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**The U.S.-Israel Enhanced Security Cooperation Act:
Legitimate Legislation or Puffed-Up Policy Statement?**

Alexa Darakjy
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Historians Mitchell G. Bard and Daniel Pipes remarked that the relationship between the United States and Israel “may well be the most extraordinary tie in international politics.”¹ This decades-long relationship can be traced back to the creation of the state of Israel in 1948.² Based on shared values and interests, it led to numerous agreements regarding protection of Israel and US-Israeli relations over the years.³ Some of these agreements, such as the Foreign Relations Authorization Act, Fiscal Year 2003 (“Foreign Relations Authorization Act”), have real and severe legal consequences if their provisions are not implemented.⁴ For instance, some sections of the Act caused problems between the three branches of government, raising questions on the separation of powers.⁵ Arguments regarding Section 214(d) of the Foreign Relations Authorization Act were just recently heard by the United States Supreme Court in May 2012.⁶ However, other acts enacted by Congress and signed into law by the President merely restate well-settled US policy, and therefore do not carry the same legal ramifications – and in fact, carry none at all – as more legitimate pieces of legislation such as the Foreign Relations Authorization Act.

¹ Mitchell G. Bard & Daniel Pipes, *How Special is the US-Israel Relationship?*, MIDDLE EASTERN Q. (1997), available at <http://www.danielpipes.org/282/how-special-is-the-us-israel-relationship>.

² According to some scholars, “The real motives behind America’s commitment to Israel are moral and ethical. They are a reaction to the horrors of the Holocaust, to the entire history of Western anti-Semitism, and the United States’ failure to help German and European Jews during the period before it entered World War II.” Patricia Riley & Thomas A. Hollihan, *Strategic Communication: How Governments Frame Arguments in the Media*, in EXPLORING ARGUMENTATIVE CONTEXTS 59, 65 (Frans H. van Eemeren et al. eds., 2012).

³ See generally, Enhanced Sec. Coopn. Act, Pub. L. No. 112-150; Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, §§ 214-15, 116 Stat. 1350; 22 U.S.C. § 2321h (regarding stockpiling of defense articles for foreign countries, and giving special status to Israel); 22 U.S.C. § 2321k (giving Israel special status as a major non-NATO ally); 10 U.S.C. § 2410i (prohibiting the United States from contracting with foreign entities that complied with the secondary Arab boycott of Israel in 2011); and 42 U.S.C. §17337 (regarding energy cooperation between the United States and Israel).

⁴ See generally, Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, §§ 214-15, 116 Stat. 1350.

⁵ Andrew Hand, *Forbidden Territory or Well-Defined Boundaries? M.B.Z. v. Clinton and the Overzealous Application of the Political Question Doctrine*, 7 DUKE J. CONST. L & PUB. POL’Y SIDEBAR 61 (2011).

⁶ See *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012).

Although signed into law and passed by both houses of Congress, the United States–Israel Enhanced Security Cooperation Act of 2012 (“Enhanced Security Cooperation Act”) is an example of the latter.⁷ Unlike the Foreign Relations Authorization Act, it carries no real legal or judicial implications if entities do not comply with its provisions. The Enhanced Security Cooperation Act is essentially a policy statement that attempts to reaffirm the “special bond” that the United States and Israel have shared since the creation of Israel in 1948.⁸ In Part I, this Note will explore a brief history of the US–Israeli relationship and the way in which US policies regarding Israel resulted in the passing of legislation such as the Enhanced Security Cooperation Act and the Foreign Relations Authorization Act. Part II will examine both of these legislative acts in turn, specifically comparing the Enhanced Security Cooperation Act and Section 214(d) of the Foreign Relations Authorization Act. Part III will show that while the Enhanced Security Cooperation Act is more of a policy statement, rather than a true example of legislation, the Foreign Relations Authorization Act is in fact real legislation with real consequences. Finally, Part IV will briefly analyze the ways in which these two acts reflect the strength of the US-Israeli relationship.

PART I: HISTORY OF US-ISRAELI RELATIONS AND US POLICY TOWARDS ISRAEL

Over the last six decades, the United States and Israel managed to foster their special bond despite the turmoil caused by multiple wars, most notably the 1967 Six–Day War.⁹ During the war, Israel captured and occupied the Gaza Strip and the Sinai Peninsula in Egypt, East Jerusalem and the West Bank in Jordan, and the Golan Heights in Syria.¹⁰ Notably, the bond has

⁷ Enhanced Sec. Coopn. Act, Pub. L. No. 112-150, 126 Stat. 1146.

⁸ *Id.* § 2(1).

⁹ BARD AND PIPES, *supra* note 1, at par. 35.

¹⁰ Richard B. Parker, THE SIX-DAY WAR: A RETROSPECTIVE xvii-xix (1996).

also endured despite the continued lack of a resolution of the Israeli–Palestinian conflict.¹¹ According to Congresswoman Ileana Ros-Lehtinen, Chairwoman of the House Committee on Foreign Affairs, “[f]or over 64 years, since the United States recognized Israel just 11 minutes after its creation, the democratic, Jewish State of Israel has been one of our closest allies.”¹² Addressing the House, Congresswoman Ros-Lehtinen stated further that the “special bond” between the United States and Israel has been founded on both countries’ commitment to peace and freedom.¹³ She continued that the fates of the people of the United States and Israel “are tied together. A threat to one of our countries is a threat to both.”¹⁴ Ros-Lehtinen is certainly not the only member of Congress, nor is she the only American, to believe in this “special bond.”¹⁵ Indeed, the very language of the Enhanced Security Cooperation Act acknowledges that such a bond exists between the United States and Israel.¹⁶ Moreover, the importance of this bond is not lost on Israel; Israeli Prime Minister Benjamin Netanyahu has described it as “unbreakable.”¹⁷

a. The Israeli-Palestinian Conflict

The Israeli-Palestinian conflict has undoubtedly earned its title as one of the most complex dilemmas in modern history.¹⁸ Over the years, countless experts grappled with this issue at length in the form of journal articles, books, and other media. The conflict therefore deserves at least a brief mention in any discussion of the US–Israeli relationship. While several

¹¹ BARD AND PIPES, *supra* note 1, at par. 35.

¹² 158 Cong. Rec. H4884-01 (2012), at 5.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Enhanced Sec. Coopn. Act, Pub. L. No. 112-150, § 2(1), 126 Stat. 1146.

