

MOVING THE US EMBASSY TO JERUSALEM:

Historical, Legal and
Policy Considerations



US Campaign for
Palestinian Rights

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Front cover: The Dome of the Rock in Jerusalem. Photo credit: Patrick McKay/Flickr. Changes were made.

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Executive Summary

President Donald Trump's campaign pledge to move the US Embassy in Israel from Tel Aviv to Jerusalem would upend seven decades of bipartisan US policy toward Jerusalem, which has consistently avoided recognizing Israeli claims to sovereignty over any portion of the contested city.

In 1947, the United States voted for UN General Assembly Resolution 181 recommending the partition of Palestine into two states. Recognizing the religious significance of the city to adherents of Judaism, Christianity, and Islam, the partition plan called for Jerusalem to be a *corpus separatum*, an international city administered by an UN-appointed governor who would be neither Israeli nor Palestinian.

The partition plan was never implemented as fighting broke out first between Zionist militias and local Palestinian forces prior and later between the newly established State of Israel and surrounding Arab states. The war ended in 1949 with Israel signing armistice agreements with neighboring Arab states. The Israeli-Jordanian armistice agreement resulted in Jerusalem being divided between Israel, which controlled the western portion of the city, and Jordan, which controlled the eastern portion.

In 1967, Israel militarily occupied the Palestinian West Bank, including East Jerusalem. In the aftermath of this war, Israel extended the boundaries of its Jerusalem municipality to encompass East Jerusalem and in 1980 the Israeli parliament passed a law stipulating the entirety of Jerusalem as its capital. Since 1967, however, the United States has maintained that East Jerusalem is held under military occupation and that Israeli settlements there violate the Fourth Geneva Convention. Although the United States has opposed the re-division of Jerusalem, its consistent policy for

the past fifty years has been that its status can only be determined through negotiations.

During the Reagan, Clinton, and George W. Bush administrations, Congress enacted legislation designed to force the hand of the Executive Branch to recognize Jerusalem as Israel's capital and move the US embassy there. On all occasions, the Executive Branch resisted these efforts to intrude into presidential foreign policy-making prerogatives. During the Obama administration, the Department of Justice argued that one of these laws was unconstitutional. The Supreme Court agreed and struck it down.

The Trump administration could move the US Embassy to Jerusalem either by its own determination or by failing to renew the waiver provision contained in the Jerusalem Embassy Act of 1995. To do so, however, would be a grave mistake. **Moving the embassy would:**

- Upend seven decades of US policy **refusing to recognize Israeli sovereignty** over any part of the city, including portions of the city held by Israel prior to 1967.
- Legitimize Israel's **ethnic cleansing** of Palestinians from Jerusalem in 1948 and its denial of Palestinian **refugee rights** there. In addition, US citizens have property claims on the land leased by the United States for a diplomatic facility in Jerusalem.
- Legitimize Jerusalem's current **separate-and-unequal regime** between Israeli Jews and Palestinians. This regime **discriminates against Palestinians** in municipal planning, services, housing and education and is designed to demographically engineer a permanent Jewish majority.
- Legitimize Israel's violations in Jerusalem of the **Fourth Geneva Convention**, including its demolishing of Palestinian homes, and its illegal **settlements and wall**.

From Internationalization to Division: US Policy on Jerusalem, 1947-1967

On November 29, 1947, the United States voted for UN General Assembly Resolution 181, recommending the partition of Palestine into two states. Under this plan, “the City of Jerusalem shall be established as a *corpus separatum* under a special international regime and shall be administered by the United Nations.”¹ The plan envisaged the UN Trusteeship Council appointing a governor for the city who would not be a citizen of either state. Palestinian and Jewish portions of the city would enjoy “wide powers of local government and administration” and a city-wide legislative council would be elected based on proportional representation to enact municipal legislation. Residents of Jerusalem could opt either for citizenship in the “City of Jerusalem” or apply for citizenship in either the Jewish or Arab State. This special international regime for Jerusalem would last for ten years, or be reevaluated beforehand if warranted. After that period, the residents of Jerusalem would vote in a referendum on whether to make changes to the city’s administration.

The partition plan, along with the special international regime for Jerusalem, was never implemented, however. Intensive fighting broke out between Zionist militias and local Palestinian forces before the end of the British Mandate, both in Jerusalem and in other parts of

