup>175</sup> Sites which are holy to both sides should be accessible to everyone.<sup>176</sup> Fifth, an agreement must be accompanied by a decision on both sides to end the conflict and uphold all compromises.<sup>177</sup>

He counseled the Palestinians to negotiate rather than resist through violence<sup>178</sup> and he reminded the Israelis that the homeland they returned to was not vacant, so they would need to compromise for peace.<sup>179</sup> Clinton pledged to spend his remaining days in office assisting the parties.<sup>180</sup>

\*250 2. George W. Bush

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President Bush's first speech related to the conflict was intertwined with the U.S. reaction to the September 11, 2001 attacks.<sup>181</sup> Speaking at the United Nations on November 10, 2001, he denounced terrorism in general and nations who supported any kind of assistance to terrorist groups.<sup>182</sup> He nevertheless adopted Clinton's perspective on resolution of the Arab-Israeli conflict.<sup>183</sup> President Bush supported "two states-Israel and Palestine" and vowed to bring the parties back to the negotiating table.<sup>184</sup>

President Bush's first speech dedicated specifically to Israel/Palestine took place in the Rose Garden on June 24, 2002. In that speech, he primarily called for a change in Palestinian leadership.<sup>185</sup> Bush proposed that the United States and other nations and international institutions-what became known as the Quartet of the United States, the European Union, the United Nations, and Russia-assist the Palestinians in creating a new constitution, organize elections, and establish a judicial system as well as contribute economically to the development of the West Bank and Gaza and aid Palestinian refugees.<sup>186</sup>

Bush repeated messages to the Palestinians and the Israelis that gave generally characterized Executive statements about the conflict. He demanded that Palestinians end terrorist activities and that Israelis end settlement building and land confiscation.<sup>187</sup> Echoing Clinton, he stated that a settlement should be based on U.N. Resolutions 242 and 338,<sup>188</sup> suggesting that the borders between Israel and Jordan as of May 1967 serve as the base line for borders between Israel and Palestine.<sup>189</sup> He also reminded Israelis that Jerusalem, Palestinian refugees, and peace with Lebanon and Syria would necessarily accompany final status negotiations.<sup>190</sup>

**\*251** On November 27, 2007 President Bush spoke at the Annapolis Conference, opening renewed negotiations between Israel and the Palestinian Authority.<sup>191</sup> The speech repeated the U.S. position that two states must form the basis of a final solution.<sup>192</sup> As in his 2002 speech,<sup>193</sup> President Bush called on the Palestinians to create a just nation and denounce terrorism.<sup>194</sup> Likewise, he called on the Israelis to end settlement activities and emphasized the potential economic gains accompanying a prosperous Palestine.<sup>195</sup> Similarly, President Bush called on the international community, including other Arab states, to support Israel and Palestine in both their internal affairs, as well as in creating positive connections with other nations.<sup>196</sup> He also pledged support from the United States<sup>197</sup> and his personal support, as Clinton did,<sup>198</sup> for his remaining time in office.<sup>199</sup>

President Bush addressed the Knesset on May 17, 2008<sup>200</sup> in recognition of the 60th anniversary of Israel's founding,<sup>201</sup> as well as the anniversary of President Truman's recognition of Israel.<sup>202</sup> He predicted both Israel and a Palestinian state living in peaceful, democratic state as well as tolerance and freedom throughout the Middle East.<sup>203</sup> He compared his vision with the reality of Europe and Japan's peace and prosperity in the six decades following World War II, despite its destruction and horror.<sup>204</sup>

Six months later, President Bush spoke at the Saban Forum in Washington, D.C.<sup>205</sup> Although the majority of this speech addressed the Middle East in general, the President did make some brief comments **\*252** about the Arab-Israeli conflict.<sup>206</sup> He made clear that the United States would defend its interests and allies from hostile actions in the Middle East.<sup>207</sup> He once again confirmed his commitment to the two-state solution,<sup>208</sup> denounced terrorism,<sup>209</sup> and praised the progress made by both parties at negotiations begun at the Annapolis Conference.<sup>210</sup>



### 3. Barack Obama

During his June 4, 2009 speech at Cairo University in Egypt,<sup>211</sup> President Obama identified the Arab-Israeli conflict as one of the major sources of tension in the Middle East.<sup>212</sup> Like President Bush before him,<sup>213</sup> he declared the bond between the United States and Israel to be unbreakable.<sup>214</sup> He also declared that threats toward Israel were wrong,<sup>215</sup> and Palestinians must not use violent tactics against Israel.<sup>216</sup> He described the situation of the Palestinian people as “intolerable”<sup>217</sup> and recognized their right to exist as equal to Israel's.<sup>218</sup> President Obama called on Israel to halt settlement activities and allow Palestinians to develop their own society.<sup>219</sup> He called on the Arab nations to recognize Israel's legitimacy and aid Palestinians.<sup>220</sup> Finally, like both President Clinton<sup>221</sup> and Bush,<sup>222</sup> President Obama supported the two-state solution<sup>223</sup> to the Arab-Israeli conflict and pledged his personal assistance to aid in the outcome.<sup>224</sup>

On May 19, 2011, President Obama spoke in Washington, D.C. about a range of issues facing the United States with respect to its interests in the Middle East and North Africa.<sup>225</sup> Despite setbacks in \*253 talks between the parties, including the continuation of settlement activities by the Israelis,<sup>226</sup> President Obama stated that he believed peace was still possible.<sup>227</sup> He insisted that Palestine must not deny Israel's right to exist, and, as in his speech in Cairo,<sup>228</sup> called for an end to Palestinian violence.<sup>229</sup> President Obama again<sup>230</sup> supported separate Israeli and Palestinian states as the solution for peace.<sup>231</sup> He indicated that the borders should be based on the lines held in 1967,<sup>232</sup> eliciting a sharply negative response from Israeli Prime Minister Benjamin Netanyahu.<sup>233</sup> This peace should be accompanied by the gradual removal of the Israeli military from occupied areas.<sup>234</sup> He also recognized that both parties would need to come to agreement about the status of Jerusalem and Palestinian refugees.<sup>235</sup>

In a pair of speeches at the United Nations delivered in 2010 and 2011, Obama both repeated his support for the two-state solution and directed that the shape of that solution must be fashioned by the parties themselves.<sup>236</sup> While the latter statement was consistent with his May 2011 speech and a renewed U.S. effort to bring the parties back to the negotiating table, it was more specifically directed at the Palestinian bid for statehood at the United Nations. While Obama did not explicitly mention that he would instruct a veto at the Security Council, he noted that

Peace will not come through statements and resolutions at the United Nations - if it were that easy, it would have been accomplished by now. Ultimately, it is the Israelis and the Palestinians who must live side by side. Ultimately, it is the Israelis and the Palestinians - not us--who must reach \*254 agreement on the issues that divide them: on borders and on security, on refugees and Jerusalem.<sup>237</sup>

On March 21, 2013, President Obama spoke at the Jerusalem International Convention Center.<sup>238</sup> He opened by praising the prosperity of the Israeli people<sup>239</sup> despite their present and historical suffering,<sup>240</sup> and mentioned the immediate U.S. recognition of Israel by President Truman,<sup>241</sup> just as President Bush did in 2008.<sup>242</sup> Unlike Presidents Clinton and Bush, whose comments were primarily focused towards the actions of national leaders, President Obama chose to direct his comments toward young Israelis,<sup>243</sup> encouraging them to push their leaders to make peace.<sup>244</sup>