¹⁶ *Id.*

¹⁷ *Remarks by President Obama and Prime Minister Netanyahu of Israel in Joint Press Availability*, THE WHITE HOUSE: OFFICE OF THE PRESS SECRETARY, July 6, 2010, par. 3, <http://www.whitehouse.gov/the-press-office/remarks-president-obama-and-prime-minister-netanyahu-israel-joint-press-availabilit>

¹⁸ Robert A. Caplen, *Mending the “Fence”: How Treatment of the Israeli Palestinian Conflict by the International Court of Justice at the Hague Has Redefined the Doctrine of Self-Defense*, 57 FLA. L. REV. 717, 728 (2005).

complicated and interwoven issues and sub-issues are contained within the conflict, some highlights are relevant to the study at issue here, most notably the issue of settlements in disputed territories and the idea of a two-state solution to the conflict.

i. Roots of the Conflict

After the Six-Day War, Israel returned the Sinai Peninsula to Egypt in the Camp David Accords of 1978, which led to the Egypt–Israel Peace Treaty of 1979.¹⁹ Israel eventually withdrew most of its forces from the Gaza Strip, but only very recently, in the mid–2000s, as a way to reduce mounting tensions between Israelis and Palestinians.²⁰ In response to the question of Israel’s returning the Golan Heights to Syria, former Israeli prime minister Shimon Peres reportedly stated that the “Golan plateau is Syrian land and we have settled on the Syrian land. . . We do not want to exercise power over another people, and that includes the Golan plateau which is not part of the Land of Israel.”²¹

In contrast, Israel has a markedly different view of the settlements in the West Bank. Tensions surrounding Israeli settlements in the area have risen since King Hussein of Jordan gave up Jordan’s claim to the West Bank to the Palestine Liberation Organization (PLO) in 1988.²² Despite Israel’s recognition of the PLO as the sole authority of the Palestinian people during the 1993 Oslo Accords, and that Yasser Arafat, then-chairman of the PLO, recognized Israel’s right to existence, the West Bank has been riddled with violence and has become a

¹⁹ Ninan Koshy, “Climbing Down the Golan Heights: Advantage to Syria” *Economic and Political Weekly* 30.26 (1995), 1562.

²⁰ Jefferson Morley, *Israeli Withdrawal From Gaza Explained*, WASHINGTON POST (Aug. 10, 2005), www.washingtonpost.com/wp-dyn/content/article/2005/08/10/AR2005081000713.html

²¹ Koshy, *supra* n.21, at 1562.

²² John Kifner, “Surrenders Claims on West Bank to the PLO; US Peace Plan in Jeopardy; Internal Tensions” *THE NEW YORK TIMES - BREAKING NEWS, WORLD NEWS & MULTIMEDIA*. 01 AUG. 1988: PAR. 2.

hallmark of the Israeli–Palestinian conflict.²³ To complicate matters further, although the United Nations, with U.S. approval, declared Israeli settlements in the area to be illegal under international law, it has done relatively little since then to persuade Israel to withdraw from the West Bank and East Jerusalem. The fact that these settlements are littered throughout the region also poses a significant problem when trying to design a two-state solution to the conflict, as it would be nearly impossible for the Palestinians to govern an area in which numerous Israeli settlements are still under Israeli sovereignty and control.

b. Settlements

The issue of settlements is arguably the one major disagreement between the United States and Israel. However, contentious as this issue may be, it appears that its effect on the US–Israeli relationship is minimal.²⁴ In fact, differences in opinion between Israeli and American leaders are relatively narrow, as they pertain mainly to disagreements over the means to common ends.²⁵ Nevertheless, the issue of settlements is a point of disagreement between the United States –and nearly every member of the United Nations– and Israel, and has been since the Six-Day War in 1967, when Israel first took control of the West Bank and immediately began building Israeli settlements there. According to Dore Gold at the Jerusalem Center for Public Affairs, “while the U.S. did not support the settlement enterprise, its response to the settlements has varied in intensity, depending on the overall relationship between the two countries.”²⁶ In addition, former President Jimmy Carter argued in his 2006 book *Palestine: Peace Not*

²³ “Trilateral Statement on the Middle East Peace Summit at Camp David.” ISRAEL MINISTRY OF FOREIGN AFFAIRS, 25 July 2000: Par.6.

²⁴ BARD AND PIPES, *supra* note 1, at par. 35.

²⁵ *Id.*

²⁶ Dore Gold, *U.S. Policy on Israeli Settlements - Jerusalem Issue Briefs*, JERUSALEM CTR. FOR PUBLIC AFFAIRS (June 9, 2009),

<http://www.jcpa.org/JCPA/Templates/ShowPage.asp?DBID=1&LNGID=1&TMID=111&FID=442&PID=0&IID=2995>.

Apartheid that “Israel’s continued control and colonization of Palestinian land have been the primary obstacles to a comprehensive peace agreement in the Holy Land.”²⁷

The United States officially voiced its concern about settlements through its position on the United Nations Security Council. In 1980, all five permanent members of the Security Council unanimously approved UN Resolution 465.²⁸ It condemned Israel’s continued building and expansion of settlements in the West Bank and East Jerusalem, calling upon the government “to dismantle the existing settlements and in particular to cease, on an urgent basis, the establishment, construction and planning of settlements in the Arab territories occupied since 1967.”²⁹ These territories include Jerusalem.³⁰

Israel has yet to freeze the building of settlements. By 2009, 289,600 Israelis had settled in the Palestinian territories.³¹ This number marks a 37 percent increase since Israel had accepted the 2003 Road Map peace plan, supported by the United States, which stipulated the freezing of settlements.³² President Obama also voiced his dissatisfaction with settlements.³³ In a 2009 joint press conference at the White House with Prime Minister Netanyahu, the President stated, “[t]here’s a clear understanding that we have to make progress on settlements. Settlements have to be stopped in order for us to move forward. That’s a difficult issue. I recognize that, but it’s an important one and it has to be addressed.”³⁴ Israel has yet to respond to these demands, and in

²⁷ JIMMY CARTER, *PALESTINE: PEACE NOT APARTHEID* 208 (2006).

²⁸ See *United Nations Resolution 465*, THE UNITED NATIONS (Mar. 1, 1980), available at <http://daccess-dds.ny.un.org/doc/RESOLUTION/GEN/NR0/399/58/IMG/NR039958.pdf?OpenElement>.

²⁹ *Id.* at 5.

³⁰ *Id.*

³¹ *Report: Israel Uses Natural Growth to Speed Up Jewish Settlement*, PEOPLE’S DAILY ONLINE, July 8, 2009, available at <http://english.peopledaily.com.cn/90001/90777/90854/6696403.html>.

³² *Id.*

³³ *Remarks by President Obama and Prime Minister Netanyahu of Israel in Press Availability*, THE WHITE HOUSE: OFFICE OF THE PRESS SECRETARY, May 18, 2009, par. 46, http://www.whitehouse.gov/the_press_office/Remarks-by-President-Obama-and-Israeli-Prime-Minister-Netanyahu-in-press-availability/.

³⁴ *Id.* at par. 46.

fact continues to expand its settlements in the occupied Palestinian territories to this day. Vice President Biden's trip to Jerusalem in March 2010 coincided with the Israeli Interior Ministry's announcement of 1,600 new housing units for Jews in the disputed territories in East Jerusalem.³⁵ While Netanyahu offered to keep track of the advancement of building plans "to avoid new surprises," in November of that year, news came of another 1,000 units in other disputed territories in Jerusalem. Continued efforts to resolve this contentious issue have been unsuccessful, but until the issue of settlements can be resolved, it is highly unlikely that the Israeli-Palestinian conflict will come to a peaceful end.³⁶

c. The Two-State Solution

Although formally introduced only recently as a way to resolve the Israeli-Palestinian conflict, for decades many heralded the two-state solution as a possibility for resolving the conflict. Over the last thirty years, the international community reached a broad consensus regarding resolution of the Israel-Palestine Conflict.³⁷ Several nations, particularly in Europe and more recently in the Middle East, have suggested that Israel withdraw from the West Bank, allowing for a Palestinian state to be established there, in exchange for widespread recognition of Israel's right to live peacefully and securely among its Arab neighbors.³⁸ The Obama administration is also supportive of this plan. Former U.S. Senator George Mitchell, the US special envoy for Middle East peace and a key negotiator in the failed 2010 attempts at a resolution of the Israeli-Palestinian conflict, stated in 2009 on the eve of renewed peace talks that

³⁵ Isabel Kershner, *On Eve of Meeting in Washington, Israel Announces More Housing Construction*, N.Y. TIMES, Apr. 4, 2011, par. 16, available at http://www.nytimes.com/2011/04/05/world/middleeast/05mideast.html?_r=2&ref=world).