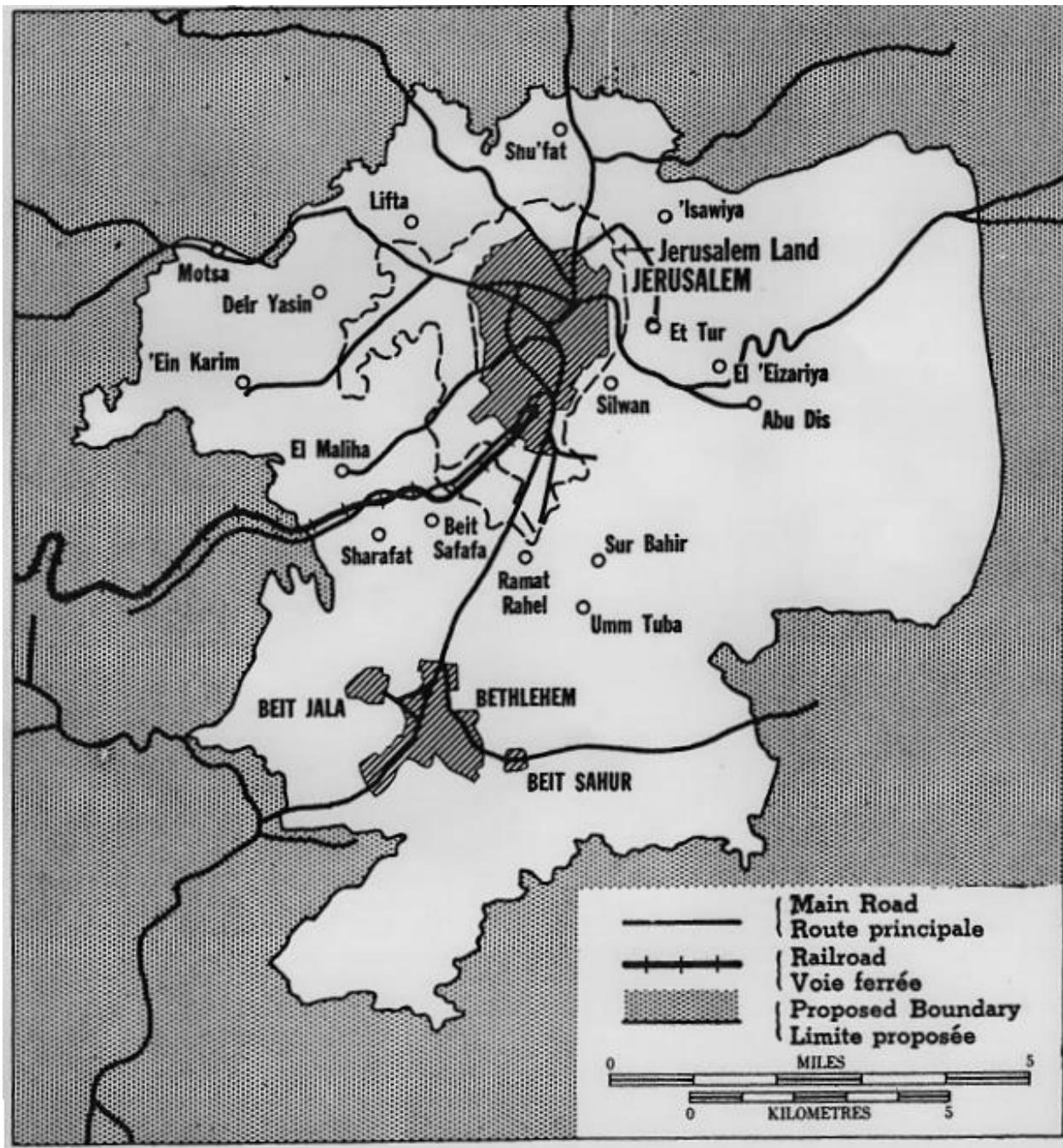
the country. In December 1947, Haganah and Irgun raids of the Palestinian village of Lifta, located northwest of Jerusalem but included in the boundaries of the proposed *corpus separatum*, killed seven Palestinians. In January 1948, the Haganah blew up the Semiramis Hotel in the Palestinian Jerusalem neighborhood of Qatamon, killing 26 civilians and triggering a flight of Palestinians from the city.² An even greater wave of Palestinians fled Jerusalem in the aftermath of one of the most infamous massacres committed by Zionist militias in April 1948 in the Palestinian village of Deir Yassin, located to the west of Jerusalem but also within the projected border of the *corpus separatum*.

After the end of the British Mandate and Israel’s declaration of independence in May 1948, neighboring Arab armies joined the fighting, largely transforming it into an interstate conflict. In Jerusalem, the Arab Legion of Transjordan battled the Israeli army to a standstill.

In December 1948, the United States voted for UN General Assembly Resolution 194, which sought to salvage the notion of a *corpus separatum* for Jerusalem, even as battle lines hardened, thereby effectively dividing the city. The resolution reaffirmed that Jerusalem and its surrounding villages and towns “should be accorded special and separate treatment from the rest of Palestine and should be placed under effective United Nations control.” The resolution also established a three-nation Conciliation Committee for Palestine, one of whose members was the United States. The

¹ UN General Assembly Resolution A/RES/181(II), 29 November 1947, available at: <https://unispal.un.org/DPA/DPR/unispal.nsf/0/7F0AF2BD897689B785256C330061D253>

² Nathan Krystall, “The De-Arabization of West Jerusalem 1947-1950,” *Journal of Palestine Studies*, Vol. 27 No. 2, 1997/1998, p. 7, available at: <http://www.palestine-studies.org/jps/fulltext/40506>



Map 1. Boundaries proposed for the *corpus separatum* of Jerusalem by UN General Assembly Resolution 181. Map No. 104-(b), November 1947, United Nations, available at:
<https://unispal.un.org/DPA/DPR/unispal.nsf/5ba47a5c6cef541b802563e000493b8c/3f1bd9477022a0c28>

mandate of the committee was to “to assist the Governments and authorities concerned to achieve a final settlement of all questions outstanding between them.” Regarding Jerusalem, the General Assembly instructed the Conciliation Committee to present to it “detailed proposals for a permanent international regime for the Jerusalem area which will provide for the maximum local autonomy for distinctive groups consistent with the special international status of the Jerusalem area.”³

In light of this responsibility, the United States “**cannot therefore support** any arrangements which would purport to authorize [the] estab[lishment] of **Israeli or TJ [Transjordanian] sovereignty over** parts of [the] **Jerusalem area**,” as Acting Secretary of State Robert Lovett informed the US Consul General in Jerusalem in January 1949. But recognizing the reality of the new situation created by the emerging division of the city, the State Department conceded that the

international regime for Jerusalem did not “require direct administration” by the UN. Instead, “Israel and Transjordan should be encouraged [to] reach any agreement on future Arab and Jewish administrative responsibilities in Jerusalem compatible with” UN General Assembly Resolution 194. However, “**some clear representation of UN interest in [the] Jerusalem area is required.**”⁴

In April 1949, Israel and Transjordan signed an armistice agreement, resulting in Jerusalem being divided between an Israeli-controlled western sector (almost completely depopulated of Palestinians as a result of the acts mentioned above) and a Jordanian-controlled eastern sector (similarly depopulated of Jewish residents who formerly inhabited the Old City). Disagreements between the two sides on the exact delineation of the Green Line marking the armistice line on the map led to the creation of a “no-man’s land” in parts of Jerusalem. The armistice and the ensuing efforts by Israel and Transjordan to consolidate their administrations over their respective portions of Jerusalem further lessened the likelihood of establishing a special international regime for the city.

