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“Scarcely any question arises in the United States which does not become, sooner or later, a subject of judicial debate . . . .”
Alexis de Tocqueville, Democracy in America

I. INTRODUCTION

Christians, Muslims, and Jews comprise about fifty-four percent of the world’s population. Each religion has a common root in Abraham, and each religion regards Jerusalem as a holy site. Jerusalem is a city of Jewish, Muslim, and Christian
residents, but is politically controlled by Israel, claimed in part by Jordan and the nascent state of Palestine, and treated by the United Nations as an international city. Given the diplomatic and geopolitical implications of the conflict between Israel and Palestine and the passion that conflict arouses in Americans of all political and religious affiliations, it is no surprise that American courts should be asked to decide the status of Jerusalem, at least as far as the United States may be concerned. M.B.Z. v. Clinton is the vehicle by which the Supreme Court must decide which branch of the federal government has the responsibility and authority to do so.6

Ever since the modern state of Israel was created, American official policy has been "to take no side in the contentious debate over whether Jerusalem is part of Israel."7 To that end, the United States Department of State has maintained a policy of noting "Jerusalem" as the place of birth of a United States citizen born in Jerusalem.8 Usually, American citizens would have the country of birth noted on their passport;9 thus, an American born in Beirut would have "Lebanon" noted as the place of birth and an American born in Haifa would have "Israel" noted as the place of birth.

Congress sought to disturb this arrangement when it passed

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8. Id.

9. Id.
the Foreign Relations Authorizations Act, Fiscal Year 2003.\textsuperscript{10} Section 214 of the Act contains three provisions—only one of which is at issue in \textit{M.B.Z.}\textsuperscript{11} Section 214(a) is a hortatory admonition to the President to move the American embassy in Israel to Jerusalem.\textsuperscript{12} Section 214(b) forbids appropriated funds to be used to operate any “diplomatic facility” of the United States in Jerusalem unless it is “under the supervision of the United States Ambassador to Israel.”\textsuperscript{13} Section 214(c) bars the use of appropriated funds to publish “any official government document which lists countries and their capital cities unless the publication identifies Jerusalem as the capital of Israel.”\textsuperscript{14} Those provisions lurk in the background, but only \textsection 214(d) is at issue in \textit{M.B.Z.}:

\begin{quote}
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.\textsuperscript{15}
\end{quote}

When President George W. Bush signed the Act into law, he insisted that American policy regarding Jerusalem has not changed and backed that statement by his declaration that \textsection 214 was entirely advisory, because a mandate to the President to act in the manner prescribed by \textsection 214 would “impermissibly interfere with the President’s constitutional authority to formulate the position of the United States, speak for the Nation in international affairs, and determine the terms on which recognition is given to foreign states.”\textsuperscript{16}

\begin{flushleft}
\textsuperscript{11} See id. \textsection 214.
\textsuperscript{12} See id. \textsection 214(a).
\textsuperscript{13} See id. \textsection 214(b).
\textsuperscript{14} See id. \textsection 214(c).
\textsuperscript{15} See id. \textsection 214(d).
Later in 2002, Menachem Zivotofsky was born in Jerusalem to parents who are American citizens. Under United States law, young Zivotofsky is automatically an American citizen. Although Menachem's mother requested a passport for her son listing Israel as the place of birth, the State Department refused to do so and issued a passport listing Jerusalem as the place of birth. The parents then brought suit in federal court, seeking an injunction to require the State Department to comply with §214(d). The district court dismissed the complaint for want of standing and because it raised a non-justiciable political question. The D.C. Circuit reversed on the standing point and remanded for a determination of whether §214(d) is mandatory or advisory and to evaluate the implications of the plaintiffs' claim. On remand, the district court dismissed the complaint for want of a justiciable issue, and the D.C. Circuit affirmed.

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that ruling on appeal. Judge Harry Edwards concurred in the judgment on the grounds that although the issue was justiciable, Congress has no constitutional authority to direct the President to recognize Jerusalem as part of Israel. A petition for rehearing en banc was denied. Judge Edwards appended a statement in which he again expressed his view that the issue is justiciable. The Supreme Court granted certiorari, directing the parties to address both the question presented and also "[w]hether section 214 of the Foreign Relations Authorization Act, Fiscal Year 2003, impermissibly infringes the President's power to recognize foreign sovereigns."  