³⁶ *Id.*

³⁷ Norman Finkelstein, *Distorting Camp David*, ZNET, 2007, at 2.

³⁸ *Id.*

US policy favors a two-state solution, where the state of Palestine would exist alongside the state of Israel.³⁹

Prime Minister Netanyahu thus far has not expressed a desire for a two-state solution. He stated that rather “[we] want them [the Palestinians] to govern themselves [minus] a handful of powers that could endanger the state of Israel.”⁴⁰ He later asserted, “I did not say two states for two peoples.”⁴¹ While the Israeli government continues to be hesitant to make concessions concerning border demarcations and disputes over territory, the possibility of a two-state solution remains just that: a *possible* resolution the conflict. Currently, Israelis and Palestinians alike have little choice but to wait for renewed talks that will ultimately come to a conclusion beneficial to all parties involved, most importantly the peoples of Israel and Palestine.

d. U.S. policy towards Israel

Despite some disagreement regarding the Israeli-Palestinian conflict, the relationship between the United States and Israel remains stronger than ever. As stated by members of Congress, what drives the US-Israeli relationship, and therefore what drives US policy towards Israel, is the idea of “shared values and shared interests” on which the special bond between the two countries rests.⁴² The Congressional Record is replete with references to the US commitment to Israeli security interests.⁴³ Indeed, Chairwoman Ros-Lehtinen stated that Congress’ goal in passing the Enhanced Security Cooperation Act is to make sure that Israel is able to protect its

³⁹ *U.S. to Press Israel on Two-State Solution*, FEATURED ARTICLES FROM CNN: CNN POLITICS, Apr. 16, 2009, par. 8, available at http://articles.cnn.com/2009-04-16/politics/mitchell.mideast_1_palestinian-statehood-two-state-solution-palestinian-issue?_s=PM:POLITICS.

⁴⁰ *Israel 'Deaf' to Two-State Solution*, AJE – AL JAZEERA ENGLISH, May 19, 2009, par. 11, available at <http://english.aljazeera.net/news/middleeast/2009/05/200951973745705990.html>.

⁴¹ *Id.* at par.9.

⁴² Enhanced Sec. Coopn. Act, Pub. L. No. 112-150, §2(1), 126 Stat. 1146.

⁴³ 158 Cong. Rec. H4884-01 (2012), at 5.

people “against the dangers that touch their lives every day.”⁴⁴ This goal encompasses the idea of providing Israel with certain capabilities to defend itself in the event of an attack.⁴⁵

With regard to these capabilities, the Carter administration was instrumental in forging a new strategic cooperation policy wherein Israel would have a “qualified military edge” over its Arab neighbors.⁴⁶ Qualified military edge is defined as follows:

the ability to counter and defeat any credible conventional military threat from any individual state or possible coalition of states or from non-state actors, while sustaining minimal damages and casualties, through the use of superior military means, possessed in sufficient quantity, including weapons, command, control, communication, intelligence, surveillance, and reconnaissance capabilities that in their technical characteristics are superior in capability to those of such other individual or possible coalition of states or non-state actors.⁴⁷

The bilateral military agreement eventually expanded to include Israel as a major non-NATO ally.⁴⁸ Granting Israel this status ultimately allowed Israeli companies to compete for military contracts as if they were NATO members themselves.⁴⁹ Ten years later, in 1997, Israel was linked to the Iron Dome, the United States’ missile-warning satellite system.⁵⁰ While today the United States provides military aid to many countries, its complex ties to Israel’s military are arguably the only of their kind between two nations that have no mutual defense treaty.⁵¹

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ BARD AND PIPES, *supra* note 1, at par. 8.

⁴⁷ 22 U.S.C. 2776(h)(2).

⁴⁸ *See* 22 U.S.C. §2321k.

⁴⁹ BARD AND PIPES, *supra* note 1, at par. 10.

⁵⁰ *Id.* at par. 11.

⁵¹ *Id.* at par. 12.

This strategic cooperation policy is not merely comprised of military aid, although Israel receives military aid under exclusive terms unavailable to any other nation.⁵² The special relationship between the United States and Israel transcends diplomatic and geostrategic components, encompassing an exceptional array of cultural, religious, and intellectual links.⁵³ This across-the-board cooperation is made possible specifically because of the countries' special relationship.⁵⁴ As a result, the American public identifies and can relate to the Israeli national style in a way that is unparalleled to US relations with the Arab world.⁵⁵

Several enacted US policies addressing a broad range of topics illustrate the extent of bilateral cooperation between the United States and Israel. While some of these policies are only informally enforced, most of them, like the Enhanced Security Cooperation Act, have been codified.⁵⁶ Another example is the United States-Israel Energy Cooperation Act.⁵⁷ The United States-Israel Energy Cooperation Act is an agreement that focuses on commercialization of technology to develop alternative energy sources.⁵⁸ Several administrative agencies also have their own respective agreements with their Israeli counterparts, including the Security Exchange Commission, the Environmental Protection Agency, the Federal Bureau of Investigation, as well as the Departments of Labor, Agriculture, and Health and Human Services.⁵⁹ Such agreements

⁵² Melvin A. Goodman, *US-Israeli Relations at a Crossroads*, MIDDLE EAST ONLINE, Mar. 30, 2010, available at <http://www.middle-east-online.com/english/?id=38141>.

⁵³ David Verbeten, *How Important is the Israel Lobby?* MIDDLE EAST Q., Fall 2006, at par. 29, available at <http://www.meforum.org/1004/how-important-is-the-israel-lobby>.

⁵⁴ *Id.* at par. 28.

⁵⁵ *Id.*

⁵⁶ Enhanced Sec. Coopn. Act, Pub. L. No. 112-150

⁵⁷ 42 U.S.C. § 17337.

⁵⁸ BARD AND PIPES, *supra* note 1, at par. 22.