Nevertheless, the Conciliation Committee for Palestine persevered in its efforts and with US approval submitted a plan to the UN General Assembly in September 1949 proposing a detailed program for an

international regime for Jerusalem which reflected the division of the city formalized in the armistice agreement. The plan called for dividing Jerusalem into two zones, a Jewish zone and an Arab zone. The General Assembly would appoint a Commissioner to administer the city for a five-year term; the Commissioner would not be a resident of either zone of Jerusalem, or a citizen of either state recommended in the partition plan. A 14-person General Council, with some members appointed by authorities from both zones and others

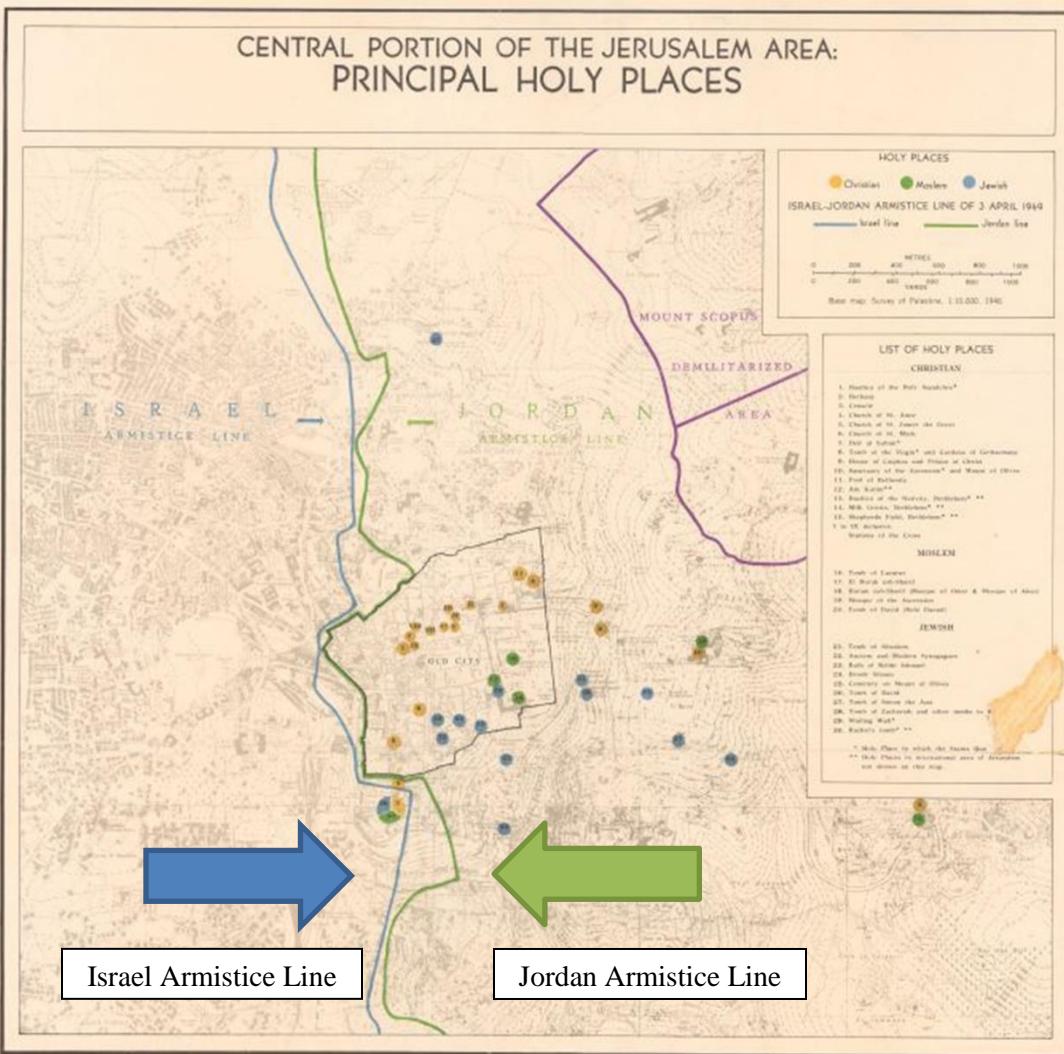
³ UN General Assembly Resolution 194, A/RES/194 (III), 11 December 1948, available at:

<https://unispal.un.org/DPA/DPR/unispal.nsf/0/C758572B78D1CD0085256BCF0077E51A>

⁴ “The Acting Secretary of State to the Consulate General in Jerusalem,” 501.BB Palestine/1-1849: Telegram, *Foreign Relations of the United States*,

1949, *The Near East, South Asia, and Africa, Volume VI*, Document 409, available at:

<https://history.state.gov/historicaldocuments/frus1949v06/d409>



Map 2. UN map showing the division of parts of Jerusalem under the 1949 Israeli-Jordanian armistice agreement. The areas on the map between the blue Israeli armistice line and the green Jordanian armistice line were a no-man's land until 1967. The current US Consular Building in Jerusalem is located within this former no-man's land. Map H212.9/JER/1949, Dag Hammarskjöld Library, New York.

appointed by the Commissioner, would be responsible for municipal planning and services.⁵

