



المركز العربي للأبحاث ودراسة السياسات  
Arab Center for Research & Policy Studies

## ASSESSMENT REPORT

# The June, 2015 US Supreme Court Decision on Jerusalem

Policy Analysis Unit - ACRPS | June 2015

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## Introduction

On Monday, June 8, 2015 the Supreme Court of the United States (SCOTUS) backed the White House in a dispute with Congress over how "Jerusalem" is used in U.S. passports. In a split decision, SCOTUS ruled that Congress is not entitled to require the State Department to record "Israel" as the birthplace of Americans born in Jerusalem. The vote was 6 to 3, with Chief Justice John G. Roberts Jr. and Justices Antonin Scalia and Samuel A. Alito Jr. dissenting.

The decision upheld a ruling of the U.S. Court of Appeals for the DC Circuit Court, who struck down as unconstitutional the 2002 law passed by Congress allowing American citizens born in Jerusalem to list Israel as their country of birth. This issue, involving Israel, has been one of the most sensitive issues in U.S. foreign policy in the Middle East. Ever since the U.S. recognized Israel in 1948, successive administrations have consistently held that Jerusalem is not under the sovereignty of any particular country. The fact that SCOTUS sided with the President in its decision is not a surprise, as the Court typically, though not always, upholds the foreign policy powers of the president as contained in Article II of the U.S. Constitution.

The case was brought before the courts by the parents of 12-year-old Menachem Binyamin Zivotofsky, who was born in Jerusalem. In applying for Menachem's passport soon after his birth, the Zivotofskys asked the State Department to list "Jerusalem, Israel" as his birthplace. The State Department refused to do so and the dispute has been in the legal system ever since. The case was heard before SCOTUS on November 14, 2014, with the split decision coming on June 8. The decision is clearly a political victory for President Obama and a loss for Congress. The dissenting justices argued that the majority opinion could weaken the role of Congress in foreign policy. The majority opinion, while siding with the President, recognized the role of Congress in managing

foreign affairs, but made it clear that the President alone has the authority to recognize foreign nations and governments.

## Background

In 2002, Congress passed, and then-President George W. Bush signed into law, the Foreign Relations Authorization Act. Section 214(d), titled "US Policy with Respect to Jerusalem as the Capital of Israel", stated: "For purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel."

President Bush signed the law, but made clear he would not follow the Jerusalem provision because it interfered with the president's constitutional authority to conduct foreign policy. The Obama Administration also objects to the provision and has refused to follow it. In its SCOTUS briefs, the Obama Administration told the justices that the status of Jerusalem should be resolved by negotiations between Arabs and Israelis. Consequently, the law has never been enforced much to the chagrin of its supporters, including the numerous Americans born in Jerusalem who identify the city with Israel.

## The Reaction

Some will correctly argue that the Court's ruling is about the separation of powers between the Executive and Legislative branches of the U.S. government, and not about Israel. However, opponents of the decision will forcibly counter-argue that it is about Israel, and attempt to blame the President for what they perceive as a weakening of support for Israel, regardless of the decision's legal ramifications.

Although the liberal Jewish group "Americans for Peace Now" welcomed the decision, other pro-Israel and conservative Jewish groups have expressed their outrage at the ruling. Abraham Foxman, National Director of the Anti-Defamation League, said the Court has "...effectively given a stamp of approval to the offensive State Department policy that singles out Israel for special treatment." The Jewish Federations of North America and Union of Orthodox Jewish Congregations of America said that Jerusalem's status as Israel's capital was a "factual reality," and also expressed support for an appeal to SCOTUS. Predictions are risky, but it is unlikely the Court will hear the case again.

Conservative pro-Israel members of Congress also oppose the decision. How they will react is not yet clear but there are ways in which Congress can register its opposition to the decision. The Senate could refuse to confirm a new U.S. ambassador to Israel or any other ambassadorial appointment it chooses, hoping to force the President to uphold the 2002 law. Congress could also vote against easing trade restrictions or entering into treaties, or any other legislative action that would demonstrate its displeasure. At this point, relations between President Obama and congressional Republicans are so frosty, it is doubtful he would be swayed by legislative actions.

The Congressional Israeli Allies Caucus led by Representative Doug Lamborn (R-Colorado) and supported by Representative Brad Sherman (D-California), are calling for the U.S. Embassy to be moved to Jerusalem, which they assert is the capital of Israel. It is possible that Congress could vote to remove the waiver provision from the Jerusalem Embassy Act of 1995, requiring the U.S. Embassy be moved to Jerusalem. The Act provides for a national security interests waiver to prevent a move, which every president since Bill Clinton has invoked. A move such as this would be typical of zealous groups who try to legislate the status of Jerusalem in isolation of the context of Israeli-Palestinian negotiations. Given the overwhelming support for Israel in this Congress,

such a move might succeed in the House, though hopefully saner heads would prevail in the Senate.

## Conclusion

Despite the outcry against the decision by these groups, the action in no way alters U.S. policy toward Israel or the Arab-Israeli conflict, and should not be interpreted as doing so. Washington's support for Israel is expected to remain strong, despite the ruling and the current tensions in the relationship brought on by personal animosity between President Obama and Prime Minister Netanyahu.