⁵⁹ *Id.*

confirm and reinforce the notion that Israel is the United States' strongest ally, and thus is entitled to a special relationship afforded to no other country in the world.⁶⁰

Perhaps one of the most remarkable aspects of the US-Israeli relationship, and in effect US policy on Israel as well, is the fact that support for Israel is nearly unanimous throughout both houses of Congress. Even in today's divisive and contentious political climate, support for Israel is unwaveringly bipartisan. This support can be traced back to the creation of Israel in 1948, when President Truman, with Americans of all faiths and creeds behind him, was one of the first heads of state to recognize Israel's independence.⁶¹ The creation of Israel came at a critical time during the Cold War, when the United States and the Soviet Union were fighting not just an arms race but a race to extend their spheres of influence throughout the world. Support for Israel, a country in the heart of the volatile and economically valuable Middle East, arose in this complicated geopolitical context and was thus based not only on cultural similarities but also on national security interests in an effort to curb Soviet influence.⁶²

With the passage of time, and the ultimate collapse of the Soviet Union in the late 1980s, American support for Israel remained strong. Even today, support for Israel has rarely wavered despite changes in the geopolitics that now surround the Middle East, most notably the threat of Iran possibly launching a nuclear attack against Israel.⁶³ However, while support for Israel remains bipartisan, the scope of such support reflects divided party lines.⁶⁴ For instance, in 2002, both the Senate and the House of Representatives presented resolutions regarding the

⁶⁰ *Id.*

⁶¹ Beth A. Rosenson, et al, *U.S. Senators' Support for Israel Examined through Sponsorship/Cosponsor Decisions, 1993-2002: The Influence of Elite and Constituent Factors*, FOREIGN POLICY ANALYSIS (2009), at 73, available at <http://onlinelibrary.wiley.com/doi/10.1111/j.1743-8594.2008.00084.x/pdf>.

⁶² *Id.* at 74.

⁶³ *Id.*

⁶⁴ *Id.*

Israeli-Palestinian Conflict.⁶⁵ Joseph Lieberman, then Democratic senator from Connecticut, introduced S.Res. 247 as an amendment to a House trade bill.⁶⁶ The resolution showcased support for Israel, but did not mention more controversial issues such as the status of the West Bank and East Jerusalem, or then-Palestinian Leader Yasser Arafat's links to terrorist networks.⁶⁷ That same year, Representative Tom DeLay, a Republican from Texas, introduced a similar House resolution, H.Res. 392, which also lent American support to Israel.⁶⁸ However, H.Res. 392 was decidedly more forceful in that it directly condemned leaders of the Palestinian Liberation Organization (PLO) and endorsed Israeli military retaliation against any PLO attacks.⁶⁹ Although the White House, fearing a disruption in the already shaky peace negotiations, initially discouraged either legislator from pushing forward with the resolutions, it later expressed that it preferred the Senate resolution as the "safer" option.⁷⁰

While the history of the Israeli-Palestinian conflict is lengthy and complicated, one theme emerges: an unwavering support for the state of Israel by the government and everyday citizens of the United States. This support is evidenced today by the passing of several types of legislation, some more legitimate than others, that seek to bolster the special bond shared between the United States and Israel.

PART II: THE UNITED STATES-ISRAEL ENHANCED SECURITY COOPERATION ACT OF 2012 AND SECTION 214(d) OF THE FOREIGN RELATIONS AUTHORIZATION ACT, FISCAL YEAR 2003

While at first glance the Enhanced Security Cooperation Act and the Foreign Relations Authorization Act could not seem any more different, they share one critical similarity: both acts

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Rosenson at 74. *Supra* Note 61.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

address or at the very least reflect the strength of the special bond between the United States and Israel and the policies that illustrate this bond. However, the similarities end there. Upon closer examination, the Enhanced Security Cooperation Act reads more like a policy statement than a true legislative act. It includes no consequences if its provisions are violated, nor does it make any mention of how its provisions are to be enforced. Meanwhile, the Foreign Relations Authorization Act is more legitimate legislation. It lists the ways in which its provisions are to be enforced, and serious legal ramifications can arise if those provisions are violated. Indeed, such ramifications have arisen as a result of the *Zivotofsky ex rel. Zivotofsky v. Clinton* case.⁷¹

a. The Enhanced Security Cooperation Act

The Enhanced Security Cooperation Act is the latest in a long history of enacted legislation meant to deepen diplomatic, military, and security ties between the United States and Israel. Signed into law by President Obama on July 27, 2012, the law expands and enhances cooperation with Israel on a range of security issues, most notably military, intelligence, and technology. The Act was passed almost unanimously when first introduced in the House.⁷²

The stated goal of the Enhanced Security Cooperation Act is to protect Israelis “against the rockets, against the bombs, against the missiles that their enemies stockpile while making well-publicized threats every day against the Jewish state.”⁷³ The Act purportedly achieves this goal by increasing security relations between the United States and Israel.⁷⁴ While such relations between the U.S. and Israel are arguably the strongest of any two nations in the world, the Enhanced Security Cooperation Act calls for increased security cooperation and expanded joint

⁷¹ See *infra*, *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012).

⁷² 158 Cong. Rec. H4884-01 (2012) at 7.

⁷³ *Id.* at 5.

⁷⁴ *Id.*

military exercises.⁷⁵ It also stipulates that Israel be provided the support it needs to enhance joint missile defense systems, particularly those systems that defend against “the urgent threat” to Israel and US forces in the region.⁷⁶ While the Act does not define this “urgent threat,” other language in the Act implies that the threat refers to Iran and its suspected nuclear plans.⁷⁷ This threat may also refer to the actions of Hezbollah and Hamas, groups that have been funded and assisted by Iran and Syria, respectively. The Act states that in recent years, Hezbollah and Hamas have been able to increase their stockpile of rockets thanks to Iranian and Syrian funding.⁷⁸ As a result, the number of rockets now ready to be fired at Israel totals more than 60,000.⁷⁹

b. The Foreign Relations Authorization Act

Unlike the Enhanced Security Cooperation Act, the Foreign Relations Authorization Act, Fiscal Year 2003 is a piece of real legislation with real consequences; that is, legislation whose provisions have been taken very seriously by the US government.⁸⁰ Disagreement over one of its provisions has resulted in “a constitutional tug-of-war in which all three branches of the U.S. government are forced to debate their proper role in the dispute.”⁸¹ The controversy pertains to the contradicting policies of the State department and Congress, and the United States Supreme Court recently decided to weigh in on the issue.

Section 214(d) of the Foreign Relations Authorization Act states as follows:

⁷⁵ Enhanced Sec. Coopn. Act, Pub. L. No. 112-150, § 4(1), 126 Stat. 1146.

⁷⁶ Enhanced Sec. Coopn. Act, Pub. L. No. 112-150, § 4(2), 126 Stat. 1146.

⁷⁷ See Enhanced Sec. Coopn. Act, Pub. L. No. 112-150, § 2(5), 126 Stat. 1146: “A nuclear-weapons capable Iran would fundamentally threaten vital United States interests, encourage regional nuclear proliferation, further empower Iran, the world’s leading state sponsor of terror, and *pose a serious and destabilizing threat to Israel and the region*” (emphasis added). See also §2(6), which states in part, “Iran continues to add to its arsenal of ballistic missiles and cruise missiles, which threaten...Israel.” *Id.* at § 2(6).

⁷⁸ Enhanced Sec. Coopn. Act, Pub. L. No. 112-150, § 2(6), 126 Stat. 1146.

⁷⁹ *Id.*

⁸⁰ See generally, Zivotofsky ex rel. Zivotofsky v. Clinton, 132 S. Ct. 1421 (2012).

⁸¹ 7 DUKE J. CONST. L. & PUB. POL’Y SIDEBAR, *supra* Note 5, at 61.

