

Israel or Jerusalem? Supreme Court decides passport case

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([The Christian Science Monitor](#)) Congress usurped the exclusive authority of the president when it passed a law requiring U.S. officials to record Israel as the place of birth of Americans born in Jerusalem, the United States Supreme Court ruled on Monday.

In a 6-to-3 decision, the high court struck down as unconstitutional a law that sought to undercut a long-standing U.S. policy of neutrality over the disputed sovereignty of Jerusalem.

The decision marks a defeat for an American couple who have fought for 12 years to have “Israel” listed as the place of birth on their son’s U.S. passport rather than simply “Jerusalem.”

Under U.S. policy, consular officials are instructed to list Jerusalem rather than Israel as the birthplace for all Americans born in that city.

Although Israel claims Jerusalem as its capital, the city’s status is considered disputed by the international community, including the U.S. State Department.

Nonetheless, Congress in 2002 passed a measure that required consular officials to record Israel as the place of birth whenever the American parents of a child born in Jerusalem requested that designation on their child’s passport.

Both the administrations of George W. Bush and President Obama opposed the congressional measure, saying it interfered with the executive branch’s conduct of foreign affairs.

The dispute was over significantly more than just which place of birth might be listed on a passport. The case grew into a major examination of the separation of powers and the sometimes conflicting roles of the president and Congress in matters of foreign policy.

Ultimately, the majority justices sided with the executive branch and against Congress, ruling that the president enjoys exclusive power to formally recognize foreign countries and that Congress may not enact laws that contradict that recognition authority. The Jerusalem passport requirement was such a law.

“It is clear that Congress wanted to express its displeasure with the president’s policy by, among other things, commanding the Executive to contradict his own, earlier stated position on Jerusalem,” the high court said. “This Congress may not do.”

Writing for the majority, Justice Anthony Kennedy said the court did not question the power of Congress to enact passport legislation “of wide scope.”

The problem with the Jerusalem law, Justice Kennedy said, was how Congress exercised its legislative authority.

“It was an improper act for Congress to aggrandize its power at the expense of another branch by requiring the president to contradict an earlier recognition determination in an official document [a passport] issued by the executive branch,” Kennedy said.

“To allow Congress to control the president’s communication in the context of a formal recognition determination is to allow Congress to exercise that exclusive power itself,” he said. “As a result, the statute is unconstitutional.”

In a dissenting opinion, Justice Antonin Scalia said the passport measure had nothing to do with diplomatic recognition or any other binding act of foreign policy. The measure simply required a listing of “Israel” as the place of birth if requested by a U.S.-citizen parent, he said.

“It is utterly impossible for this deference to private requests to constitute an act that unequivocally manifests an intention to grant recognition,” Scalia wrote in a dissent joined by Chief Justice John Roberts and Justice Samuel Alito.

The decision stems from a lawsuit filed by Ari and Naomi Zivotofsky, whose son, Menachem, was born in 2002 in Jerusalem.

As U.S. citizens, the parents were entitled under the Foreign Relations Authorization Act to have their infant son’s passport record that he was born in Israel.

When Naomi Zivotofsky requested that designation, consular officials refused. They said State Department policy was to record the place of birth as simply “Jerusalem.”

Since the sovereign status of the city is under dispute between Arabs and Israelis, the U.S. government has tried to maintain a neutral position, in part to bolster its credibility as an honest broker in Mideast peace talks.

Congress rejected that approach and decided instead that the United States should recognize Jerusalem as the capital of Israel and should move the U.S. embassy there. Congress also instructed consular officials that whenever a U.S.-citizen parent of a newborn in Jerusalem requested it, the place of birth should be recorded as Israel.

A federal judge dismissed the Zivotofskys’ case, ruling that they lacked the necessary legal standing to challenge consular rule. An appeals court reversed. On remand, the federal judge again dismissed the case, ruling that the underlying issue presented a political question best resolved by elected officials. The appeals court upheld that decision, but the US Supreme Court reversed it and sent it back to the lower courts to resolve the case. On remand, the appeals court found that the congressional measure impermissibly intruded into the president’s authority to recognize foreign governments.

The case then returned to the Supreme Court. It was argued November 3.

In its decision on Monday, the majority justices said the executive branch was not free from the “ordinary controls and checks of Congress” in all matters of foreign affairs.

Rather the court’s ruling related only to the recognition of foreign governments. The majority said it is for the president alone to decide what foreign power he will recognize.

“Recognition is an act with immediate and powerful significance for international relations, so the president’s position must be clear,” Kennedy said. “Congress cannot require him to contradict his own statement regarding a determination of formal recognition.”

In his dissent, Scalia said the majority opinion threatens to erode congressional power over foreign affairs by assigning exclusive authority to the executive branch.

He said the decision upsets the constitutional balance set by the nation's founders. "They did not entrust either the president or Congress with sole power to adopt uncontradictable policies about any subject—foreign-sovereignty disputes included," he said.

"They instead gave each political department its own powers, and with that the freedom to contradict the other's policies."

Under that constitutional approach, Scalia said, Congress could require a citizen's requested birthplace designation, even if it clashed with the president's "preference for neutrality about the status of Jerusalem."

In a separate dissent, Chief Justice John Roberts said the majority justices were reaching out to decide too much in the case. "It has not been necessary over the past 225 years to definitively resolve a dispute between Congress and the president over the recognition power," he said. "Perhaps we could have waited another 225 years."

He said instead, the majority "strains to reach the question based on the mere possibility that observers overseas might misperceive the significance of the birthplace designation."

"And in the process," the chief justice added, "the court takes the perilous step—for the first time in our history—of allowing the president to defy an act of Congress in the field of foreign affairs."

The case was *Zivotofsky v. Kerry* (13-628).