This plan was shelved, however, when in December 1949, the UN General Assembly voted in favor of a different plan for the internationalization of Jerusalem truer to the original partition plan. Israeli Prime Minister David Ben-Gurion responded to this effort by declaring Jerusalem to be Israel's eternal capital and requesting the Israeli parliament to convene there.⁶ Secretary of State Dean Acheson cabled the US Embassy to Israel later that month, instructing it to convey to Israel that the United States "considers particularly **unfortunate** any step or course of action on [the] part of **Israel likely to prejudice or complicate** [the] settlement of [the] **Jerusalem** question."⁷ At the same time, however, the United States began to realize that plans to internationalize Jerusalem over the objections of Israel and Jordan were not feasible. Acheson conceded in a memorandum to President Truman that "any solution agreed

⁵ "Palestine: Proposals for a Permanent International Regime for the Jerusalem Area," A/973, 12 September 1949, available at: <https://unispal.un.org/DPA/DPR/unispal.nsf/5ba47a5c6cef541b802563e000493b8c/426ab77c3c1b506d852563b9007023d8?OpenDocument>

⁶ "Statements of the Prime Minister David Ben-Gurion Regarding Moving the Capital of Israel to Jerusalem," available at: <https://www.knesset.gov.il/docs/eng/bengurion-jer.htm>

⁷ "The Secretary of State to the Embassy in Israel," 501.BB Palestine/12-1749: Telegram, *Foreign Relations of the United States, 1949, The Near East, South Asia, and Africa, Volume VI*, Document 1084, available at: <https://history.state.gov/historicaldocuments/frus1949v06/d1084>

upon by the Christian world and by Israel and Jordan could be supported by us."⁸

Even though the United States essentially gave up on the plan to internationalize Jerusalem from that point forward, by no means did it acquiesce in Israel's determination to make its proclamation of Jerusalem as its capital effectual and transfer its governmental operations to the city from Tel Aviv. In fact, in January 1950, the United States slapped a boycott on government officials working in Jerusalem. Acheson instructed US Ambassador to Israel James McDonald **not to "conduct official business in Jerusalem with Israeli central government officials"**

and to "restrict to an absolute minimum" any unofficial contacts in the city. However, this ban proved short-lived as it turned out to be impractical, with Acheson acceding in 1951 to embassy requests to do business with Israeli governmental counterparts in Jerusalem.⁹

Thereafter, the United States offered perfunctory restatements of its desire for the internationalization of Jerusalem, most vociferously when Israel announced that it was moving its Foreign Ministry to Jerusalem in July 1953. That development prompted the Eisenhower administration to publicly and

⁸ "Memorandum by the Secretary of State to the President," 501.BB Palestine/12-2049, *Foreign Relations of the United States, 1949, The Near East, South Asia, and Africa, Volume VI*, Document 1083, available at: <https://history.state.gov/historicaldocuments/frus1949v06/d1083>

⁹ Donald Neff, "Jerusalem in US Policy," *Journal of Palestine Studies*, Vol. 23 No. 1, Autumn 1993, p. 27, available at: <http://jps.ucpress.edu/content/23/1/20>

explicitly note that “**the United States does not plan to transfer its Embassy from Tel Aviv to Jerusalem.**” Relocating the US Embassy to Jerusalem, it argued, “would be **inconsistent with the UN resolutions dealing with the international nature of Jerusalem.**” In a press conference later that month, Secretary of State John Foster Dulles denounced the Israeli move, stating that “it would **embarrass the United Nations, which has a primary responsibility for determining the future status of Jerusalem.**”¹⁰

However, with the entrenchment of Jerusalem’s division between Israel and Jordan (the latter having annexed the West Bank, including East Jerusalem in April 1950), the issue largely lay dormant both in US foreign policy and in the international arena until the 1967 war dramatically altered Jerusalem’s status.

East Jerusalem under Israeli Occupation: US Policy on Jerusalem Since 1967

In the June 1967 Arab-Israeli war, Israel occupied the Palestinian West Bank, including East Jerusalem, and the Gaza Strip, along with the Egyptian Sinai Peninsula and the Syrian Golan Heights. The Johnson administration urged that “**before any unilateral action is taken** on the status of **Jerusalem** there will be **appropriate consultation** with religious leaders and others who are deeply concerned...The world must find an answer that is fair and recognized to be fair. That could not be achieved

¹⁰ Jody Boudreault and Yasser Salaam (editors), *US Official Statements: The Status of Jerusalem*, Institute for Palestine Studies, Washington, DC, 1992, pp. 9-10.

by hasty unilateral action, and the President is confident that the wisdom and good judgement of those now in control of Jerusalem will prevent any such action.”¹¹

However, that sentiment proved to be misplaced as Israel took swift action that same month to extend the administration and jurisdiction of the municipality of Jerusalem to encompass both the totality of East Jerusalem and portions of the West Bank hitherto considered beyond the municipal boundaries of East Jerusalem. The State Department condemned Israel’s “**hasty administrative action**” and argued that it “**cannot be regarded as determining the future of the holy places or the status of Jerusalem** in relation to them.” With a nod toward its original support for a *corpus separatum* for Jerusalem, the State Department further explained that “**the United States has never recognized such unilateral actions by any of the states in the area as governing the international status of Jerusalem.**”¹²