RECORD OF PLACE OF BIRTH AS ISRAEL FOR PASSPORT PURPOSES. – 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 [of State] shall, upon the request of the citizen or the citizen’s legal guardian, record the place of birth as Israel.⁸²

This provision comes in direct conflict with the Executive branch’s long-established policy of leaving the issue of sovereignty over Jerusalem to be settled by the Israelis and Palestinians during peace negotiations.⁸³

As the Foreign Relations Authorization Act oversees US foreign diplomatic relations with many countries, including Israel, its purpose, at least in part, is to reaffirm the United States’ and Israel’s special relationship; while this goal is very similar to that of the Enhanced Security Cooperation Act, the Foreign Relations Authorization Act differs in that legal consequences have resulted from violation of its provisions.⁸⁴ In addition, the Foreign Relations Authorization Act’s purpose regarding Israel is particularized: it confirms Congressional support for Israel by recognizing Israel’s right to name Jerusalem as its capital.⁸⁵ For instance, Section 214(a) states:

CONGRESSIONAL STATEMENT OF POLICY. – The Congress maintains its commitment to relocating the United States Embassy in Israel to Jerusalem and urges the President, pursuant to the Jerusalem Embassy Act of 1995..., to immediately begin the process of relocating the United States Embassy in Israel to Jerusalem.⁸⁶

⁸² Foreign Relations Authn. Act, Pub. L. No. 107-228, § 214(d), 116 Stat. 1350.

⁸³ 7 DUKE J. CONST. L. & PUB. POL’Y SIDEBAR *supra* Note 5, at 62.

⁸⁴ Foreign Relations Authn. Act, Pub. L. No. 107-228, § 214(a), 116 Stat. 1350.

⁸⁵ 148 Cong. Rec. H6649-01.

⁸⁶ Foreign Relations Authn. Act, Pub. L. No. 107-228, § 214(a), 116 Stat. 1350. Today, the US embassy in Israel remains in Tel Aviv. While presumably § 214(a) also contradicts Executive policy as it presumes the capital of Israel to be Jerusalem, it has not yet been challenged in federal court and thus is outside the scope of this Note.

Although these two pieces of legislation are similar in that they address the same overarching issues, Part III will reveal that they could not be more different. While the Enhanced Security Cooperation Act outlines no legal consequences if its provisions are violated, the Foreign Relations Authorization Act does outline such consequences. As a result, the Enhanced Security Cooperation Act is no more than a statement regarding U.S. policies towards Israel, but the Foreign Relations Authorization Act is legitimate legislation with legal ramifications over which the United States Supreme Court has argued.

PART III: WHILE THE ENHANCED SECURITY COOPERATION ACT IS MERELY A POLICY STATEMENT, THE FOREIGN RELATIONS AUTHORIZATION ACT IS REAL LEGISLATION WITH REAL CONSEQUENCES

A thorough reading of both the Enhanced Security Cooperation Act and the Foreign Relations Authorization Act reveals that the Enhanced Security Cooperation Act is not actual legislation but rather is simply a policy statement regarding the US-Israeli relationship. In contrast, the Foreign Relations Authorization Act is a law that poses severe consequences if its provisions are violated, or, as discussed *infra*, if the courts find that its provisions violate the separation of powers doctrine.⁸⁷

a. The Enhanced Security Cooperation Act is an example of puff legislation because there are no legal ramifications if its provisions are violated

Upon closer examination, the Enhanced Security Cooperation Act does not seem to carry any real weight. Analyzing each section of the Act individually reveals that the Act neither imposes nor even alludes to any consequences for violating or failing to implement its provisions.⁸⁸ Section 2, titled “Findings,” gives a general description of the “special relationship”

⁸⁷ See generally, *Zivotofsky*, 132 S. Ct. 1421 (2012).

⁸⁸ See generally, Enhanced Sec. Coopn. Act, Pub. L. No. 112-150, 126 Stat. 1146.

between the United States and Israel.⁸⁹ In fact, Section 2(1) begins by stating that the United States has in the past “repeatedly reaffirmed the special bond” between the two countries.⁹⁰ It then stipulates that this bond is founded upon “shared values and shared interests.”⁹¹ The remainder of the section describes the dangerous state of Middle East affairs today.⁹² It notes Iran’s continued failure to cease its pursuance of a nuclear plan, and the threat that Iran and groups like Hezbollah and Hamas pose to the already shaky peace in the region.⁹³ The only aspect of the section pertaining to actual lawmaking states the date upon which authority to provide Israel with loan guarantees, pursuant to the Emergency Wartime Supplemental Appropriations Act, 2003, will expire.⁹⁴

The next section of the Act by title alone illustrates that no clear legal ramifications are present.⁹⁵ Section 3 of the Act, titled “Statement of Policy,” is just that: a blanket statement of US policy towards Israel.⁹⁶ It begins by reiterating the claim made by President Obama when he first signed the bill into law that the American commitment to Israeli security is unshakeable.⁹⁷ It then reiterates President George W. Bush’s statement, made when he appeared before the Israeli Knesset in 2008 for the 60th anniversary of the founding of Israel: “The alliance between our governments is unbreakable, yet the source of our friendship runs deeper than any treaty.”⁹⁸

⁸⁹ See generally, Enhanced Sec. Coopn. Act, Pub. L. No. 112-150, § 2, 126 Stat. 1146.

⁹⁰ *Id.* at § 2(1)

⁹¹ *Id.*

⁹² *Id.* at § 2(2). (“The Middle East is undergoing rapid change, bringing with it hope for an expansion of democracy but also great challenges to the national security of the United States and our allies in the region, particularly to our most important ally in the region, Israel.”).

⁹³ *Id.* § 2(2)-(5).

⁹⁴ Enhanced Sec. Coopn. Act, Pub. L. No. 112-150, § 2(6), 126 Stat. 1146.

⁹⁵ *Id.* § 3

⁹⁶ *Id.*

⁹⁷ *Id.* § 3(1)

⁹⁸ *Id.*

Section 4 is perhaps most illustrative of the Act's seeming lack of authority, as it states the sense of Congress regarding the issue of US-Israeli security relations.⁹⁹ The section puts forth several goals that the US government *should* accomplish in protecting Israel.¹⁰⁰ The section offers several lofty suggestions, but gives no real details or specifics. For instance, it encourages the government to "seek to enhance" capabilities to address threats to security.¹⁰¹ It also suggests an examination of ways to increase efforts to prevent weapons smuggling in disputed territories such as the Gaza Strip.¹⁰² Another vague provision asks the government to "work to encourage an expanded role for Israel with...NATO, including an enhanced presence at NATO headquarters."¹⁰³ Finally, it addresses expansion of the United States' already-strong intelligence cooperation with Israel, but makes no suggestions as to how this expansion should be pursued.¹⁰⁴

Section 5 is the only section that refers to prior legislation, and even then it merely provides extensions for Congress' right to authorize war reserves stockpiles and loan guarantees to Israel.¹⁰⁵ The sixth section requires reports on Israel's qualitative military edge, to be submitted by the President to the Committee on Foreign Relations in the Senate and the Committee on Foreign Affairs in the House of Representatives,¹⁰⁶ but does not specify any repercussions whatsoever if those reports are not received or do not contain the information requested.¹⁰⁷ The final section merely offers definitions of key terms used throughout the Act.¹⁰⁸

⁹⁹ *Id.* § 4

¹⁰⁰ Enhanced Sec. Coopn. Act, Pub. L. No. 112-150, § 4, 126 Stat. 1146.