While Obama again mentioned “two states for two peoples” as his belief about where negotiations must lead, he made no mention of the 1967 armistice lines between Israel and Jordan and he placed emphasis on the alternative possibility that Israel may become a state with a much larger Arab population: “only you can determine what kind of democracy you will have,”<sup>245</sup> implying that Israel cannot continue settlement activities and control of the occupied territories and remain a Jewish majority democracy.<sup>246</sup> President Obama also quoted former Israeli Prime Minister, Ariel Sharon: “it is impossible to have a Jewish democratic state, and at the same time to control all of Eretz Israel. If we insist on fulfilling the dream in its entirety, we are liable to lose it all.”<sup>247</sup> Indeed, Obama's call for two-states notwithstanding, the tone of his remarks was decidedly ecumenical:

\*255 That's where peace begins, not just in the plans of leaders, but in the hearts of people; not just in some carefully designed process, but in the daily connections, that sense of empathy that takes place among those who live together in this land and in this sacred city of Jerusalem.<sup>248</sup>

### III. The Shift in the Palestinian Movement for Self-Determination from Sovereignty to Civil Rights

It is not possible at this time to tie with firm evidence the subtle shifts in U.S. policy arguably revealed in the Zivotofsky litigation and presidential speeches with changes on the ground, but those changes are certainly under way. Palestinians in Gaza, the West Bank, and Jerusalem are increasingly adopting Hebrew into their educational curricula; Arab Jerusalem residents are increasingly electing to attend Israeli universities; East Jerusalem itself is undergoing a process of “Israelization” which diminishes its feasibility as a political capital for a future Palestinian state; the Palestinian leadership, after a failed effort at U.N. recognition in 2011, increasingly discuss the desirability of “exiting” the Oslo peace process; and, the Israeli settlement of Ma'ale Adumim, which Israel has persistently stated it will never relinquish, effectively obstructs the possibility for a viable Palestinian state. A Palestinian civil rights movement that emphasizes equality between Arabs and Jews living under Israeli control is slowly but surely displacing the movement historically led in the name of sovereignty and membership in the community of nations.

#### A. The Israelization of East Jerusalem

East Jerusalemites increasingly elect Israeli citizenship, vote in Jerusalem municipal elections, and elect places in Israeli universities, trends which move against the city's socially divided past.<sup>249</sup> Approximately 801,000 people live in Jerusalem.<sup>250</sup> Of these, about 35% are Palestinian and 62% are Jewish.<sup>251</sup> Although Palestinians are a minority in Jerusalem, the growth rate of the Palestinian population has been higher than that of the Jewish population over the last several years.<sup>252</sup>

##### \*256 1. Education

Immediately following the Six-Day War and Israel's annexation of East Jerusalem, Arab educators and parents refused the imposition of Israeli curricula in their schools.<sup>253</sup> After a two-year strike, the Israeli government allowed Jordanian, later Palestinian, curricula to be taught in Jerusalem's Arab schools.<sup>254</sup> Despite these long-standing features of education in the Arab parts of Jerusalem, teachers, and students are increasingly turning to the Israeli education system<sup>255</sup> because they believe it will lead to better opportunities in the long run.<sup>256</sup>

In 2013, eligibility for bagrut-Israeli matriculation-increased 5% over the previous five years among Arab students, a trend explained by a number of phenomena relevant to the conflict generally.<sup>257</sup> Since the Israeli government began building its security barrier in 2002, it has become increasingly difficult to travel to Arab universities outside Jerusalem; it is faster and simpler to attend Israeli universities on the Jerusalem side of the barrier.<sup>258</sup> The extra courses required for students studying Palestinian curricula to prepare for Israeli matriculation exams are expensive.<sup>259</sup> Demand from parents and students has led Jerusalem city officials to implement Israeli curriculum as an option in some East Jerusalem schools to eliminate the need for extra courses.<sup>260</sup> The Israeli curriculum is considered by some to be more valuable to gain opportunities for jobs and higher education.<sup>261</sup>

This trend is also reflected in the expansion of Hebrew language education not only in East Jerusalem, but in schools in the West Bank and Gaza. Hebrew and Arabic are both Semitic languages.<sup>262</sup> \*257 They share many word roots and grammatical principles.<sup>263</sup> Many words sound the same and Arabic grammar is more difficult than Hebrew grammar, so Hebrew is fairly easy to learn for Arabic speakers.<sup>264</sup> While Hebrew has not yet become officially sanctioned by the Palestinian Ministry of Education (it is officially offered in Gaza), private schools in the West Bank are expanding Hebrew language offerings.<sup>265</sup> At the Mohammed bin Rashid Bin Al-Maktoum School near Ramallah, 120 out of 600 students enrolled in its Hebrew courses.<sup>266</sup> There are also schools in East Jerusalem which are now offering Israeli curriculum at the encouragement of the Israeli government.<sup>267</sup>

For Palestinians inside or outside of Jerusalem, knowledge of Hebrew is pursued for both pragmatic and political reasons. Degrees from Arab universities are not always recognized in Israel, forcing the degree holders to take lower-paying jobs in Gaza and the West Bank rather than in Israel.<sup>268</sup> Students who take the Palestinian matriculation exam, the tawjih, but wish to study at Israeli universities must undergo an additional year of education to demonstrate adequate skills in Hebrew.<sup>269</sup> By learning Hebrew, students in East Jerusalem can choose to prepare for the bagrut instead and bypass the extra year of study.<sup>270</sup> Because Israel is more technologically developed<sup>271</sup> and its education system places more emphasis on math and science,<sup>272</sup> this is particularly beneficial for students who are interested in science and medicine.<sup>273</sup> Those who elect to continue on the Palestinian course of study will still have \*258 more job opportunities over the Israeli border if they can communicate in Hebrew.<sup>274</sup>

Politically, the expansion of Hebrew language proficiency enhances Palestinians' access to information about developments in Israel and, for those committed to it, serves a peace promoting purpose.<sup>275</sup> While Arabic media outlets translate Hebrew language news services, the information is filtered and shaped, limiting the ability for Palestinians to listen to first-hand accounts of Israeli actions and attitudes.<sup>276</sup>

## 2. Housing and Water

Housing and utilities are a major problem for the residents of East Jerusalem.<sup>277</sup> Without documentation of property ownership, residents may not obtain a building permit; without a permit, residents may be denied utilities or have their homes destroyed.<sup>278</sup> Housing density is higher in Arab households than in Jewish ones, almost double in 2009.<sup>279</sup> Housing costs in the eastern part of the city are high<sup>280</sup> and it is inconvenient to travel from East Jerusalem to the rest of the city.<sup>281</sup> East Jerusalem neighborhoods outside the security fence are particularly disadvantaged.<sup>282</sup>