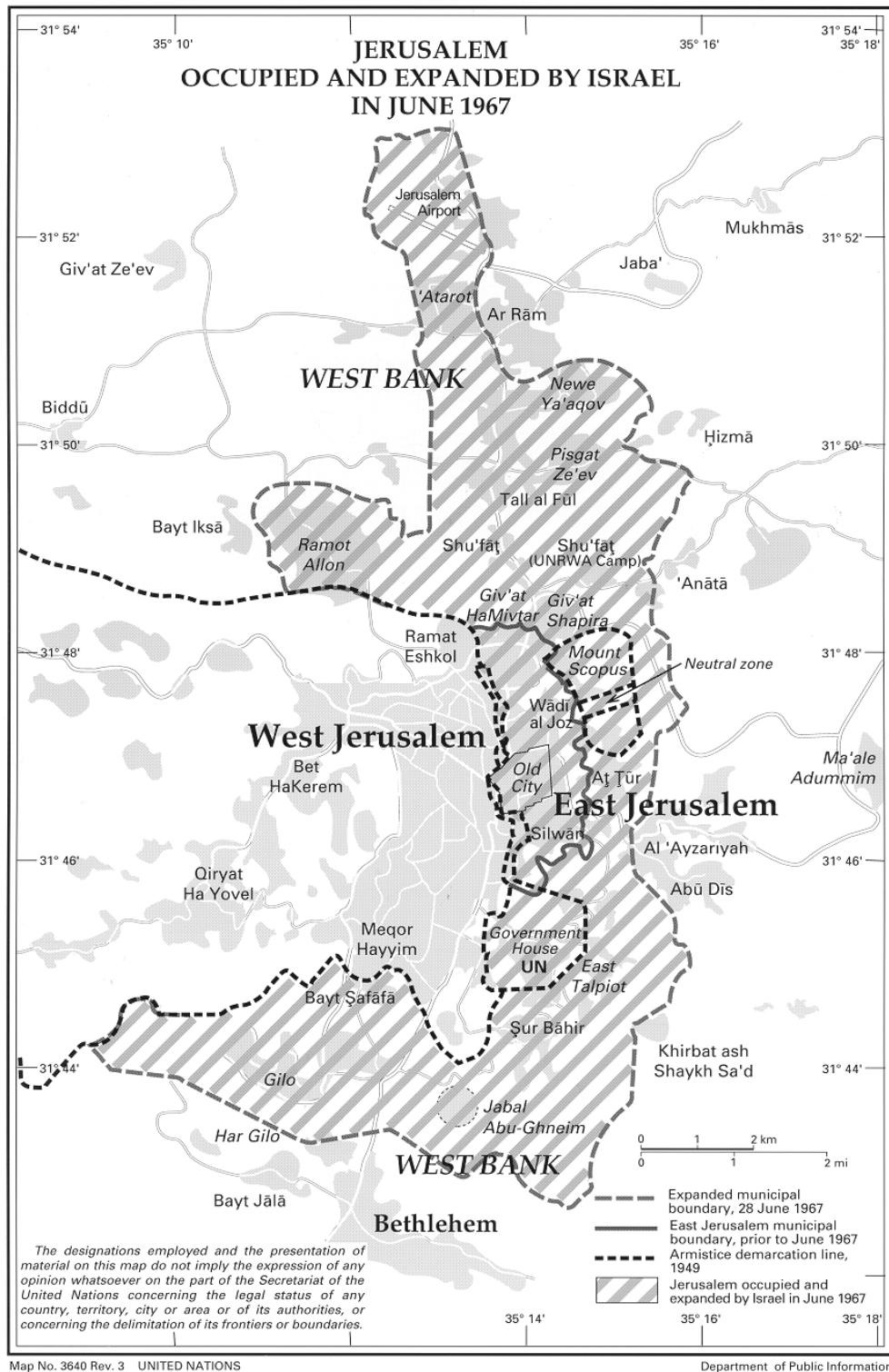
In July 1967, the UN General Assembly debated several resolutions pertaining to Israel’s actions in Jerusalem during an emergency special session. During the debate, US Ambassador to the UN Arthur Goldberg reiterated that the status of **Jerusalem** “**should be decided not unilaterally** but in consultation with all concerned,” and stipulated that “**the United States does not recognize the recent administrative action taken by Israel as**

“The United States does not recognize the recent administrative action taken by Israel as determining...the status of Jerusalem.”

-US Representative to UN, July 1967

¹¹ Ibid, pp. 19-20.

¹² Ibid, p. 20.



Map 3. Expanded areas of East Jerusalem incorporated into Israel's Jerusalem municipality after the 1967 war. UN Map No. 3640 Rev. 3, June 1997, available at:
<https://unispal.un.org/DPA/DPR/unispal.nsf/796f8bc05ec4f30885256cef0073cf3a/b2093ae6ac9de94985256b98006e3ad2?OpenDocument>

determining the future of the holy places or **the status of Jerusalem** in relation to them.”¹³

In a telegram sent to all US diplomatic posts, Secretary of State Dean Rusk explained the rationale for the US votes. The United States voted for a Latin American-drafted resolution “in line with” the US government’s views on Jerusalem, Rusk stated, “which would have reaffirmed ‘the desirability of establishing an international regime for the City of Jerusalem.’” This resolution was defeated in favor of a Pakistani-drafted resolution on which the United States abstained because it contained “unrealistic” timeframes for the Secretary General to report back on the implementation of the resolution. Nevertheless, the State Department expressed agreement with the Pakistani resolution “expressing Assembly concern over [the] situation that would arise if unilateral measures were taken permanently to alter [the] status of Jerusalem.” Rusk went on to explain that “we will continue to stress our opposition to any unilateral efforts to change the permanent position in Jerusalem or elsewhere, and to insist that any such change be accomplished only by internationally effective action, taking full account of international interests. **We do not recognize Israeli measures as having effected changes in [the] formal status of Jerusalem.**”

Rusk then expanded the US criticism of Israel’s action into a policy determination that East Jerusalem constituted occupied territory which could not be annexed by Israel. He noted that “**Israelis are in that city, as they are in other recently occupied territory, as a result of hostilities,**” and that therefore “**Israel may**

thus be said to be an occupying power with duty under international law to conform its administration as closely as possible to existing local law.” Furthermore, Rusk elaborated that “**Israeli action to establish a unified municipal administration of Jerusalem** cannot be regarded and **will not be recognized as a valid annexation.**”¹⁴