II. MAY THE COURT DECIDE?

Some years ago, Louis Henkin asked whether there really was a political question doctrine. He thought the doctrine was chimerical: the cases in which the Court supposedly created the political question doctrine actually involved only "the Court refus[ing] to invalidate the challenged actions because they were within the constitutional authority of President or Congress." In other words, a ruling that an issue was a non-justiciable political question was actually a determination on the merits that the challenged action was valid. Despite Professor Henkin's opinion, the Court says it has a political question doctrine, and thousands of law students have absorbed the six criteria that the Court articulated in Baker v. Carr. It is well

24. Zivotofsky IV, 571 F.3d at 1227.
25. Id. at 1233–45 (Edwards, J., concurring).
27. Id. at 84–89 (statement of Edwards, J.).
28. Id. at 84.
30. Id. at 601.
31. See id.
32. See 369 U.S. 186, 217 (1962). "Prominent on the surface of any case held to involve a political question is found 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
settled that the President’s power to “receive Ambassadors and other public Ministers”33 confers upon the President the exclusive power to extend or withdraw political recognition of a foreign sovereign.34 The D.C. Circuit concluded that this power was “a textually demonstrable constitutional commitment of the issue to a coordinate political department.”35 Of course, that required the court of appeals to formulate the issue as “whether the State Department can lawfully refuse to record [M.B.Z.’s] place of birth as Israel in the face of a statute that directs it to do so,” not whether the statute is constitutionally valid.36 But are the two questions distinctly different queries?

To determine whether the text of the Constitution demonstrably commits resolution of the issue to a political branch of government, the Court must first interpret the relevant constitutional text.37 There can be little doubt that Article II

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.

33. U.S. Const. art. II, § 3.

34. See Goldwater v. Carter, 444 U.S. 996, 1007 (1979) (Brennan, J., dissenting); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 410 (1964); Baker, 369 U.S. at 212 ("[T]he judiciary ordinarily follows the executive as to which nation has sovereignty over disputed territory."); Williams v. Suffolk Ins. Co., 38 U.S. 415, 420 (1839) ("[C]an there be any doubt, that when the executive branch of the government, which is charged with our foreign relations, shall in its correspondence with a foreign nation assume a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department? And in this view it is not material to inquire, nor is it the province of the Court to determine, whether the executive be right or wrong. It is enough to know, that in the exercise of his constitutional functions, he has decided the question."); Foster v. Neilson, 27 U.S. 253, 307 (1829) ("In a controversy . . . concerning national boundary, . . . [t]he judiciary is not that department of the government, to which the assertion of its interests against foreign powers is confided.").


36. Zivotofsky IV, 571 F.3d at 1230.

37. See, e.g., id. at 1232 ("We must always begin by interpreting the constitutional text in question and determining whether and to what extent the
commits reception of foreign ambassadors to the exclusive
discretion of the President.38 Prior courts interpreting that
provision—for simplicity, the recognition power—have held that
the recognition power includes the question of acknowledging or
withholding recognition of territory as under the sovereignty of
some foreign power, especially when there is an international
dispute on that point.39 The only remaining interpretational
issue is whether § 214(d)—a statutory command to treat
Jerusalem as part of Israel for purposes of passport issuance—
involves the recognition power. Issuance of a passport is a
government’s official declaration of the citizenship of the
passport holder, and the information contained in that document
is an assertion of fact by the issuing government.40 Thus, a
statement that Israel is the place of birth of a passport holder
born in Jerusalem is a governmental declaration about which
nation has sovereignty of Jerusalem.41 Even if that statement is
only one of policy—either it is American policy to regard
Jerusalem as a de facto part of Israel or it is national policy to
refrain from making any assertion about the status of
Jerusalem—“[o]bjections to the underlying policy as well as
objections to recognition [of foreign governments] are to be
addressed to the political department and not to the courts.”42
Zivotofsky claims that the political department has
addressed the issue, by enacting § 214(d), and thus the issue is
justiciable.43 But this argument leaps too many hurdles in one
bound. The entire point of the political question doctrine is to

