



## The Supreme Court Decision on Jerusalem

*Roxanne Perugino*  
*Tuesday, June 9, 2015*

On Monday, June 8, 2015 the Supreme Court of the United States (SCOTUS) sided with President Obama in a dispute with Congress over how Jerusalem should be treated on US passports. In a split decision SCOTUS ruled Congress might not require the State Department to indicate in passports that Jerusalem is part of Israel. 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 US Court of Appeals for the DC Circuit Court striking the 2002 law passed by Congress, that allows US citizens born in Jerusalem to list Israel as their country of birth, as unconstitutional. This issue, involving Israel, has been one of the most sensitive issues in US foreign policy. Ever since the US recognized Israel in 1948, US presidents have consistently held that Jerusalem is not under the sovereignty of any country. That the SCOTUS sided with the President in its decision is not a surprise as the Court often, but not always, upholds the foreign policy powers of the President as contained in Article II of the US Constitution.

The parents of 12-year-old Menachem Binyamin Zivotofsky, who was born in Jerusalem, brought the case before the Court. The parents asked the State Department for a passport for Menachem that listed “Jerusalem, Israel” as his birthplace. The State Department refused to do so and the dispute has been in the legal system since then. The case was heard before the Court on November 14, 2014 with the split decision coming on June 8. The decision is a victory for President Obama and a loss for Congress. Justices dissenting said 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 foreign policy, but was clear the President has the authority to make foreign policy.

## **Background**

In 2002 Congress passed and the President 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 George W. 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 Supreme Court 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 supporters of the law and the numerous Americans born in Jerusalem.

## **The Reaction**

Some will correctly argue that the Court’s decision is about the separation of powers between the Executive and Legislative branches, and not about Israel. Still, opponents of the decision will argue, forcibly, it is about Israel and attempts to blame the President for what they perceive as a weakening of support for Israel, disregarding the legal ramifications of the decision.

Although the liberal “Americans for Peace Now” welcomed the decision, other pro-Israel and Jewish groups are expressing their outrage at the decision. 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 expressed its support as well for an appeal to the Supreme Court. 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 US Ambassador to Israel or any other ambassadorial appointment it chooses, hoping to force the President to uphold the 2002 law. Congress also could vote against easing trade restrictions or entering into treaties, or any other legislative action that would demonstrate its displeasure with the decision. 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 US 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 US Embassy be moved to Jerusalem. The Act provides for a national security interests waiver preventing 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. However, given the overwhelming support for Israel in this Congress, such a move might succeed in the House, but hopefully saner heads may prevail in the Senate.

## **Conclusion**

Despite the outcry against the decision by pro-Israel groups, the decision in no way alters US policy toward Israel and should not be interpreted as doing so. US support for Israel will remain strong, despite the ruling and the current tensions in the relationship, brought on by personal tension between President Obama and Prime Minister Netanyahu.