Despite US and international condemnation of Israel’s move to extend its Jerusalem municipality’s geographic scope, Israel moved rapidly in the years following the 1967 war to consolidate its hold over East Jerusalem by demolishing Palestinian homes, confiscating Palestinian land, and building settlements. These developments led the UN Security Council to unanimously approve

Resolution 267 in July 1969, which held “that all legislative and administrative measures and actions taken by Israel which purport to alter the status of Jerusalem, including expropriation of land and

properties thereon, are invalid and cannot change that status,” and called on Israel to rescind those measures.¹⁵

The Nixon administration used this opportunity to deliver what stands as perhaps the most detailed explanation of US policy toward Jerusalem to date or since, and is therefore worth

¹⁴ “Circular Telegram From the Department of State to All Posts,” 1508. Subj: Jerusalem Resolution in UNGA, July 5, 1967, *Foreign Relations of the United States, 1964-1968, Arab-Israeli Crisis and War, 1967, Volume XIX*, Document 344, available at: <https://history.state.gov/historicaldocuments/frus1964-68v19/d344>

¹⁵ UN Security Council Resolution 267, S/RES/267 (1969), 3 July 1969, available at: <https://unispal.un.org/DPA/DPR/unispal.nsf/0/5932E CF53FF36A04852560C300656122>

¹³ Boudreault and Salaam, p. 21.

quoting at length. On July 1, 1969, US Ambassador to the UN Charles Yost told the UN Security Council:

The expropriation or confiscation of land, the construction of housing on such land, the demolition or confiscation of buildings, including those having historic or religious significance, and the **application of Israeli law to occupied portions of the city are detrimental** to our common interests in the city. The **United States considers that the part of Jerusalem** that came under the control of Israel in the June [1967] war, like other areas occupied by Israel, is **occupied territory** and hence subject to the provisions of international law governing the rights and obligations of an occupying Power. Among the provisions of international law which bind Israel, as they would bind any occupier, are the provisions that the **occupier has no right to make changes in laws** or in administration other than those which are temporarily necessitated by his security interests, and that an **occupier may not confiscate or destroy private property**. The pattern of behavior authorized under the Geneva Convention and international law is clear: the occupier must maintain the occupied area as intact and unaltered as possible, without interfering with the customary life of the area, and any changes must be necessitated by the immediate needs of the occupation. I regret to say that **the actions of Israel**

"The United States considers that the part of Jerusalem that came under the control of Israel in the June [1967] war...is occupied territory."

-US Ambassador to UN, July 1969

in the occupied portion of Jerusalem present a different picture, one which gives rise to understandable concern that the eventual **disposition of East Jerusalem may be prejudiced**, and that the private rights and activities of the population are already being affected and altered.

My Government regrets and deplores this pattern of activity, and it has so informed the Government of Israel on numerous occasions since June 1967. **We have consistently refused to recognize those measures** as having anything but a provisional character and do not accept them as affecting the ultimate status of Jerusalem.¹⁶

Although the Nixon administration continued to adhere to its policy of not recognizing the validity of Israeli actions in East Jerusalem, in December 1969 the United States added an important new dimension to its policy toward Jerusalem. Addressing the Galaxy Conference on Adult Education, Secretary of State William Rogers stated that "we believe **Jerusalem should be a unified city** within which there would no longer be restrictions on the movement of persons and goods. There should be open access to the unified city for persons of all faiths and nationalities. Arrangements for the administration of the unified city should take into account the interests of all its inhabitants and of the Jewish, Islamic, and Christian communities."¹⁷ Beyond those general principles, the United States would not

¹⁶ Boudreault and Salaam, p. 32.

¹⁷ Ibid, p. 35.

recommend specific resolutions to the Jerusalem issue, only to note—as Rogers did in a press conference that same month—that “**the arrangements for Jerusalem have to be worked out between the parties.** We do not want to suggest what we think that final solution might be. We have indicated the framework, we think, that suggests how they might work it out.”¹⁸

These pillars of US policy toward Jerusalem articulated during the Nixon administration—the illegality of Israeli actions in East Jerusalem and the spurning of the internationalization of the city in favor of a negotiated resolution of the issue between the relevant parties that would leave the city undivided—became fundamental cornerstones of all subsequent administrations’ policies.

In July 1980, the Israeli parliament passed a basic law entitled “Jerusalem, Capital of Israel.” The law declares “complete and united” Jerusalem as Israel’s capital. The law was amended in November 2000 to define the boundaries of Jerusalem according to its post-1967 extension into East Jerusalem and parts of the West Bank (see Map 3, above). In addition, the amended law declared that no state or municipal authority within those borders “may be transferred either permanently or for an allotted period of time to a foreign body, whether political, governmental or to any other similar type of foreign body.”¹⁹ Many analysts have interpreted this basic law and its

“We do not accept [Israel’s basic law on Jerusalem] as in any way determining the future of Jerusalem which can only be resolved through negotiations.”

-Pres. Jimmy Carter, August 1980

amendment as a de jure annexation by Israel of East Jerusalem.

