

# Jerusalem is in Israel

International differences over territory and legitimacy of states are neither rare nor obscure, but the unparalleled number of religious, ethnic, symbolic, political, national, and legal factors concerning Jerusalem make it the most controversial and disputed issue.

The issue has divided the United States Supreme Court. On June 8, 2015, in the case of *Zivotofsky v. Secretary of State Kerry*, the Supreme Court issued its ruling, in a 6-3 decision, in a complex constitutional law debate on the extent of presidential powers. The Court faced the issues of whether the U.S. president has exclusive power to grant formal recognition to a foreign sovereign, and whether the U.S. Congress can decide foreign policy. It discussed whether Congress can command the U.S. president and secretary of state to accept its decisions.

However, the context and real significance of the case were whether the city of Jerusalem should be regarded as a part of Israel. The son of Mr. Zivotofsky was born to United States citizens who were living in Jerusalem. They asked the U.S. Embassy officials to list his place of birth as "Jerusalem, Israel." The officials refused to do so on the grounds that the U.S. does not recognize any country having sovereignty over Jerusalem.

Zivotofsky had made the request on the basis of Foreign Relations Authorization Act, Fiscal Year 2003, that stated that for "purposes of the registration of birth ... 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 ... record the place of birth as Israel." President George W. Bush signed the bill but expressed reservations about the passport provision. President Barack Obama has maintained the same reservation.

In the case, to challenge the denial by the officials brought by Zivotofsky, the D.C. Circuit Court and then the U.S. Supreme Court held that the passport provision of the congressional statute was unconstitutional, concluding that it contradicted the exclusive power of the Executive Branch (the president) to recognize foreign sovereigns.

The constitutional decision, based on the foreign policy powers given to the president in Article 2, Section 2 of the U.S. Constitution, was that it is for the president alone to make the specific decision of what foreign power he will recognize as legitimate, and that his asserted power must be both exclusive and conclusive. The Supreme Court held that the weight of evidence indicated that Congress has accepted that the recognition power is exclusive to the presidency, and that it was an executive power that Congress may not qualify.

More related to the specific case, the Court also held that it was U.S. policy that neither Israel nor any other country is acknowledged as having sovereignty over Jerusalem. It neglected the reality that Israel controls the city of Jerusalem.

An interesting aspect of the constitutional debate is that the U.S. Constitution nowhere uses the word "recognition."

Presidents claim and exercise this power on the basis of the so-called Reception Clause, Article 2, Section 3, that the president "shall receive Ambassadors and other public ministers." Alexander Hamilton, in *Federalist Paper 69*, said this function was "more a matter of dignity than of authority." Nevertheless, President George Washington, by receiving the French ambassador in 1793, in effect recognized the French Revolutionary Government.

The U.S. Supreme Court has not questioned the substantial powers of Congress over foreign affairs in general. Indeed, Congress has made its position clear in discussions of a host of foreign issues. In 1934, Congress legislated an act to grant independence to the Philippines, then an American

colony. Congress has not given a president what Justice Scalia called “uncontrolled mastery of the nation’s foreign affairs.”

On July 30, 1980, the Knesset passed a Basic Law that “Jerusalem, complete and united, is the capital of Israel.” Less than a month later, on August 20, 1980, the U.N. Security Council Resolution 478 was “deeply concerned that Israeli law had proclaimed a change in the character and status of Jerusalem.” As a result, all 13 foreign embassies then present in the city left, and no international embassy is present there today.

However, in 1995, the U.S. Congress passed the Jerusalem Embassy Act, to the effect that Jerusalem should be recognized as the capital of the State of Israel, and the U.S. Embassy should be established in Jerusalem no later than May 31, 1999.

The U.S. Department of Justice regarded this as unconstitutional, and no such establishment has taken place.

This is a flagrant disregard of the constitutional provision that the president “should take care that the laws be faithfully executed.”

James Madison in *Federalist Paper 47* already knew that the accumulation of all powers in the same hands may justly be pronounced the very definition of tyranny. Most commentators would agree that each part of the U.S. political structure has its own powers and freedom to contradict the policies of the others. A president should not be immune from congressional laws disagreeing with his political views. President Obama should implement the 1995 congressional statute, and move the U.S. Embassy to the city of Jerusalem.

First published in the