As a result, many Arab residents have begun to move into Jewish neighborhoods in other parts of Jerusalem.<sup>283</sup> There, housing costs are lower and it is easier to travel to jobs, schools, and other places.<sup>284</sup> The mayor of Jerusalem, Nir Barkat, has created a system allowing residents who cannot prove ownership of land to obtain a temporary permit which becomes permanent after twenty years of undisputed ownership.<sup>285</sup> As a result, demolitions in East Jerusalem \*259 are lower than in previous years<sup>286</sup> and housing density among Arab households has decreased.<sup>287</sup> Hagihon, Jerusalem's water provider, indicated that it would continue laying more pipes and installing more water meters in East Jerusalem.<sup>288</sup> This will provide residents with a more reliable source of water<sup>289</sup> and generate revenue for the city.<sup>290</sup>

### 3. Health

Until the 1990s, East Jerusalem's healthcare services lagged far behind the rest of the city in terms of both quality and access.<sup>291</sup> In January 1995, the National Health Insurance Law went into effect; it required all residents and citizens to become a member of a health-care organization.<sup>292</sup> Health-care organizations must provide the following services: medical diagnosis and treatment at clinics and at home, preventative medicine and health education, hospitalization, surgery and transplant, preventative dental care for children, first aid and transportation to a clinic or hospital, medical services at the workplace, treatment for drug and alcohol abuse, medical equipment and appliances, obstetrics and fertility treatments, treatment of injuries caused by violence, medications, treatment of chronic diseases, and paramedical services.<sup>293</sup>

Following the enactment of this law, there was a large increase in both the number and quality of medical clinics and services available in East Jerusalem. Many clinics now have their own advanced medical equipment and transportation services.<sup>294</sup> They also have a close connection with the neighborhoods they service, going out of their way to ensure that residents seek out proper preventative care.<sup>295</sup>

\*260 As a result, health quality indices in East Jerusalem have risen significantly—from 74 in 2009 to 87 in 2012—making them almost equal with the national average.<sup>296</sup> Improvements in health care quality are also evidenced by a sharp decrease in mortality rate among Arab residents.<sup>297</sup> The mortality rate dropped from 4.5 deaths per 1,000 persons in the 1980s to 2.9 deaths per person in the 2000s.<sup>298</sup> By contrast the decrease in the mortality rate of the Jewish population was much more moderate, falling from 5.9 deaths per 1,000 persons in the 1980s to 5.2 deaths per 1,000 persons in the 2000s.<sup>299</sup>

### 4. Arab Migration into West Jerusalem and Israeli Naturalization

Jerusalem's Arabs are not only moving to Jewish neighborhoods, increasing numbers are also seeking Israeli citizenship.<sup>300</sup> When East Jerusalem was annexed, the Palestinians living there were granted only residency, not citizenship; however, they have the right to apply for Israeli citizenship.<sup>301</sup> Permanent residency status denies Jerusalem's Arabs many rights, particularly the right to live wherever they would like in Israel.<sup>302</sup> If an Arab resident leaves Jerusalem for more than seven years, the government may revoke her residency permit<sup>303</sup> and she may lose her home.<sup>304</sup> Israeli citizenship allows Arabs to move within Israel and Jerusalem<sup>305</sup> and to vote in national elections.<sup>306</sup> Israeli

citizens may not travel to all parts of the West Bank, only those areas under Israeli or joint Israeli and Palestinian control.<sup>307</sup>

A 2011 poll of East Jerusalem residents reported that 35% of East Jerusalem residents would prefer to become Israeli citizens, 30% would choose Palestine, and 35% either declined to answer or did not know.<sup>308</sup> In addition, 40% of Palestinians in East Jerusalem \*261 said they would move in order to become Israeli citizens, and even a larger number of Palestinians living in refugee camps would choose Israeli citizenship.<sup>309</sup> These results confirm the results of a similar poll conducted for the U.S. Council on Foreign Relations in 2010.<sup>310</sup>

The impetus to Israeli citizenship among these groups is driven by pragmatic advantages in education, health care, and basic services, notwithstanding formal and informal forms of discrimination against Arabs in Israeli society.<sup>311</sup> Arabs who have moved into Jewish neighborhoods have experienced resistance to their presence.<sup>312</sup> Yet their security situation in East Jerusalem is just as tenuous; the state funds private security guards to protect Jewish settlers in areas of East Jerusalem; Arabs in the same neighborhoods are not so protected.<sup>313</sup>

Beginning in 2002, Israel began constructing a set of concrete walls, ditches and fences (the “separation barrier”) separating its territory and settlements from Arab population centers.<sup>314</sup> The separation barrier winds through Arab East Jerusalem and includes some major Arab neighborhoods but excludes others.<sup>315</sup> Palestinians living outside the wall are far more deprived relative to “Israel-side” Jerusalemites.<sup>316</sup> There are approximately 60,000 Palestinian residents of East Jerusalem living outside the separation wall.<sup>317</sup> They typically do not have access to basic services from the city, and the Palestinian Authority may not enter the area to provide them with security or services under the Oslo Accords.<sup>318</sup>

The Israeli government initially began building the fence to provide security from attacks originating from the West Bank.<sup>319</sup> \*262 However, Israeli security forces have recently become concerned that completion of the wall will actually increase security problems.<sup>320</sup> They believe that completely ending illegal entry of Palestinians into Jerusalem may destabilize the Palestinian economy and lead to escalating unrest.<sup>321</sup> As a result, security forces are considering granting more work permits as the wall is completed.<sup>322</sup> There is no consensus on what the changes in East Jerusalem will mean for the city as a whole although the increasing integration between East and West Jerusalem threatens the feasibility of neatly separating Arab and Jewish areas.<sup>323</sup>

## B. “Exiting” Oslo

The Oslo Accords function in practice if not in form as an international treaty, even though they are officially a “Declaration of Principles” and they regulate the relationship between parties clearly authorized to enter into a treaty (Israel, Russia, and the United States) and a party whose status under international law is less clear.<sup>324</sup> Unlike many treaties, the Oslo Accords themselves provide no mechanism for termination, although assuming the parties formed a treaty to which the Vienna Convention on the Law of Treaties is applicable, either side may claim that a material breach of treaty provisions “entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.”<sup>325</sup> Indeed, this is more or less what both have asserted about the other-Israel arguing that the Palestinians have breached their promises with respect to Israeli security and the Palestinians arguing that Israel has not only failed to stop expropriating land, but has accelerated settlement and built a barrier deep into Palestinian territory.

Legal and scholarly analysis of the Oslo Accords have produced a wide range of conclusions as to what they originally intended.<sup>326</sup> Those \*263 conclusions are invariably shaped by the viewpoints of their analysts. Israeli opponents viewed Oslo as a Trojan horse giving legitimacy to a sworn enemy of Israel and a base from which the PLO could attack as it had from Jordan and Lebanon.<sup>327</sup> Palestinian opponents saw Oslo as a massive surrender of rights established under a long line of U.N. General Assembly Resolutions and an agreement which privileged Israeli security over the human cost of military occupation.<sup>328</sup> Certainly, the Accords supported the view taken by the United States (although not until 2000) that the eventual resolution was two sovereign states, but the document itself never promised that, referring obliquely to U.N. Resolutions 242 and 338 which themselves were vaguely worded so as to accommodate the conflicting interests they were drafted to reflect.<sup>329</sup>

Whatever the beginning and end of Oslo-and there is widespread agreement that the Oslo project not only failed but may have never even began-it can be safely stated that it envisioned segregated Israeli and Palestinian populations living under political authorities to which each was accountable.<sup>330</sup> Between 2009 and 2011, the Palestinian Authority attempted to have the two-state vision implied by Oslo made explicit through admission of Palestine as a state to the United Nations with the pre-June 6, 1967 armistice lines between Jordan and Israel as the borders of the new state, a position taken by the PLO in 1988. Palestine's effort failed, largely because of a promised veto by the United States, who, as the aforementioned speech by Obama stated, that two states need to be achieved by bilateral negotiations.