Despite the incendiary nature of this law, the Carter administration’s response was fairly muted, especially in light of previous administrations’ firm stances against Israeli actions in East Jerusalem. The United States abstained on UN Security Council Resolution 478 in August 1980, thereby allowing it pass. The resolution censured “in the strongest terms the enactment by Israel of the ‘basic law’ on Jerusalem” and determined it constituted a violation of international law.²⁰ Even though Secretary of State Ed Muskie acknowledged that

the resolution was “in line” with the US position encouraging all parties not to engage in unilateral actions in Jerusalem, the United States did not vote for the resolution because it called upon states maintaining diplomatic missions in Jerusalem to withdraw them.²¹

The Carter administration soft-pedaled its response to Israel’s provocative action because it feared a harsh condemnation could scupper the Israeli-Palestinian autonomy talks then in the works, an outgrowth of the Egyptian-Israeli peace treaty. In a State Department telegram, President Carter conveyed to Egyptian President Anwar Sadat that “our two governments must make clear **we do not accept them as in any way determining the future of**

²⁰ UN Security Council Resolution 478 (1980), S/RES/478 (1980), 20 August 1980, available at: <https://unispal.un.org/DPA/DPR/unispal.nsf/0/DDE590C6FF232007852560DF0065FDDB>

²¹ “Jerusalem and the Peace Negotiations,” Department of State Bulletin, October 1980, Volume 80, Number 2034, pp. 78-79, available at: <https://babel.hathitrust.org/cgi/pt?id=msu.31293008122339;view=1up;seq=90>

¹⁸ Boudreault and Salaam, p. 35.

¹⁹ “Basic Law: Jerusalem, Capital of Israel,” Knesset, 30 July 1980, available at: https://www.knesset.gov.il/laws/special/eng/basic10_eng.htm

Jerusalem which can only be resolved through negotiations." The United States referenced a statement it had previously issued declaring that "we do not accept the new law as determining the status of Jerusalem." But the Carter administration downplayed the ramifications of the legislation. "The bill does not change anything on the ground as far as we can determine and we do not contemplate any further action with respect to it at this time."²² Privately, Carter was considerably more worried about the implications of this development, confiding in his diary that it "almost puts the final nail in the coffin of the Camp David negotiations between Israel and Egypt."²³

During the Reagan administration, Congress began to weigh in on the issue by introducing bills and resolutions calling on the United States to recognize Jerusalem as Israel's capital and move its embassy there. One prominent bill—S.2031—introduced during the 98th Congress by Sen. Daniel Patrick Moynihan (D-NY)—attracted the support of half the Senate,²⁴ but elicited a strongly-worded written statement in opposition to the legislation by Secretary of State George

Schultz in February 1984. He argued that "**the decision to locate our facilities in Tel Aviv for supporting the conduct of diplomatic relations with Israel is an integral part of US foreign policy.** The United States has consistently taken the position that the final status of **Jerusalem must be resolved among the parties concerned**, in the context of a comprehensive, just and lasting Middle East Peace. For that reason, **we have refused to recognize unilateral acts by any party as affecting Jerusalem's status.** In accordance with this policy, **pending a negotiated resolution of Jerusalem's final status, our Embassy and Ambassador's residence remain in Tel Aviv.**" Schultz also warned that "**a precipitous transfer of US diplomatic facilities to Jerusalem would give the erroneous impression that the US had altered its longstanding position on the future of Jerusalem, thereby seriously undercutting and discrediting our facilitative role in promoting a negotiated settlement.** Such an action

"The decision to locate our facilities in Tel Aviv for supporting the conduct of diplomatic relations with Israel is an integral part of US foreign policy."

*-Sec. of State George Schultz,
February 1984*

would in that sense be **damaging to the cause of peace** and would therefore **not be in the interest of the United States.**"²⁵ The Reagan administration sent a similar letter of opposition to the House in response to similar legislative initiatives in that chamber.

These bills did not pass due to the Reagan administration's staunch opposition. But Sen. Jessie Helms (R-NC) and the Reagan administration engaged in "intense and extensive negotiations" to reach a mutually agreeable compromise in October 1988 between the State Department's insistence on maintaining the US Embassy in Tel Aviv, and many Members of

²² "Telegram From the Department of State to the Embassy in Egypt," August 2, 1980, *Foreign Relations of the United States, 1977-1980, Volume IX, Arab-Israeli Dispute August 1978-December 1980*, Document 390, p. 1316, available at: <https://s3.amazonaws.com/static.history.state.gov/frus/frus1977-80v09/pdf/frus1977-80v09.pdf>

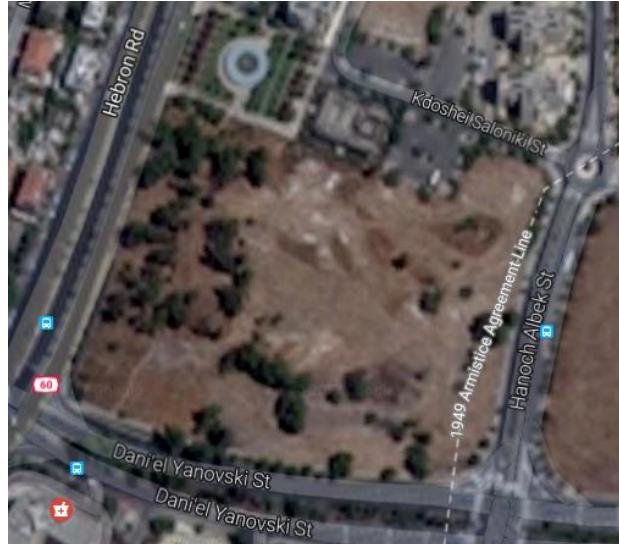
²³ Cited in ibid., "Editorial Note," Document 388, p. 1309.

²⁴ S.2031, A bill relating to the residence of the American Ambassador to Israel, introduced October 31, 1983, available at: <https://www.congress.gov/bill/98th-congress/senate-bill/2031>

²⁵ Boudreault and Salaam, pp. 68-69.