38. Zivotofsky IV, 571 F.3d at 1231.
39. See Williams, 38 U.S. at 420 (holding that recognition power includes
the question of sovereignty of the Falkland Islands).
D’Arcy, 34 U.S. 692, 699 (1835)).
41. Cf. Haig, 453 U.S. at 292–93 (inferring that the government’s retention
of authority on the issuance of a passport and the decision where a passport
holder is from, in effect asserts which nation has sovereignty of the passport
holder).
granted sub nom. M.B.Z. ex rel. Zivotofsky v. Clinton, 563 U.S. ____,
preserve the Constitution’s separation of federal powers.\textsuperscript{44} The “textually demonstrable commitment” strand of the doctrine mandates that the courts defer to that political organ of government to which the Constitution has assigned the power and responsibility to decide the matter.\textsuperscript{45} Thus, in \textit{Nixon v. United States}, the Court interpreted the constitutional text in question (“[t]he Senate shall have the sole Power to try all Impeachments”\textsuperscript{46}) to confer an exclusive and non-justiciable power upon the Senate to decide upon the manner of impeachment trials.\textsuperscript{47} \textit{Nixon} requires the Court in \textit{M.B.Z.} first to interpret the constitutional provision—the recognition power.\textsuperscript{48} Because the recognition power has been previously determined to be an exclusive and discretionary power of the President to formulate policy concerning recognition of foreign governments and the scope of their sovereignty over disputed territory, the courts have no power to entertain claims to the contrary.\textsuperscript{49} By enacting a statute, Congress may attempt to dictate national

\textsuperscript{44} See, e.g., \textit{id.} at 85 (citing \textit{Powell v. McCormack}, 395 U.S. 486, 549 (1969) (“Our system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch.”)).

\textsuperscript{45} See \textit{Zivotofsky V}, 610 F.3d at 88 (citing \textit{Baker v. Carr}, 369 U.S. 186, 211 (1962) (“Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the constitution.”)).

\textsuperscript{46} U.S. CONST. art. I, § 3, cl. 6.

\textsuperscript{47} 506 U.S. 224, 243 (1993). Similarly, the Court in \textit{Powell} first interpreted the provision of Article I, Section 5, empowering each House of Congress to “be the judge of the . . . qualifications of its own members,” to determine the scope of the textual commitment to each House. The Court relied upon the qualifications clause of Article I, Section 2, which specifies the minimum qualifications for members of the House—age, citizenship, and residence—as limiting the scope of the non-justiciable power conferred on each House to judge the qualifications of its members. \textit{Powell}, 395 U.S. at 489, 521.


policy but recourse to the courts to enforce the statute is not an option.  

By this reasoning, the issue in M.B.Z. is a non-justiciable political question, but one must ask whether there is any substantive difference between a conclusion that § 214(d) is an unconstitutional invasion of the recognition power and a decision that the matter is not susceptible to judicial resolution. Courts are permitted to determine the scope of the recognition power, when a decision involves a recognition power question, because that is the predicate for a conclusion that any particular dispute is not justiciable. That seems identical to the question presented when Congress directs the President to use the recognition power in a specified manner: Did Congress exceed its constitutional authority?

There is, however, somewhat more elasticity to the political question doctrine than in decisions on the merits. Consider §214(b), which forbids appropriated funds to be used to operate any “diplomatic facility” of the United States in Jerusalem unless it is “under the supervision of the United States Ambassador to Israel.” Suppose that the President wishes to establish a diplomatic facility in Jerusalem, perhaps to provide visas and other consular services, under the auspices of the United Nations. A judicial conclusion that § 214(b) implicates the recognition power and is thus non-justiciable avoids deciding the thorny question of whether Congress may use its undeniable appropriations power to prevent the President from engaging in a particular form of non-recognition of the status of Jerusalem. If the issue is deemed justiciable, the courts have no choice but to decide the vexed question of a clash between Congress’s appropriation power and the President’s recognition power.

50. Zivotofsky III, 511 F. Supp. 2d at 102–03.
Invocation of the political question doctrine leaves this issue as a political struggle between Congress and the President. The President may find other funds to establish the diplomatic facility or he may simply ignore the appropriations limit. Congress may retaliate by embarrassing the President via hearings or, in extremis, impeachment.