Since that failure, the Palestinian leadership has put in place alternatives to statehood under international law. First, it has sketched out the possibility of withdrawing from the Oslo Accords, undertaking a widespread non-violent protest movement akin to those undertaken between 1936 and 1939, and dissolving the Palestinian Administration and altering the mandate of the PLO.<sup>331</sup> Saeb Erakat, the Palestinians' chief negotiator, raised the one state solution as an alternative \*264 possibility with former U.S. Senator George Mitchell, President Obama's envoy to the parties, as early as 2009.<sup>332</sup> Indeed, there is some evidence that among younger Palestinians, a civil rights movement approach to the conflict-with a single political entity as its aim-is far more likely to achieve Oslo's stated purpose of "a just, lasting and comprehensive peace settlement and historic reconciliation . . . ."<sup>333</sup> Given the unpredictable nature of Palestinian self-determination movements and aims-the 1987 intifada was spontaneous and amorphous-it is not clear when top-level bureaucratic frustration and bottom-up movements for equal rights under Israeli rule might coalesce.

### C. The Problem of Ma'ale Adumim

#### 1. Dividing the West Bank and East Jerusalem

Ma'ale Adumim is an Israeli settlement established around 1973 and given official recognition by the Israeli government in 1977.<sup>334</sup>

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It is located roughly three miles east of Jerusalem,<sup>336</sup> in territory \*265 captured by Israel in 1967.<sup>337</sup> It started as a small settlement of about 2,000 residents<sup>338</sup> and has expanded to approximately 39,000 today.<sup>339</sup> Although it is only one of many settlements in the area immediately surrounding Jerusalem, it is situated so as to both cut off Palestinian access to East Jerusalem and to disrupt territorial contiguity between the northern and southern parts of the West Bank.<sup>340</sup> The boundaries of Ma'ale Adumim are oddly shaped, and take up more than twice the space of the actual settlement.<sup>341</sup> The expansive boundaries, especially when combined with the E-1 area, effectively separate the large Palestinian cities of Bethlehem and Ramallah, forcing Palestinians to use a circuitous route around the settlement,<sup>342</sup> or to pass through Israeli checkpoints.<sup>343</sup>

In Ma'ale Adumim, Israeli Jews can find low cost housing—much lower than housing in Jerusalem<sup>344</sup>—and the commute to Jerusalem is short, making it convenient for those who work there.<sup>345</sup> As such, Ma'ale Adumim has effectively become a mainstream suburb of Jerusalem with the independent infrastructure necessary to maintain a community.<sup>346</sup> Many of the schools, retailers, synagogues, and community centers received government subsidies to encourage expansion within the settlement.<sup>347</sup>

Plans to build more homes were announced in 2000, just before the start of renewed negotiations between the Israelis and the Palestinians.<sup>348</sup> The Palestinians issued a formal complaint to the Israelis, stating that the announcement indicated that Israel would be \*266 unwilling to make the necessary concessions for peace.<sup>349</sup> Following the failure of the 2000 negotiations, Prime Minister Ariel Sharon prioritized continued expansion despite active conflict with the Palestinians.<sup>350</sup> By this time, the population of Ma'ale Adumim had expanded to 30,000 residents, although the actual settlement encompassed less than half of the municipal territory claimed for it by the Israeli government.<sup>351</sup> In addition to having a large amount of land claimed for the settlement, the borders were drawn in order to separate large areas of the West Bank from each other.<sup>352</sup>

In 2005, following the Israeli withdrawal from the Gaza Strip, Israel announced intentions to begin construction on thousands of new homes in Ma'ale Adumim.<sup>353</sup> Prime Minister Sharon stated that he intended to retain the Ma'ale Adumim area in exchange for the loss of the Gaza Strip.<sup>354</sup> In 2007, Prime Minister Ehud Olmert pledged to halt the building of any new settlements and stop the expropriation of additional land in the West Bank<sup>355</sup> but this announcement was understood to allow Israel to continue building in Jerusalem and large settlements like Ma'ale Adumim.<sup>356</sup> Similarly, in 2009, Prime Minister Benjamin Netanyahu placed a moratorium building new homes in the West Bank, including Ma'ale Adumim, to encourage peace talks with the Palestinians.<sup>357</sup> As before, there were exceptions to the Israeli decision; they stated that building would continue in East Jerusalem and schools, synagogues, public buildings, and other necessary structures would still be built in the West Bank.<sup>358</sup> In 2011, the Israeli government made the decision to speed up the building of 2,000 more homes in West Bank areas, including Ma'ale Adumim, it would like to keep once a settlement is reached.<sup>359</sup>

Since at least 1982, U.S. administrations have discouraged Israeli expansion of Ma'ale Adumim (as well as all other settlement activity \*267 beyond the 1967 “green line”). In 1982, President Reagan stated that the expansion was an obstacle to peace, and the area of Ma'ale Adumim should ultimately be governed by the Palestinians in association with Jordan.<sup>360</sup> The Israeli government rejected Reagan's proposal.<sup>361</sup> The United States objected to building in Ma'ale Adumim throughout the 1990s and 2000s because West Bank expansion violated U.S. peace blueprints which called



for a freeze on settlement activity.<sup>362</sup> Throughout expansion plans, the Israeli government has clashed with both the Bush<sup>363</sup> and the Obama administration.<sup>364</sup> The Bush administration sometimes objected to settlement and expansion activities,<sup>365</sup> but stated that demographic makeup of the area should be taken into account during negotiations.<sup>366</sup> The Obama administration has been more critical of settlement activity.<sup>367</sup>

## 2. The E-1 Corridor

Like Ma'ale Adumim, the E-1 (East 1) corridor is located in territory captured by Israel in the Six-Day War with Jordan in 1967,<sup>368</sup> and has been claimed as state land by the Israeli government.<sup>369</sup>

It is approximately 12 square kilometers and sits north and west of Ma'ale Adumim, within its municipal area.<sup>370</sup> Though unfulfilled, there have been plans to build two residential areas, an industrial area, a hotel \*268 area, and a water reservoir in the E-1 area.<sup>371</sup> These plans were revived by the Israeli defense minister in 1997.<sup>372</sup> Beginning in 2002, Israel began constructing a set of concrete walls, ditches and fences (the “separation barrier”) separating its territory and settlements from Arab population centers.<sup>373</sup> The separation barrier wraps around the E-1 area and Ma'ale Adumim.<sup>374</sup>