¹⁰¹ *Id.* at § 4(1)

¹⁰² *Id.* at § 4(6)

¹⁰³ *Id.* at § 4(8)

¹⁰⁴ *Id.* at § 4(9)

¹⁰⁵ Enhanced Sec. Coopn. Act, Pub. L. No. 112-150, § 5, 126 Stat. 1146. The provision was initially put in as an amendment to the bill when it was being deliberated on in the Senate.

¹⁰⁶ *Id.* at § 6

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at § 7. The terms defined in this section include the terms "appropriate congressional committees" and "qualitative military edge," which is discussed in the text. The appropriate corresponding Senate committees that

Therefore, it is clear upon a close examination of its individual provisions that the Enhanced Security Cooperation Act holds no real force as a heavyweight piece of legislation, but is merely a policy statement, thinly veiled as legislation, reporting on Congress' opinion regarding US-Israeli security relations. In fact, the President's decision to sign the bill into law implies that it was merely a political ploy to "shore up support" among Israel supporters just days before Republican candidate Mitt Romney's trip to Israel.¹⁰⁹ One author went so far as to say that the President's signing "was a not-so-subtle attempt to pre-empt his opponent's trip."¹¹⁰

However, while the Enhanced Security Cooperation Act arguably is a piece of "puff legislation," as it has no effective force if its provisions are not implemented, it is nonetheless illustrative of the "special bond" between the United States and Israel.¹¹¹ In fact, it may be even *more* illustrative of this special relationship than other pieces of legislation with greater force, simply by the fact that it demonstrates Congress's willingness to put forth "pseudo" legislation in its continuing efforts to support Israel even at high costs. This willingness in turn ensures that regardless of the constant volatility of the Middle East and its ever-changing landscape in the wake of large scale, violent, sometimes anti-American protest, Israel will forever retain its status as the closest ally of the United States.¹¹²

oversee the Enhanced Strategic Cooperation Act are the Committee on Armed Services, the Committee on Foreign Relations, and the Select Committee on Intelligence. *Id.* § 7(1)(A). The corresponding House committees are the Committee on Appropriations, the Committee on Armed Services, the Committee on Foreign Affairs, and the Permanent Select Committee on Intelligence. *Id.* § 7(1)(B).

¹⁰⁹ Carol E. Lee, *Obama Signs U.S.-Israel Security Bill Ahead of Romney Visit*, WALL ST. J. BLOG (July 27, 2012, 1:08 PM), <http://blogs.wsj.com/washwire/2012/07/27/obama-signs-u-s-israel-security-bill-ahead-of-romney-visit/>.

¹¹⁰ *Id.*

¹¹¹ Enhanced Sec. Coopn. Act, Pub. L. No. 112-150, § 2(1), 126 Stat. 1146.

¹¹² This willingness to continue supporting Israel undoubtedly also directly corresponds to a wish to maintain the special bond the United States and Israel share, as US commitment to Israel is due to "the the fact that Israel is a democracy that shares virtually all of the same values as the United States." RILEY AND HOLLIHAN, *supra* note 4, at 65.

b. The Foreign Relations Authorization Act is a Legitimate Piece of Legislation, as it Includes Serious Legal Repercussions if its Provisions are Violated

When President George W. Bush signed the Foreign Relations Authorization Act into law, he stated that Section 214(d) “impermissibly interferes with the President’s constitutional authority to conduct the Nation’s foreign affairs and to supervise the unitary executive branch. Moreover, the purported direction in Section 214 would, if construed as mandatory rather than advisory, impermissibly interfere with the President’s constitutional authority to formulate the official position of the United States, to speak for the Nation in international affairs, and to determine the terms on which recognition is given to foreign states.”¹¹³ He concluded that US policy with regards to Jerusalem had not changed.¹¹⁴

As the following subsections will show, the *Zivotofsky* case demonstrates that the Foreign Relations Authorization Act is certainly not an example of “puff” legislation, as the constitutionality of its provisions were deliberated upon by the United States Supreme Court. The tension between all three branches of government caused by the Act and *Zivotofsky* points to the fact that the Foreign Relations Authorization Act is a legitimate piece of legislation that has definite legal ramifications if its provisions are not upheld.

c. § 214(d) and *Zivotofsky*

The federal courts debated the conflict presented by § 214(d), and it eventually landed in front of the United States Supreme Court.¹¹⁵ Plaintiff Menachem Binyamin Zivotofsky was born shortly after President Bush signed the Foreign Relations Authorization Act into law.¹¹⁶ Born in Jerusalem to American citizens (and thus an American citizen himself), when his mother visited

¹¹³ Statement by President George W. Bush Upon Signing H.R. 1646, 2002 U.S.C.C.A.N. 931, 932 (Sept. 30, 2002).

¹¹⁴ *Id.*

¹¹⁵ See *Zivotofsky*, 132 S. Ct. 1421 (2012).

¹¹⁶ *Id.*

the US Embassy in Tel Aviv to apply for his passport, she requested that his place of birth be listed as “Jerusalem, Israel” as stated by § 214(d).¹¹⁷ The Embassy, presumably under authorization from the State Department, denied her request, instead listing the boy’s place of birth simply as “Jerusalem.”¹¹⁸

The United States District Court for the District of Columbia dismissed the claim for want of an injury in fact, since Zivotofsky could still use his passport regardless of the way in which his place of birth was listed.¹¹⁹ The court found that finding in favor of the plaintiffs would force the court to rule on whether Jerusalem is part of Israel, a clear violation of the separation of powers doctrine as the right to recognize foreign sovereigns belongs exclusively to the Executive.¹²⁰ The United States Court of Appeals for the D.C. Circuit reversed, and found that § 214(d) gave Zivotofsky a statutory right to have “Israel” listed on his passport.¹²¹ The court remanded the case back to the district court for further findings and to rule on whether Section 214 is a mandatory or advisory provision.¹²² On remand, the district court again dismissed the case, this time for lack of subject matter jurisdiction, because the issue posed a political question, which is not justiciable.¹²³ The court of appeals affirmed the decision, and denied rehearing of the case *en banc*.¹²⁴ The Supreme Court granted certiorari and decided the case in March 2012.¹²⁵

¹¹⁷ Zivotofsky ex rel. Ari Z. v. Secretary of State, 444 F.3d 614, 615 (D.C. Cir. 2006).

¹¹⁸ *Id.* at 616.

¹¹⁹ 7 DUKE J. CONST. L. & PUB. POL’Y SIDEBAR 61, *supra* Note 5, at 63.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ 7 DUKE J. CONST. L. & PUB. POL’Y SIDEBAR 61, *supra* Note 5, at 64.

¹²⁵ *See Zivotofsky*, 132 S. Ct. 1421 (2012).

