

A Rare Defeat for the Israel Lobby

In a rare rebuke to the powerful Israel Lobby, the U.S. Supreme Court struck down a congressional encroachment on presidential powers regarding the official status of Jerusalem. Even some right-wing justices turned on each other, as ex-CIA analyst Paul R. Pillar explains.

By Paul R. Pillar

The Supreme Court's decision this month in Zivotofsky v. Kerry was not only the correct outcome of the case at hand and of the specific issues it raised but also an important statement about the need for consistency and coherence in the administration of U.S. foreign policy. The Court's majority scrupulously avoided wading into the politics underneath the case, but its decision has helped to minimize the extent to which political undercurrents make for incoherence in foreign policy.

The decision struck down, as an unconstitutional Congressional encroachment on Executive Branch powers, the portion of the Foreign Relations Authorization Act for 2003 that would have required the State Department to indicate on passports issued to U.S. citizens born in Jerusalem that the place of birth was "Israel" if the individual requested that designation.

This requirement contradicted the longstanding U.S. position that the sovereignty of Jerusalem is a matter yet to be decided by international negotiation. That position also is consistent with the policies and practices of every other country besides Israel itself.

Justice Anthony Kennedy's majority opinion was firmly rooted in the concept that in foreign relations, the United States must speak with one voice. Recognition of foreign states, and the terms under which recognition is extended, as was true with the Carter administration's recognition of Communist China and the related special status of Taiwan, has always been a presidential prerogative.

Even when Congress also has played a role, as was true with legislation relating to relations with Taiwan, presidential primacy on this subject has not been seriously challenged. And according to the majority opinion, what is said on a passport is inseparable from the broader issue of recognition.

Chief Justice John Roberts, in a dissent joined by Justice Samuel Alito, questioned that last connection, contending that only a "perception" of recognition was involved, and that the majority was in effect submitting to an "international heckler's veto." But there is no doubt that recognition was what Congress was attempting to deal with in the nullified section of the

legislation, the title of which is "United States Policy with Respect to Jerusalem as the Capital of Israel."

Roberts's further argument that Congress is constitutionally empowered to do all sorts of things contrary to a president's policy toward a foreign government, including declaring war or establishing an embargo, is off the mark, since even a war or embargo does not necessarily speak to recognition of the foreign state in question. (E.g., the United States currently is sanctioning Russia but still recognizes it as a sovereign state.)

A separate dissent by Justice Antonin Scalia, joined by Roberts and Alito, is best read in conjunction with a concurring opinion by Clarence Thomas, who, in a rare break with Scalia, agreed with the majority regarding the key question concerning passports.

Thomas points out how loosely and expansively Scalia tries to apply the Necessary and Proper Clause of Article I of the Constitution in arguing for a Congressional role regarding the birthplace box on passports, far more loosely and expansively than is Scalia's custom in addressing many other issues. Thomas quotes back some of what Scalia has said on other cases and concludes that his conservative colleague's opinion in the present case represents a "dubious way to undertake constitutional analysis."

Strictly maintaining the policy that sovereignty over Jerusalem is yet to be settled through negotiation is essential if the United States is to have any hope of maintaining (or rather, salvaging) a useful role in attaining a settlement of the Israeli-Palestinian conflict.

Going beyond the Jerusalem matter, the issue that first comes to mind as involving similar political dynamics is the impending nuclear agreement with Iran. As with the Jerusalem question, this is another instance of members of Congress marching to the Israeli government drummer and taking actions that contradict and undermine the Executive Branch's execution of an important element of U.S. foreign policy.

The Iran issue has already demonstrated the chaotic result when Congress (or more precisely, what happens to be the current majority party in Congress) tries to conduct its own foreign relations at odds with the official policy that the Executive Branch is running.

The chaos has included the notorious letter of Republican senators to the leadership of Iran and the uncoordinated invitation to the Israeli prime minister to address Congress for the purpose of denouncing U.S. diplomacy. The Supreme Court's decision represents at least a modest backtracking from this

sort of damage.

More generally and more broadly, the Court's majority has reaffirmed that there is such a thing as the pursuit of national interests in the international arena that is distinct from domestic politics. In this regard it is worth noting that the U.S. policy regarding Jerusalem has been maintained by every U.S. administration, Republican and Democratic, ever since the United States recognized the new State of Israel during Harry Truman's presidency.

The domestic political process, including actions by the U.S. Congress, does play an important role in determining U.S. national interests, though more as a matter of broad objectives and values than as tactics and administrative details. That process is essential in addressing unavoidable trade-offs involving major decisions and major interests, such as weighing expected gains versus likely costs in any resort to warfare.

That is why Congress ought to devote more of its energies to efforts such as enacting an authorization specifying objectives and limits for the current use of military force than to telling the State Department what it ought to write in a box on someone's passport.

Paul R. Pillar, in his 28 years at the Central Intelligence Agency, rose to be one of the agency's top analysts. He is now a visiting professor at Georgetown University for security studies. (This article first appeared as [a blog post](#) at The National Interest's Web site. Reprinted with author's permission.)