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

<sup>375</sup>

Work began on the E-1 corridor building plans in 2004,<sup>376</sup> which, like Ma'ale Adumim proper, Prime Minister Sharon viewed as *quid pro quo* \*269 for the Israeli withdrawal from the Gaza Strip.<sup>377</sup> However, work was frozen temporarily in 2005 when the Bush administration requested its cessation on behalf of the Palestinians.<sup>378</sup> In 2012, following a successful bid by the Palestinians to be a non-member observer state in the United Nations, Israel announced that it would implement plans to build 3,000 additional homes in the E-1 area.<sup>379</sup> This announcement was strongly objected to by both the United States<sup>380</sup> and the European Union<sup>381</sup> as harmful to both the peace process and Israel's interests.<sup>382</sup> The new building was explicitly tied to securing Ma'ale Adumim and the E-1 corridor in any future settlement with Palestine.<sup>383</sup>

Including E-1 and Ma'ale Adumim within Israel's official borders would effectively complete a ring of Israeli settlements in the West Bank surrounding East Jerusalem.<sup>384</sup> By settling immigrant Israelis there,<sup>385</sup> Israel will limit Palestinian access to East Jerusalem.<sup>386</sup> This territory would also jut deep into the West Bank, jeopardizing continuity for a Palestinian state.<sup>387</sup> The Israeli government claims that a road may be built that will provide Palestinians with unfettered access between Ramallah, East Jerusalem, and Bethlehem although it is difficult to create such a road that would not also conflict with Israeli security priorities.<sup>388</sup>

Since 1982, the Israeli government has been adamant that they will not surrender Ma'ale Adumim or the E-1 area to Palestinian control.<sup>389</sup> Indeed, Israeli prime ministers from every part of the Israeli political spectrum-Benjamin



Netanyahu, Ehud Olmert, Shimon Peres, Yitzhak Rabin, and Ariel Sharon have committed to retaining both as part of any final agreement between Israel and Palestine although it is entirely possible that this is posturing.<sup>390</sup> The Clinton Parameters for peace called for Ma'ale Adumim to be annexed as compensation for agreeing \*270 to partition Jerusalem.<sup>391</sup> Israeli annexation of Ma'ale Adumim and E-1 would result in essentially four divided Palestinian population centers: East Jerusalem, the Northern West Bank, the Southern West Bank, and Gaza.<sup>392</sup> Palestinian leaders have emphasized the one-state solution as an alternative to disaggregated Palestinian territories.<sup>393</sup>

U.S. Secretary of State John Kerry is now in an energized effort to reach a final resolution based on the two-state solution, an effort that, once again, involves a freeze on settlement expansion in the West Bank.<sup>394</sup> Israel has already declared any such freeze will not include some settlements, including Ma'ale Adumim.<sup>395</sup> Echoing past cycles of negotiation and failure (and potential redirection of the Palestinian self-determination movement), the Abbas government has responded by refusing to recognize Israel as a Jewish state.<sup>396</sup>

## Conclusion

This Article has argued that by examining certain “interpretation catalysts”-presidential speeches from Clinton to Obama and the U.S. Government's pleadings in its lawsuit with the Zivotofskys (and, by extension, Congress), it is possible to see a growing flexibility toward adopting a foreign policy position that accommodates a Palestinian self-determination movement that sounds more like civil rights in Israel rather than sovereignty under international law. The Article does not argue that there has been a fundamental abandonment of the two-state solution in U.S. foreign policy. Indeed, President Obama and Secretary of State John Kerry have explicitly adopted it as their current platform in the predictable second-term push for Arab-Israeli peace. However, given the realities on the ground, firstly and most importantly with respect to Jerusalem, it is possible to see a U.S. acceptance that the time for the two-state solution may have already passed.

## Footnotes

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<sup>1</sup> Chad Emmett, *The Capital Cities of Jerusalem*, 86 *Geographic Rev.* 233, 239 (1996) (“Because Israel refused to recognize the U.N. plan for an internationalized Jerusalem and because of its annexation of occupied East Jerusalem in 1967, no country in the world has offered legal and diplomatic recognition of Jerusalem as the capital of Israel.”).

<sup>2</sup> *Id.* at 236-38.

<sup>3</sup> G.A. Res. 181 (II), U.N. Doc. A/516 (Nov. 29, 1947); Leon Sheleff, *Jerusalem - Figment of the Imagination*, 53 *GeoJournal* 297, 306 (2001).

<sup>4</sup> Sheleff, *supra* note 3, at 298.

<sup>5</sup> The United States has considered, at one time or another, a separate Palestinian state, return of the occupied territory to Jordan, or joint Jordanian-Palestinian condominium over the West Bank. See generally U.S. Policy on Palestine from Wilson to Clinton (Michael W. Suleiman ed., 1994).

- 6 Consulate General of the United States: Jerusalem, [http://jerusalem.usconsulate.gov/about\\_the\\_embassy.html](http://jerusalem.usconsulate.gov/about_the_embassy.html) (last visited June 11, 2014).
- 7 Saul Cohen, *Jerusalem's Unity and West Bank Autonomy - Paired Principles*, 13 *Middle E. Rev.* 27-34 (1981).
- 8 So far, the number of settlers living in communities that would need to be evacuated has not passed the point of irreversibility. Jerusalem is still dividable. Hamas is confined to its Gaza fortress. And Abbas, a Palestinian leader like no other before and perhaps no other to come, remains in office.  
By the end of Barack Obama's presidency, however, every one of these circumstances could vanish-and if that happens, the two-state solution will vanish along with them.  
Ben Birnbaum, *The Last Chance*, *New Republic*, Mar. 2013, at 16.
- 9 In relatively modern times, "Zionism" has taken on a somewhat pejorative connotation in political discourse. By "Zionism" I mean only the movement originating in Europe in the late nineteenth century which aimed to create-somewhere in the world-a Jewish majority state since Zionism's founders attributed the historical persecution of Jews in Europe to their minority status in every state. Because the modern State of Israel did not exist before 1948, it is necessary to refer either to specific Jewish institutions in the British Mandate of Palestine like the Jewish Agency (the organization overseeing Jewish immigration), Haganah (the precursor to the IDF), the Jewish National Fund (the quasi-governmental land-holding institution), or others. For the sake of simplicity I broadly include these institutions as "Zionists" or "Zionist organizations." See generally Walter Laqueur, *A History of Zionism* (2003).
- 10 David Fromkin, *A Peace to End All Peace* 297 (1989); Tom Segev, *When Zionism was an Arab Cause*, *Haaretz*, June 12, 2014, <http://www.haaretz.com/weekend/the-makings-of-history/when-zionism-was-an-arab-cause-1.422991>.
- 11 Shaw Commission, *Report of the Commission on the Palestine Disturbances of August 12, 1929* (1930).
- 12 Beverly Milton-Edwards, *Islamic Politics in Palestine* 25 (1999); *The Future of Jerusalem: Proceedings of the First Israeli-Palestinian International Academic Seminar on the Future of Jerusalem* 33 (Gershon Baskin & R. Twite eds., 1993); Without East Jerusalem there would be no West Bank. It is the navel, the pivotal link between Nablus to the north and Hebron to the south. Together with its Arab suburbs, it is the largest Arab concentration on the West Bank. It is the former capital of the sanjak (district) of Jerusalem under the Ottomans, as well as of mandatory Palestine. The highest proportion of the Palestinian professional elite under occupation resides in it. It is the holiest of the Muslim shrines on Palestinian soil. Muslims first turned to it in prayer before they turned to Mecca . . . It evokes the proudest Palestinian and Arab historical memories. It contains the oldest religious endowments of Palestinians, their most prestigious secular institutions-the cumulative and priceless patrimony of a millennium and a quarter of residence. Architecturally it is distinctively Arab. In ownership and property, it is overwhelmingly so. It is the natural capital of Arab Palestine.  
Walid Khalidi, *Thinking the Unthinkable: A Sovereign Palestinian State*, 56 *Foreign Aff.* 695, 705 (1978).
- 13 Teddy Kollek & Moshe Pearlman, *Jerusalem: A History of Forty Centuries* 155-61 (1968). Originally, David chose Jerusalem for purely pragmatic reasons. See Emmett, *supra* note 1, at 234.
- 14 Sheleff, *supra* note 3, at 297.
- 15 See generally Yehoshua Frenkel, *Political and Social Aspects of Islamic Religious Endowments ("awqaf")*: Saladin in Cairo (1169-73) and Jerusalem (1187-93), 62 *Bull. Sch. Oriental & Afr. Studs.* 1 (1991).
- 16 Shaw Commission, *supra* note 11, at 28; Ronald Storrs, *Orientalist* 420 (1937).
- 17 Shaw Commission, *supra* note 11, at 55-56.
- 18 *Id.* at 65; Karen Armstrong, *Jerusalem: One City, Three Faiths* 380-83 (1996).
- 19 See generally Neil A. Silberman, *Visions of the Future: Albright in Jerusalem, 1919-1929*, 56 *Biblical Archaeologist* 8 (1993).