Section 214(c) bars the use of appropriated funds to publish "any official government document which lists countries and their capital cities unless the publication identifies Jerusalem as the capital of Israel." This also poses a conflict between the appropriations power and the recognition power. Congress seeks to put the President to a hard choice: Ignore the political map of the world unless he is willing to proclaim Jerusalem as Israel's capital. Suppose the President ignores the edict. Once again, refusal to adjudicate a proper case that seeks to enforce § 214(c) avoids resolution of the intractable conflict between an exclusively congressional power and an exclusively presidential power.

In its "textual commitment" form, the political question doctrine leaves room for ordinary democratic politics to resolve issues that the Constitution, by design, has left to one or both of the political branches. At the dawn of American constitutional law, Chief Justice Marshall observed that "[t]he province of the court is . . . not to enquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court." But the limits of that notion can be seen in an old case, Jones v. United States.

The question arose whether United States courts could exercise jurisdiction over a person charged with murder on Navassa, a Caribbean island claimed by the United States and a foreign nation. The Court upheld jurisdiction because the President, with the blessing of Congress, had asserted that the

54. Id. § 214(c).
56. 137 U.S. 202, 212 (1890).
57. Id. at 203–04.
United States possessed sovereignty over the island. The Court noted: "Who is the sovereign, de jure or de facto, of a territory is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens and subjects of that government." In Jones, Congress and the President were in agreement that the United States possessed sovereignty over the disputed island, but what if Congress and the President were at odds? Suppose that despite a statute abjuring any American claim to Navassa, the President asserted sovereignty and federal prosecutors acted accordingly. Application of the political question doctrine would leave the courts with jurisdiction. But if Congress enacted a law expressly asserting American sovereignty over Navassa and the President disclaimed sovereignty, application of the political question doctrine would leave the courts without jurisdiction. That latter conclusion would effectively render the government powerless to prosecute crimes committed on the island, and thus would amount to a decision that the United States lacked sovereignty—precisely the issue the Court said it could not decide. If the Court had proceeded to decide the actual case on the merits it would no doubt have ruled that the recognition power gave the President exclusive authority to decide the issue. Jurisdiction would then depend on whichever position the President happened to take, but that is precisely what would happen under the political question doctrine.

A somewhat different problem occurred in Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp. Congress created the Civil Aeronautics Board, vested it with the responsibility to grant or deny permits for air carriers to provide service to or from foreign nations (subject to final approval of those decisions by the President), and provided for judicial review

58. Id. at 223.
59. Id. at 212.
60. Id. at 222–23.
61. Id. at 213.
62. Of course, a criminal prosecution would depend upon the existence of a valid federal statute covering the act in question. See, e.g., id. at 211.
63. 333 U.S. 103 (1948).
of all such orders. The President approved the Board’s denial of a permit to Waterman and grant of one to C&S. Waterman sought judicial review. The Court noted that it could not review the Board’s action prior to presidential action because this would be an advisory opinion barred by the “case or controversy” limit upon the federal judicial power. Nor could it review the President’s approval of the Board’s actions:

The President . . . has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts . . . should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit in camera in order to be taken into executive confidences. But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

Here is a conflict between Congress and the President. Congress sought to vest the courts with the power to review presidential decisions concerning foreign relations; the President (via the Civil Aeronautics Board) resisted such review. By declaring that the controversy was not justiciable the Court effectively sided with the President. Unlike Jones, however, the Court could not just as easily have said that the

64. Civil Aeronautics Act of 1938, ch. 601, §§ 402(a)–(g), 1006(a), 52 Stat. 973, 991–92, 1024 (1938).
66. Id.
67. Id. at 112–13.
68. Id. at 111.
69. Id. at 110.
70. Id. at 105.
President has exclusive control over air transportation routes in foreign commerce, for Section Eight of Article I plainly gives Congress power to regulate foreign commerce.\(^{71}\) It may or may not be the case that the President has final control over the award of air routes in foreign commerce, but the Court did not decide that question. By refusing to decide the issue, it left the matter for decision by Congress and the President. Congress could amend the statute to vest the Civil Aeronautics Board with final authority, or it could award the routes by ordinary legislation. If award of air routes in foreign commerce is truly a non-justiciability political question, the validity of those measures might also be beyond judicial ken. But if the President does have total control over such matters, these latter measures would require a decision on the merits that the President's constitutional authority has been usurped.