One reason for the case's constant movement through the federal courts is partly due to disagreement over the issue at hand.¹²⁶ The Supreme Court ultimately found that Zivotofsky was not asking the courts to rule Jerusalem as the capital of Israel, but rather whether § 214(d) was constitutional.¹²⁷ However, its final holding stated only that the case was justiciable and did not present a political question.¹²⁸ The Court declined to rule the case on the merits, but rather vacated the D.C. Circuit court's decision and remanded for further findings.¹²⁹

Judge Edwards, the Senior Circuit Judge for the D.C. Circuit Court, stated in his concurring opinion that § 214(d) does in fact infringe upon the Executive's exclusive recognition power in violation of the Constitution.¹³⁰ Additionally, he found that the language of § 214 is clearly mandatory, and not advisory as argued by the Secretary of State.¹³¹ As such, he concluded that § 214 violates the President's recognition power regarding the status of Jerusalem.¹³²

Judge Edwards then went on to explain the recognition power. As a foreign affairs power, nearly all of which are exclusive to the Executive, the recognition power is vested in the President alone.¹³³ The Executive's judgment would go unquestioned by the judiciary with

¹²⁶ *Id.* The procedural posture of the case by the time it reached the Supreme Court, described in the Majority opinion, attests to this fact.

¹²⁷ *Id.* at 1427.

¹²⁸ *Id.* at 1430. In his majority opinion, Chief Justice Roberts explained the Court's hesitancy to rule on the merits, stating, "Because the District Court and the D.C. Circuit believed that review was barred by the political question doctrine, we are without the benefit of thorough lower court opinions to guide our analysis of the merits. Ours is 'a court of final review and not first view.'" *Id.*, quoting *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103 (2001).

¹²⁹ *Id.* at 1431.

¹³⁰ *Zivotofsky v. Sec'y of State*, 571 F.3d 1227, 1240 (D.C. Cir. 2009).

¹³¹ *Id.* at 1243.

¹³² *Id.* at 1240.

¹³³ *Id.*, quoting *Baker v. Carr*, 369 U.S. 186, 212 (1962).

regard to disputed territory.¹³⁴ Judge Edwards concluded by stating that the recognition power “includes the power to determine the policy which is to govern the question of recognition.”¹³⁵

Judge Edwards’ final holding stated that Congress lacks the power to attack the Executive’s policy by enacting a conflicting one.¹³⁶ The US policy to save judgment on the status of Jerusalem until the Israelis and Palestinians come to an agreement – both claim Jerusalem to be their respective capital – must stand.¹³⁷ Judge Edwards stated, “[g]iven the mandatory terms of the statute, it can hardly be doubted that § 214(d) intrudes on the President’s recognition power. . . [and] effectively vitiates the Executive’s policy.”¹³⁸ The Supreme Court declined to review Zivotofsky’s case on the merits because it strives to maintain its position as a court of final, and not first, review.¹³⁹ However, Judge Edwards essentially reviewed the merits of the case, offering a hint of what may come when the case is finally settled.¹⁴⁰

d. *Zivotofsky* and the Political Question Doctrine

The court’s reasoning illustrates that there are legal consequences when a provision of the Foreign Relations Authorization Act is challenged or allegedly violated, which evidences that it is in fact a legitimate piece of legislation. The court’s reasoning also demonstrates a tension between the branches of the US government inherent in the separation of powers doctrine that results when sections of the Act are contested. In *Zivotofsky*, the courts below that dismissed the case did so by holding that their hearing the case would violate the separation of powers doctrine because the issue presented a non-justiciable political question. The political question doctrine,

¹³⁴ *Id.* at 1240.

¹³⁵ *Id.* at 1241, quoting *United States v. Pink*, 315 U.S. 203, 229 (1942).

¹³⁶ *Zivotofsky v. Sec’y of State*, 571 F.3d (D.C. Cir. 2009), *supra* Note 132, at 1241.

¹³⁷ *Id.*

¹³⁸ *Id.* at 1244.

¹³⁹ *Id.* at 1430.

¹⁴⁰ *Zivotofsky*, 132 S. Ct. 1421 at 1430.

promulgated through a six-factor test established in *Baker v. Carr*,¹⁴¹ allows courts to identify when the issue at bar constitutes a political question. The six factors include: (1) the constitutional power at issue is textually given to some other branch of government, either the legislature or the executive; (2) the issue illustrates a lack of judicially discoverable or manageable standards for resolving it; (3) it is impossible for the Court to decide the case without an initial policy determination; (4) the Court cannot decide the case without disrespecting another branch; (5) there exists an unusual need for the Court to accept the decision of another branch; or (6) the Court's pronouncement would conflict with another political branch, causing embarrassment.¹⁴²

A finding of any or all of the above criteria could potentially allow a case to be dismissed as non-justiciable as a political question; in *Zivotofsky*, the first criterion was at issue.¹⁴³ After setting forth the political question test, the *Baker* Court added a caveat by distinguishing cases that present a political question from cases that were merely political in nature.¹⁴⁴ While cases that embody a political nature could be heard by the courts, cases that entail a political question are dismissed because resolving the issue by judicial means is impossible.¹⁴⁵ However, the Court was free, "well equipped, and indeed designed" to interpret legislation passed by Congress and executive agreements carried out by the President.¹⁴⁶

The Court, in apparent lockstep with this distinction, found that *Zivotofsky* did not present a political question, although the case does have political consequences. The Court, as stated previously, found that the issue at bar was not that the courts were being asked to dictate foreign

¹⁴¹ *Baker*, 369 U.S. at 217.

¹⁴² *Id.*

¹⁴³ *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. at 1424.

¹⁴⁴ 7 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 61, *supra* Note 5, at 64.

¹⁴⁵ *Id.* at 65.

¹⁴⁶ *Japan Whaling Ass'n v. American Cetacean Society*, 478 U.S. 221, 230 (1986).

policy by deciding whether or not Jerusalem is the capital of Israel, but instead were merely being asked to determine the constitutionality of the Foreign Relations Authorization Act § 214(d) mandate that, in direct opposition to State department policy, Israel was to be listed as the place of birth on the passports of American citizens born in Jerusalem.¹⁴⁷ The Court ultimately found that this issue, while certainly political in nature, does not present a political question.¹⁴⁸ In fact, in his Majority opinion Chief Justice John Roberts stated that to resolve Zivotofsky's claim requesting judicial enforcement of a specific statutory right, it was up to the Court to decide (1) whether Zivotofsky correctly interpreted the statute, and (2) whether the statute is constitutional.¹⁴⁹ The Chief Justice expressed that making such findings is a familiar judicial exercise.¹⁵⁰ The Chief Justice further stated that when congressional legislation is challenged on the ground that it conflicts with the Constitution, "[I]t is emphatically the province and duty of the judicial department to say what the law is."¹⁵¹ The Court found that this duty of the Judiciary may pertain to resolving litigation that challenges the constitutional authority of one of the three branches.¹⁵² However, courts cannot refuse to hear or dismiss such cases on the basis that the issues involved have political implications.¹⁵³

Justice Breyer took a different view of the issue in *Zivotofsky*.¹⁵⁴ In his dissent, the Justice described the Judiciary's general hesitancy to decide cases that fall so squarely within the Executive's exclusive power to reign over foreign relations.¹⁵⁵ When the issue at bar involves foreign affairs, it is of the utmost importance that the United States speak "with one voice and

¹⁴⁷ *Zivotofsky*, 132 S. Ct. at 1426.