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- 20 Palestinian Academic Society for the Study of International Affairs, The Peel Commission Partition Proposal, 1937 [Map 7], available at <http://www.passia.org/publications/bookmaps/page1.htm>.
- 21 See generally British Policy in Palestine, 1937-38: From the Peel to the Woodhead Report, *Bull. Int'l News* 3 (1938).
- 22 *Id.*
- 23 Avalon Project, British White Paper of 1939, available at [http://avalon.law.yale.edu/20th\\_century/brwh1939.asp](http://avalon.law.yale.edu/20th_century/brwh1939.asp).
- 24 Manuel Hassassian, The Palestinian National Movement 1919-1939, in *Shared Histories: A Palestinian Israeli Dialogue* 100 (Paul Scham, et al. eds., 2005).
- 25 Fred John Khouri, The Arab-Israeli Dilemma, 43-48 (1985); Thomas Lippman, The View from 1947: The CIA and the Partition of Palestine, 61 *Middle E. J.*, 17, 21 (2007).
- 26 BBC News, Key Maps-UN Partition Plan for Palestine, [http://news.bbc.co.uk/hi/english/static/in\\_depth/world/2001/israel\\_and\\_palestinians/key\\_maps/6.stm](http://news.bbc.co.uk/hi/english/static/in_depth/world/2001/israel_and_palestinians/key_maps/6.stm) (last visited June 18, 2014).
- 27 Rashid Khalidi, The Palestinians and the Failure of 1948, in *The War for Palestine 12-15* (Eugene Rogan & Avi Shlaim eds., 2007); David Ben-Gurion, *Israel: Years of Challenge* 39-40 (1963).
- 28 See, e.g., Abba Eban, *An Autobiography* 140-42 (1977); Martin Gilbert, *The Arab-Israeli Conflict: Its History in Maps* 37 (1981).
- 29 See generally *The Jerusalem Question and Its Resolution: Selected Documents* 83 (R. Lapidot & M. Hirsch eds., 1994); see also Benny Morris, *The Birth of the Palestinian Refugee Problem, 1947-1949*, at 112 (1987); Dan Kurzman, *Genesis 1948: The First Arab-Israeli War* 141-46 (1970); Larry Collins & Dominique Lapierre, *O Jerusalem* 112 (1972); Henry Cattani, *Jerusalem* 36 (1981); Walid Khalidi, *All that Remains: The Palestinian Villages Occupied and Depopulated by Israel in 1948*, at 301-02 (1992); Teddy Kollek, *Again, the Right U.S. Stance on Jerusalem*, *N.Y. Times*, Apr. 15, 1990, at 413, available at 1990 WLNR 2973376; Nathan Krystall, *The De-Arabization of West Jerusalem 1947-50*, 28 *J. Palestine Stud.* 5, 6-7 (1998).
- 30 See generally Avi Shlaim, *Collusion Across the Jordan: King Abdullah, The Zionist Movement and the Partition of Palestine* (1998).
- 31 Alan Baker, *Is Jerusalem Really Negotiable? An Analysis of Jerusalem's Place in the Peace Process*, 24 *Jewish Pol. Stud. Rev.* 78 (2013).
- 32 BBC News, *Key Maps-Jerusalem*, [http://news.bbc.co.uk/hi/english/static/in\\_depth/world/2001/israel\\_and\\_palestinians/key\\_maps/3.stm](http://news.bbc.co.uk/hi/english/static/in_depth/world/2001/israel_and_palestinians/key_maps/3.stm) (last visited June 18, 2014).
- 33 Jan de Jong, *Greater Jerusalem: A Special Report* 1SR (1997); Sheleff, *supra* note 3, at 297.
- 34 Sheleff, *supra* note 3, at 298; see generally Helga Tawil-Souri, *Uneven Borders, Coloured (Im) mobilities: ID Cards in Palestine/Israel*, 17 *Geopolitics* 153 (2012).
- 35 BBC News, *supra* note 32.
- 36 See generally Ian Lustick, *Has Israel Annexed East Jerusalem?*, 5 *Middle E. Pol'y Council J.* 34 (1997). In many academic and media publications, Israel's "annexation" of East Jerusalem occurred in both 1967 and in 1980. Ziv Bohrer explains Israeli actions in this way:  
In 1967, immediately after the war, the Israeli Parliament amended an act passed in 1948 called (Bohrer's translation): "The Regulation of Government and Law Ordinance of 1948." The 1967 amendment (which added article 11b to the law) authorized the Israeli executive to expand (by way of publishing executive decrees) the jurisdiction of Israeli law to any territory that was part of mandatory Palestine but did not become part of the State of Israel after the war of 1948. Based on this new legal authority, the Israeli executive published the "Regulation of Government and Law Decree (No. 1) of 1967" which

expanded the jurisdiction of Israeli law, judiciary and administration to East Jerusalem. In other words, Israel annexed East Jerusalem, using secondary legislation, already in 1967. The legal change done in 1980 was mostly symbolic-at that year the Israeli Parliament passed: "Basic Law: Jerusalem Capital of Israel." The term "Basic Law" is the term used in Israeli law for constitutional amendments. Article 1 of that Basic Law (which is the article that annoyed the world) declared "The whole and unified Jerusalem is the capital of the State of Israel." Though it annoyed the world, the actual implications of that article, at that time, were minimal at best; as, on the one hand, Israel already annexed East Jerusalem in 1967, and on the other hand, at that time (i.e. from 1980 to 2000) the basic law did not include a map of what is considered "whole and unified Jerusalem" and further this basic law was not protected from any future amendments (i.e. the parliament in 1980 did not limit, in any unique way, its ability in the future to amend or cancel the basic law - and so theory that basic law could have been changed or canceled in a session of parliament in which only one MP is present). These two issues, however, were amended in 2000 and articles 5-7 were added to the basic law. Article 5 refers to a map that defines the municipal jurisdiction of Jerusalem and that map includes East Jerusalem. Article 6 prohibits the Israeli Government from transferring to any foreign element any authorities currently found at the hands of either the Israeli central government or the municipal government of the City of Jerusalem. Article 7 further limits the ability to amend articles 5 and 6, by allowing to amend these articles only by a majority of 61 or more MPs out of 120.