These possibilities illustrate the chameleon-like nature of the political question doctrine: A decision on the merits is unnecessary if the status quo is an acceptable constitutional solution, but if it is not acceptable, a decision on the merits may be necessary. That may explain the enigmatic concurrence of Justice Souter in Nixon: The Senate's use of a twelve-member committee to hear evidence in an impeachment trial of a federal judge was not justiciable because "[t]his occasion does not demand an answer," but "different and unusual circumstances"—such as the Senate acting "in a manner seriously threatening the integrity of its results, convicting, say, upon a coin-toss"—"might be so far beyond the scope of [the Senate's] constitutional authority . . . to merit a judicial response."\(^{72}\) But this understanding of the political question doctrine treats it as prudential—a matter of judicial discretion—rather than a constitutional imperative. Yet the "textually demonstrable commitment" prong of the doctrine strongly implies that the Constitution commits judicially unreviewable discretion over some issues to either the President or Congress.

So, in the end, Professor Henkin may have it about right. The political question doctrine is a mirage. It looks like a

\(^{71}\) U.S. Const. art. I, § 8.

constitutional rule, mandating courts to eschew decision of matters that the Constitution has committed to a political branch for decision, but it dissolves on closer inspection, leaving only the hardpan of a decision on the merits of the claim.

III. MAY CONGRESS DIRECT THE PRESIDENT TO RECOGNIZE JERUSALEM AS PART OF ISRAEL?

This question can be reduced to two syllogisms:

I. Major Premise: The recognition power is possessed exclusively by the President.\(^\text{73}\)
Minor Premise: Congress is not the President.
Conclusion: Congress does not possess the recognition power.

II. Major Premise: The recognition power includes the power to remain neutral as to the political status of territory claimed by two or more sovereigns.\(^\text{74}\)
Minor Premise: Jerusalem is claimed by Israel, Jordan, and as a "corpus separatum"—an international city under the control of the United Nations and independent of any nation state.
Conclusion: The recognition power includes the political status of Jerusalem.

Therefore, Congress may not direct the President to recognize Jerusalem as part of Israel. If this conclusion is incorrect it must be due to a defect in either of the syllogisms. Let us attend to the premises.

Justice Robert Jackson set forth in his concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer* a framework for analyzing the validity of unilateral exercise of executive power, a structure that contains "as much combination of analysis and common sense as there is in this area."\(^\text{75}\) Justice Jackson divided the instances of presidential power into three categories: a maximum power zone, a minimum power zone, and a twilight zone. "When the President acts pursuant to an express or

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\(^{75}\) Dames & Moore v. Regan, 453 U.S. 654, 661 (1981) (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring)).
implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." 76 By contrast:

When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject . . . . 77

The twilight zone is up for grabs:

When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law. 78

Section 214(d) falls into the minimum power zone. Congress has directed the President to list Israel as the birthplace of American citizens born in Jerusalem. 79 If the President has the power to ignore this directive it is because the issue of the status of Jerusalem, as indicated in an official government-issued document, is assigned by the Constitution exclusively to the President and the Congress is barred from acting upon the subject. 80 Ample precedent holds that this is indeed so. 81

76. Youngstown, 343 U.S. at 635 (majority opinion).
77. Id. at 637–38.
78. Id. at 637.
To the extent that the political question doctrine is a decision on the merits by another name, the political question cases provide the answer.

What government is to be regarded here as representative of a foreign sovereign state is a political rather than a judicial question, and is to be determined by the political department of the government. That authority is not limited to a determination of the government to be recognized. It includes the power to determine the policy which is to govern the question of recognition . . . .

Moreover, there is no "doubt, that when the executive branch of the government, which is charged with our foreign relations, shall in its correspondence with a foreign nation assume a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department."  