¹⁴⁸ *Id.* at 1427.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 1427-28, quoting *Marbury v. Madison*, 5 U.S. 137 (1803).

¹⁵² *Id.* at 1428, quoting *INS v. Chadha*, 462 U.S. 919 (1983).

¹⁵³ *Zivotofsky*, 132 S. Ct. at 1428.

¹⁵⁴ *Id.* at 1437.

¹⁵⁵ *Id.*

ac[t] as one.”¹⁵⁶ Justice Breyer felt that if courts were forced to answer questions of conflict between the branches and the Constitution similar to the one presented in *Zivotofsky*, they risked forcing themselves “to evaluate the foreign policy implications of foreign policy decisions.”¹⁵⁷ In addition, Justice Breyer recognized that the scope of the Executive’s power regarding foreign relations is so expansive that the President enjoys “a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.”¹⁵⁸ Justice Breyer concluded by stating that several of the six factors put forth in the *Baker* political question test applied, including the fact that there was serious risk that a judicial resolution would be embarrassing, would demonstrate judicial disrespect for the other branches, and had the potential to disrupt decision-making with regards to foreign policy.¹⁵⁹

e. *Zivotofsky* Evidences that the Foreign Relations Authorization Act, unlike the Enhanced Security Cooperation Act, is Legitimate Legislation

Justice Breyer’s dissent further illustrates the legal ramifications that have occurred in response to the State department’s alleged violation of Section 214 of the Foreign Relations Authorization Act. The repercussions are threefold, having been felt in every branch of government.¹⁶⁰ First, Section 214 presents a clear disconnect between the Executive, via the State department’s policies, and the desires of Congress, via its passing the Act. In addition, the Judiciary has been heavily involved in the dispute, as it has been challenged throughout the federal judicial hierarchy.¹⁶¹ While the fact that the policies and goals of the Executive and Legislative branches are in direct conflict on this issue, the role of the courts has been far less

¹⁵⁶ *Id.* at 1438, quoting *Pink*, 315 U.S. at 242.

¹⁵⁷ *Id.* at 1438.

¹⁵⁸ *Id.*, quoting *Clinton v. City of New York*, 524 U.S. 417 (1998).

¹⁵⁹ *Id.*

¹⁶⁰ 7 DUKE J. CONST. L. & PUB. POL’Y SIDEBAR, *supra* Note 5, at 61.

¹⁶¹ *Id.* at 63.

clear, as can be seen by *Zivotofsky's* turbulent and tumultuous procedural history.¹⁶² Even the Supreme Court justices are at odds over the way in which to treat the issue.¹⁶³ Moreover, although the Supreme Court did hold that *Zivotofsky's* claim was justiciable, it has yet to be heard on the merits, as a result of the Supreme Court's status as "a court of final review and not first view."¹⁶⁴ As such, there is still no final, authoritative decision determining whether or not Section 214 is constitutional.¹⁶⁵

Regardless of how the courts decide the fate of Section 214, more legal ramifications are still to come. If, for instance, the courts find in favor of *Zivotofsky* and allow his passport to list "Jerusalem, Israel" as his place of birth, some kind of response from the Executive branch can certainly be expected, especially if at the time of the decision peace negotiations are still at a stalemate and the volatility that now characterizes the region continues.¹⁶⁶ On the other hand, if the courts rule in favor of the Executive, it may be presumed that Congress, in furtherance of its purpose to affirm its commitment to Israel, will respond to the decision by passing new legislation.¹⁶⁷

The *Zivotofsky* case pointedly illustrates the legal ramifications that result if the provisions of the Foreign Relations Authorization Act are violated or even contested. The fact that the Supreme Court found that the Act implicated the separation of powers and political question doctrines attests to the legitimacy of the Act as a piece of true legislation. In contrast, no such legitimacy is found in any of the provisions of the Enhanced Security Cooperation Act. While the Act is certainly much newer, the previous sections of this Note demonstrate that a case

¹⁶² See generally, *Zivotofsky*, 132 S. Ct. 1421.

¹⁶³ *Id.* at 1441.

¹⁶⁴ *Id.* at 1430, quoting *Adarand Constructors, Inc.*, 534 U.S. at 110 (2001).

¹⁶⁵ *Id.* at 1431.

¹⁶⁶ Enhanced Sec. Coopn. Act, Pub. L. No. 112-150, § 2(1), 126 Stat. 1146.

¹⁶⁷ Foreign Relations Authn. Act, Pub. L. No. 107-228, § 214(a), 116 Stat. 1350.

like *Zivotofsky* is extremely unlikely to emerge as a result of the passing of the Enhanced Security Cooperation Act. Moreover, as tensions in the Middle East continue to mount, one expects similar “puff” legislation to become more common.

PART IV: CONCLUSION

The issues presented in *Zivotofsky* clearly illustrate the ramifications that can arise when certain provisions of the Foreign Relations Authorization Act are not implemented or come into direct conflict with Executive policy. Section 214 implicates a rare separation of powers issue that affects all three branches of the US government.¹⁶⁸ This trait is in stark contrast to the provisions found in the Enhanced Security Cooperation Act of 2012.¹⁶⁹ The differences between these two pieces of legislation demonstrate that while the Foreign Relations Authorization Act is a law whose repercussions extend to every political branch of the US government, the Enhanced Security Cooperation Act enjoys no such position.¹⁷⁰

However, despite its veil of legitimacy (a veil which can only be described as gossamer-thin), it can be argued that the Enhanced Security Cooperation Act does nevertheless serve some purpose. It demonstrates, both expressly through its wording and impliedly through its legislative history, that the United States’ commitment to Israel and the “special bond” between the two countries is so unwavering, to the point of being nearly unconditional, that is willing to enact both actual legislation (like the Foreign Relations Authorization Act) and pseudo legislation (like the Enhanced Security Cooperation Act) alike to reaffirm its loyalty to the Israeli cause.¹⁷¹ The relationship between the United States and Israel is a model of cooperation that is so

¹⁶⁸ *Id.* at §§ 214(a),(d).

¹⁶⁹ *See generally*, Enhanced Sec. Coopn. Act, Pub. L. No. 112-150, 126 Stat. 1146.

¹⁷⁰ 7 Duke J. Const. L. & Pub. Pol’y Sidebar, *supra* Note 5, at 61.

¹⁷¹ *Id.* at § 2(1).

comprehensive, and so overreaching, that it is not found between any other countries of the world. Such willingness is the product of sixty years of mutual support and underlying mutual respect. Indeed, it has been posited that “Israel has become part of the American story, resting on a foundation of shared values orchestrated by powerful advocates operating in very friendly circumstances.”¹⁷² Although as of late some have questioned the veracity of the US-Israeli relationship, it is undeniable that its legacy as a defining aspect of American history, and American foreign policy, will never be forgotten.

¹⁷² Aaron David Miller, *The US-Israeli Relationship: Special but Not Exclusive*, HARVARD INTERNATIONAL REVIEW, Sept. 28, 2008, available at <http://hir.harvard.edu/climate-change/the-us-israeli-relationship>.