Email from Ziv Bohrer, Faculty of Law, Bar-Ilan University, to author (Feb. 8, 2014, 13:56 EST) (on file with author).

37

Sheleff, *supra* note 3, at 300.

[T]he immediate effect of the legislation aimed ostensibly at strengthening Israel's hold on Jerusalem was actually to weaken its international standing - it should be noted particularly that the countries that moved were all amongst Israel's strongest allies, as they were the ones who had earlier agreed to place their embassies there, most countries refusing to do so, because its status is in dispute, having been originally assigned, as mentioned, as an international city.

*Id.*

38

Clyde Mark, Cong. Research Serv., RS20339, Jerusalem: The U.S. Embassy & P.L. 104-45, at 2 (1999).

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David Ben-Gurion, Israel: A Personal History 331 (1971); Sydney D. Bailey, Four Arab-Israeli Wars and the Peace Process 64-65 (1990).

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Memorandum by the Director of the Office of Near Eastern and African Affairs (Satterthwaite) to the Secretary of State (Feb. 9, 1949), available at <http://digioll.library.wisc.edu/cgi-bin/FRUS/FRUS-idx?type=goto&id=FRUSFRUS1949v06&Isize=M&submit=Go%20to%20page&page=739>.

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Richard F. Nyrop, Jordan a Country Study 27 (1980); James Baker's Letter of Assurance to the Palestinians (Oct. 18, 1991); Saul B. Cohen, Jerusalem: Bridging the Four Walls 198-99 (1977).

42

Emmett, *supra* note 1, at 240.

43

*Id.*

44

Statement by the Under Secretary of State for Political Affairs Before the Senate Foreign Relations Committee, 4 American Foreign Policy Current Documents 497, 498 (1984) (statement of Lawrence Eagleburger, Under Secretary of State for Political Affairs); Stephen Zunes, Clinton's Stand on Jerusalem Reverses Longstanding U.S. Policy, Seattle Post-Intelligencer, June 6, 1995, at A7. There have been an overwhelming number of proposals advanced as to how to meet the goal of two capitals in a single city. See generally Emmett, *supra* note 1.

45

See, e.g., Stephen D. Krasner, Are Bureaucracies Important?, 7 Foreign Pol'y 159, 161 (1971) ("The behavior of states is the outcome of a rational decision-making process. This process has three steps. The options for a given situation are spelled out. The consequences of each option are projected. A choice is made which maximizes the values held by the decision makers.").

46

See John G. Ikenberry, American Foreign Policy: Theoretical Essays 395 (2002).

- 47 See, e.g., Deborah Welch Larson, *The Role of Belief Systems and Schemas in Foreign Policy Decision-Making*, 15 *Pol. Psychol.* 17, 17 (1994); Alex Mintz & Karl DeRouen, Jr., *Understanding Foreign Policy Decision Making* 156 (2010); Michael J. Shapiro & G. Matthew Bonham, *Cognitive Process and Foreign Policy Decision-Making*, 17 *Int'l Studs. Q.* 147, 147 (1973).
- 48 Paul A. Anderson, *Justifications and Precedents as Constraints in Foreign Policy Decision-Making*, 25 *Am. J. Pol. Sci.* 738, 738-39 (1981) (“[E]ven if it were possible to define the national interest, and if organizations could act in ways consistent with a single underlying goal, the limited information-processing capabilities of humans would be sufficient to undermine these approaches.”).
- 49 *Id.* at 740-41.
- 50 See generally Rebecca Ingber, *Interpretation Catalysts and Executive Branch Decision-Making*, 38 *Yale J. Int'l L.* 359 (2013).
- 51 *Id.* at 367.
- 52 *Id.*
- 53 See generally *Zivotofsky v. Sec’y of State*, 511 F. Supp. 2d 97 (D.D.C. 2007).
- 54 See generally Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 97 *Am. J. Int'l L.* 179 (2003).
- 55 Letter from George P. Shultz, Secretary of State, to Dante B. Fascell, Chairman, Committee on Foreign Affairs, U.S. House of Representatives (Feb. 13, 1984), cited in Memorandum from Walter Dellinger, Assistant Attorney General, to Abner J. Mikva, Counsel to the President (May 16, 1995), reprinted in 104 *Cong. Rec.* S15,469 (daily ed. Oct. 23, 1995).
- 56 Frederick G. Dutton, ‘Jerusalem Bill’: A Loser, *N.Y. Times*, July 30, 1984, at A21.
- 57 See Lawrence Eagleburger, Under Secretary of State for Political Affairs, *The Status of Jerusalem is an Integral Part of the Arab-Israeli Conflict*, Statement Before the Senate Foreign Relations Committee (Feb. 23, 1984), in 4 *American Foreign Policy Current Documents* 497, 498 (1984); Richard Murphy, Assistant Secretary of State for Near Eastern and South Asian Affairs, *Meeting the Challenges of the Middle East*, Address Before the Chicago Conference of the American-Arab Affairs Council (Mar. 23, 1984), in 4 *American Foreign Policy Current Documents* 484, 487 (1984).
- 58 President Ronald Reagan, *Remarks at the Young Leadership Conference of the United Jewish Appeal* (Mar. 13, 1984), in *Public Papers of the Presidents of the United States, Administration of Ronald Reagan*, Book I, 340, 344 (1984).
- 59 Major Garrett, *Bush Firm on Israel Policy*, *Wash. Times*, Mar. 23, 1990, at A1.
- 60 Lawrence M. O'Rourke, *Jerusalem Strains U.S.-Israeli Ties*, *St. Louis Post-Dispatch*, Apr. 29, 1990, at 1B.
- 61 Major Garrett, *House Accepts Jerusalem as Israeli Capital*, *Wash. Times*, Apr. 25, 1990, at A4.
- 62 136 *Cong. Rec.* 4,690 (1990).
- 63 Marlin Fitzwater, *Statement by Press Secretary Fitzwater on the President's Meeting with Mayor Teddy Kollek of Jerusalem* (May 3, 1990), in 1 *Public Papers of the Presidents of the United States, Administration of George H.W. Bush*, Book I, at 621 (1990).
- 64 138 *Cong. Rec.* 10,344 (1992).
- 65 *Jerusalem Embassy Act of 1995*, *Pub. L. No. 104-45*, 109 *Stat.* 398.
- 66 *Id.* § 3(a).
- 67 *Id.*