Zivotofsky argues that the political question doctrine is not applicable because Congress is a political branch and it has decided the issue by enactment of § 214(d). But this simply raises the question of whether Congress has any authority to enact the law (assuming that the issue is justiciable and that the political question issue is analytically distinct from the issue of congressional power). The practical problems attendant to permitting Congress any role in directing the President to treat disputed territory as under the sovereignty of one of the ordinarily follows the executive as to which nation has sovereignty over disputed territory . . . ." (citations omitted); see also Knox v. Palestine Liberation Org., 306 F. Supp. 2d 424, 440 (S.D.N.Y. 2004) ("[B]ecause comity is often a function of recognition, matters concerning who is recognized as the sovereign or government of a particular territory, and whether and to what extent comity is accorded to its acts and officials, are political questions uniquely within the domain and prerogatives of the executive branch.").  

82. United States v. Pink, 315 U.S. 203, 229 (1942) (citations omitted) (internal quotation marks omitted).  
disputants overwhelmingly point to a conclusion that this is an exclusively executive power. Foreign relations require that a nation speak with a single voice. Multiple and contradictory declarations of American foreign policy cause other nations to doubt that they can rely on anything that the President or Congress may say. Foreign relations are conducted, in practice and on a daily basis, by executive branch officials. If Congress can countermand the policies that result from these often secret diplomatic initiatives, foreign policy will be made in an informational deficit, if not an outright vacuum. To permit Congress to tell the President how the nation must treat disputed territory is to require the President to lobby Congress continually to preserve the President's policies. That is a cumbersome, inefficient, and awkward method of conducting foreign relations. Moreover, it poses great risks to the nation as a whole to permit Congress to overrule a delicate diplomatic truce that the President deems appropriate. If Congress could tell the President that passports issued to American citizens born in Taipei must list the country of birth as "Taiwan," or the "Republic of China," the repercussions with the People's Republic of China would be enormous. If ever there were an occasion for employing prudential reasoning to interpret the Constitution, this must be it.

The implications of deciding the validity of § 214(d) on the merits are considerable. Section 214(d) may be easily determined to be ultra vires, but what about sections 214(b) and (c), each of which condition the expenditure of appropriated funds on presidential conformity to Congress's notion of the proper status of Jerusalem? Of course Congress has control of the purse, but its exercise of that power is not unlimited. For example, Congress may not condition federal spending on state compliance with an otherwise unconstitutional mandate, or by coupling that spending with a condition wholly unrelated to any federal interest, or to coerce states to abandon their independent

86. *E.g.*, *id.* at 208, 210.
governance. Congress may decide how much money it is willing to spend to support the State Department and other organs of American foreign policy, but surely it cannot condition the use of that money on presidential obedience to a congressional dictate of which foreign government has sovereignty over the island of Taiwan, the Falkland Islands, or Jerusalem. If it is untenable to permit Congress to require the President to treat Avignon as the capital of France, it must be equally untenable to permit Congress to condition the expenditure of any funds for American diplomatic facilities in France upon the President's acquiescence in relocating the American embassy to Avignon.

These issues are not, of course, before the Court in M.B.Z., but a decision on the merits of § 214(d) will inevitably require the Court to decide, case by case, the limits of congressional power to use the federal treasury to compel presidential acquiescence to a congressionally driven foreign policy. Consider the current dispute among China, Vietnam, and the Philippines concerning sovereignty in the South China Sea. China claims sovereign control of the entire sea. Vietnam and the Philippines make more modest claims to their territorial waters in the South China Sea, and Vietnam claims sovereignty over the Spratly Islands, which are also claimed by China. Suppose that Congress were to enact an omnibus appropriations measure that bars any expenditures for any American governmental presence in the Philippines or Vietnam unless the President has declared that China has sovereignty over the South China Sea and the Spratly Islands. Suppose the President declares that the United States regards the South China Sea as international waters, and proceeds to spend funds in disregard of the statute. Once again, the political question doctrine most likely permits the Court to defer to the President without deciding whether Congress has exceeded its appropriation power.

88. See, e.g., Dole, 483 U.S. at 211.
However analytically correct Professor Henkin may have been about the political question doctrine, it turns out that there is practical wisdom in invoking the doctrine. Treating vexed issues of these types as non-justiciable forces Congress and the President to resolve their differences through appeals to the people. Perhaps De Tocqueville had it half right: All subjects in America become a matter of judicial debate, but not every subject will be resolved by the judiciary.

91. DE TOCQUEVILLE, supra note 1, at 284.