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NOTE FOR THE SECRETARY

FROM: L – Harold Hongju Koh

RE: Supreme Court Decision in Jerusalem Passport Case (*Zivotofsky v. Clinton*)

Yesterday, the Supreme Court issued its judgment in *Zivotofsky v. Clinton*, the case about whether an American citizen born in Jerusalem is entitled to have his passport identify his place of birth as “Israel.” The Court held that this dispute is not a “political question” and therefore that it can be decided by the judiciary. The Court did not decide, however, the substantive issue in the case: whether the Department must print “Israel” in Jerusalem-born citizens’ passports. This issue will now return to the lower courts for resolution.

The Department of State’s Foreign Affairs Manual states that U.S. citizens born in Jerusalem may not have “Israel” listed in their passports as their place of birth. This reflects a longstanding U.S. Government policy of recognizing no state as having sovereignty over the city of Jerusalem. In 2002, Congress passed and the President signed the FY 2003 Foreign Relations Authorization Act, which included a section entitled “United States Policy with Respect to Jerusalem as the Capital of Israel.” One provision in this section purports to require the Secretary of State to allow U.S. citizens born in Jerusalem to have their passports indicate their place of birth as Israel. The Department has not implemented this section of the law, on the ground that it intrudes on the President’s constitutional authority over the recognition of other countries and the territories over which they have sovereignty. Menachem Zivotofsky, through his parents, brought suit to compel the Department to identify “Israel” as his place of birth on his passport, but the D.C. Circuit ruled that the case was a “political question” beyond the authority of a court to resolve.

The Supreme Court, in a decision by Chief Justice Roberts, reversed the D.C. Circuit and held – contrary to the position advanced by DOJ – that the case does not present a political question. The Court viewed the issue as a basic constitutional question: does the statute interfere with the President’s power to recognize foreign nations, or is it within Congress’s power to regulate passports in this manner? The Court did not decide this merits question, but instead concluded that it is the sort of question the judiciary is competent to answer. Justices Alito

and Sotomayor concurred in separate opinions. Only Justice Breyer dissented and would have dismissed Zivotofsky's lawsuit as presenting a "political question."

Although the Court's decision leaves the substantive issue for judicial decision, it does not call into question the U.S. Government's policy on the status of Jerusalem, nor does it require the Department to begin honoring requests to print "Israel" in the passports of Jerusalem-born citizens. The Court's decision does, however, mean that this litigation will continue, perhaps for many more months. The case now returns to the lower courts, which will decide whether the Department must comply with the law as written, or whether -- as we will likely argue—that the statute interferes with the President's authority (in which case it is invalid and the Department can continue disregarding Congress's instruction).

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