- 68 Id. § 7.
- 69 President Bill Clinton, The President's News Conference with President Hosni Mubarak of Egypt (Mar. 10, 1997), in 1 Public Papers of the Presidents of the United States, Administration of Bill Clinton, Book I, at 269, 271 (1997).
- 70 Helen Dewar, Congress Approves Move of U.S. Embassy to Jerusalem by Mid-1999, Wash. Post, Oct. 25, 1995, at A22; see also Letter from Secretary of State Warren Christopher to Senator Robert Dole (June 20, 1995) (on file with author) (“My opposition to this legislation is also strongly rooted on constitutional grounds. The Justice Department’s Office of Legal Counsel has issued an opinion to the White House Counsel concluding that the bill would unconstitutionally invade exclusive Presidential authorities in the field of foreign affairs. Because the bill would seek to compel the President to build and open an embassy at a particular site for foreign political reasons, it is incompatible with the separation of powers under the Constitution. This is the same position taken by this and previous Administrations on comparable legislative efforts to dictate the location of diplomatic and consular facilities.”).
- 71 Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, § 214, 116 Stat. 1350, 1365-66.
- 72 Jerusalem Embassy Act of 1995 §§ 1-8.
- 73 Foreign Relations Authorization Act, Fiscal Year 2003, § 214.
- 74 Id. § 215.
- 75 President George W. Bush, Statement on Signing the Foreign Relations Authorization Act, Fiscal Year 2003 (Sept. 30, 2002), in 2 Public Papers of the Presidents of the United States, Administration of George W. Bush, Book II, at 1697 (1992). For general background on the legal significance of Presidential signing statements see ABA, Task Force on Presidential Signing Statements and the Separation of Powers Doctrine (Aug. 2006), [http:// www.americanbar.org/content/dam/aba/migrated/ leadership/2006/annual/dailyjournal/ 20060823144113.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/leadership/2006/annual/dailyjournal/20060823144113.authcheckdam.pdf); Note, [Context-Sensitive Deference to Presidential Signing Statements](#), 120 Harv. L. Rev. 597 (2006).
- 76 Statement on Signing the Foreign Relations Authorization Act, Fiscal Year 2003, *supra* note 75, at 1698.
- 77 Jerusalem Embassy Act of 1995, § 7.
- 78 U.S. ‘Neutrality’ on Jerusalem, L.A. Times, July 25, 2013, at A16.
- 79 Statement on Signing the Foreign Relations Authorization Act, Fiscal Year 2003, *supra* note 75, at 1698.
- 80 Jerusalem Embassy and Recognition Act of 2009, H.R. 3412, 111th Cong. (2009).
- 81 Jerusalem Embassy and Recognition Act of 2011, S. 1622, 112th Cong. (2011).
- 82 Jerusalem Embassy and Recognition Act of 2013, H.R. 104, 113th Cong. (2013).
- 83 Jerusalem Embassy Act of 1995, Pub. L. No. 104-45, 109 Stat. 398.
- 84 H.R. 3412 § 2(c); S. 1622 § 2(c); H.R. 104 § 2(c).
- 85 Obama Renews Suspension of Jerusalem Embassy Act, Kuwait News Agency, June 5, 2011, [http://www.thefreelibrary.com/ Obama renews suspension of Jerusalem embassy act.-a0258083230](http://www.thefreelibrary.com/Osama+renews+suspension+of+Jerusalem+embassy+act.-a0258083230).
- 86 Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, § 214(d), 116 Stat. 1350, 1366.
- 87 [Zivotofsky ex rel. Zivotofsky v. Clinton \(Zivotofsky I\)](#), 132 S. Ct. 1421 (2012).
- 88 John H. Cushman, Jr., Justices Decline to Say if Jerusalem-Born Americans Can Claim Israeli Birthplace, N.Y. Times, Mar. 27, 2012, at A17.



- 89 Foreign Relations Authorization Act, Fiscal Year 2003, § 214(d).
- 90 [Zivotofsky I](#), 132 S. Ct. at 1425.
- 91 *Id.*
- 92 U.S. Dep't of State, 7 F.A.M. § 1383 (1987), cited in Defendant's Motion to Dismiss at 10-11, [Zivotofsky ex rel. Zivotofsky v. Sec'y of State](#), Nos. 03-1921, 03-2048, 2004 WL 5835212 (D.D.C. Sept. 7, 2004).
- 93 [Zivotofsky I](#), 132 S. Ct. at 1425-26.
- 94 [Zivotofsky ex rel. Zivotofsky v. Sec'y of State \(Zivotofsky II\)](#), Nos. 03-1921, 03-2048, 2004 WL 5835212, at \*2 (D.D.C. Sept. 7, 2004).
- 95 *Id.*
- 96 *Id.* at \*3 (citing [U.S. Const. art. III, § 1](#)). Article III of the U.S. Constitution allows courts to exercise jurisdiction only over “cases and controversies,” which requires a plaintiff to show they have suffered an injury which is concrete and actual or imminent. [Lujan v. Defenders of Wildlife](#), 504 U.S. 555, 560 (1992), cited in [Zivotofsky II](#), Nos. 03-1921, 03-2048, 2004 WL 5835212, at \*3 (D.D.C. Sept. 7, 2004). The Secretary argued that the plaintiffs suffered no actual injury by having only “Jerusalem” listed as their place of birth. They still had valid, unrestricted passports and the plaintiffs, being infants, were too young to suffer psychological injury arising from this incident. Under the political question doctrine, the judiciary declines to review cases “which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch.” [Japan Whaling Ass'n v. American Cetacean Soc'y](#), 478 U.S. 221, 230 (1986). The U.S. Supreme Court's decision in [Baker v. Carr](#), a voting rights case, is the seminal decision regarding the political question doctrine. [369 U.S. 186 \(1962\)](#). In that case, the Supreme Court ruled that federal courts could not adjudicate cases where the issue to be decided was subject to:  
[A] textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.  
[Id.](#) at 217. Only one of these factors is necessary to conclude that a case presents a political question. [Bancoult v. McNamara](#), 445 F.3d 427, 432 (D.C. Cir. 2006) (citing [Schneider v. Kissinger](#), 412 F.3d 190 (D.C. Cir. 2005)).
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- 101 Brief for Appellee, at i, [Zivotofsky ex rel. Ari. Z. v. Sec'y of State \(Zivotofsky III\)](#), 444 F.3d 614 (D.C. Cir. 2006) (No. 04-5395), 2005 WL 1995890.
- 102 *Id.* at 615.
- 103 *Id.* at 619-20. In 1988, two declarations, one from the PLO and one from the Kingdom of Jordan, effectively recognized Israel within its 1967 borders. On August 1, 1988, King Hussein of Jordan conceded that the PLO was the sole legitimate government of the Palestinian people and renounced Jordanian claims to the territory it controlled between 1948 and 1967. John Kifner, [Hussein Surrenders Claims on West Bank to the PLO](#), N.Y. Times, Aug. 1, 1988, at A1, available at <http://www.nytimes.com/1988/08/01/world/hussein-surrenders-claims-west-bank-plo-us-peace-plan->



jeopardy-internal-tensions.html. On November 15, 1988, the Palestinian National Council issued the Palestinian Declaration of Independence which, together with reference to U.N. Resolution 242, effectively renounced Palestinian claims on territory controlled by Israel before 1967. Palestine Declaration of Independence, G.A. Res. 43/827, Annex III, U.N. Doc. A/RES/43/827 (Nov. 18, 1988), available at <http://www.un.int/wcm/content/site/palestine/cache/offonce/pid/12353>.

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