Congress who wished to see it transferred to Jerusalem. The compromise came in the form of an amendment to the FY1989 Department of Commerce, Justice, State, and Judiciary appropriations bill which authorized the State Department to construct “two new diplomatic facilities in Israel, Jerusalem, or the West Bank,” provided that the two facilities “equally preserves the ability of the United States to locate its Ambassador or its Consul General at that site, consistent with United States policy.” The amendment, Helms explained, “leaves the decision as to the location of the Embassy up to the President, while removing all practical impediments for a President who wishes to locate our Embassy in Jerusalem.”²⁶

In light of this amendment, the United States and Israel signed a Land Lease and Purchase Agreement in January 1989 for two new properties for diplomatic facilities, one in Tel Aviv and one in Jerusalem. Under the terms of this agreement, the Jerusalem property would be leased to the United States for 99 years at the cost of \$1 annually with the option to renew on the same terms.²⁷ In June 1989, the State Department wrote to Rep. Lee Hamilton (D-IN) that the Jerusalem property “was formerly used by the British Army as barracks and, in more recent times, has been used by the Israeli police,”²⁸ confirming rumors that the tract of land in question was the Allenby Barracks, located at the corner of Hebron Road and Daniel Yanovski Street, in territory which fell immediately to the west of the Green Line (see Map 4, right).



Map 4. Google Map of the corner of Hebron Rd. and Yanovski St. in Jerusalem, the site leased for the US diplomatic facility.

To date, the United States has made no moves to construct a diplomatic facility on this parcel of land for one or both of two reasons. First, a detailed study of land records conducted by Professor Walid Khalidi found that at least 70 percent of the site is private property belonging to Palestinian refugees, among whose heirs and their dependents are approximately 90 US citizens. “With all that Jerusalem connotes, it is, to say the least,” Khalidi wrote, “unbecoming for the United States’s future embassy in that city to be built on land that is stolen property.”²⁹ Second, a Congressional Research Service report found that the location was unsuitable from a security standpoint, noting that “other building on higher ground bordering the Allenby tract would look down on the embassy and compromise its security.”³⁰

²⁶ “The Helms Amendment and the Legislative History,” *Palestine Yearbook of International Law* (1989), Volume 5, pp. 334-335.

²⁷ Ibid. “Land Lease and Purchase Agreement,” p. 328.

²⁸ Ibid. “The US Department of State Position,” p. 336.

²⁹ Walid Khalidi, “The Ownership of the US Embassy Site in Jerusalem,” *Journal of Palestine Studies*, XXIX, no. 4 (Summer 2000), pp.90, 93, 94, available at: <http://www.palestine-studies.org/jps/fulltext/40840>

³⁰ Clyde Mark, “Jerusalem: The US Embassy and PL 104-45,” Congressional Research Service Report for Congress, RS20339, September 22, 1999, pp. 1-2,

During the Clinton administration, Congress moved to undo the delicate compromise that was struck during the Reagan era. Sen. Bob Dole (R-KS) introduced the Jerusalem Embassy Act of 1995 (PL 104-45), which attempted to force the hand of the executive by mandating the move of the US embassy to Jerusalem by May 1999 and made the expenditure of appropriated State Department funds for the acquisition and maintenance of buildings contingent on progress being made toward building the new US embassy.³¹ An earlier version of the bill also introduced by Dole prompted the Department of Justice to issue an opinion that “**the provisions of this bill** that render the executive branch’s ability to obligate appropriated funds conditional upon the construction and opening in Jerusalem of the United States Embassy to Israel **invade exclusive presidential authorities in the field of foreign affairs and are unconstitutional.**” In the opinion, Assistant Attorney General Walter Dellinger argued that “**Congress cannot trammel the President’s constitutional authority** to conduct the Nation’s foreign affairs and to recognize foreign governments **by directing the relocation of an embassy.** This is particular true where, as here, the location of the embassy is not only of great significance in establishing the United States’ relationship with a single country, but may well also determine our relations with an entire

available at:
https://digital.library.unt.edu/ark:/67531/metacrs993/m1/1/high_res_d/RS20339_1999Sep22.pdf

³¹ Jerusalem Embassy Act of 1995, Public Law 104-45, November 8, 1995, available at:
<http://uscode.house.gov/statutes/pl/104/45.pdf>

region of the world.”³² Dole sought to sidestep these constitutional concerns by inserting a presidential waiver authority into the version of the bill enacted into law.

Even with this nod toward the president’s prerogatives in the realm of foreign policy, the Clinton administration still vehemently objected to the bill, calling it a “**mistake.**” President Clinton warned that “a step such as this could **hinder the peace process,**” in explaining why he would make use of the waiver provision to prevent the embassy move. White House Press Secretary Mike McCurry stated the bill contradicted the principle “that it is **unwise for the United States to take actions that could be**

interpreted as prejudicing sensitive matters, such as Jerusalem, that the parties themselves have agreed should be decided in final status talks.” Clinton would have vetoed the bill, “but given the virtually unanimous votes by which these bills were adopted, exercising that option in this case would not alter the outcome.” Instead, “it would only prolong a divisive debate and risk further damage to the peace process.”³³

The waiver provision in the Jerusalem Embassy Act has been consistently invoked every six months by the Clinton, George W. Bush, and Obama administrations on the grounds that moving the US embassy to

³² “Bill to Relocate United States Embassy from Tel Aviv to Jerusalem,” Department of Justice, Office of Legal Counsel, May 16, 1995, available at :
<https://www.justice.gov/file/20221/download>

³³ “Statement by the Press Secretary,” Office of the Press Secretary, White House, October 24, 1995, available at: <https://clinton6.nara.gov/1995/10/1995-10-24-statement-by-press-secretary-on-israeli-embassy-bill.html>

Jerusalem would pose a national security threat. The Presidential Determinations published in the *Federal Register* do not offer much explanation for why the waiver authority was invoked, but a June 2004 report to Congressional leadership, made public through a Freedom of Information Act request, sheds light on why President Bush invoked the waiver even though “the Bush administration is committed to beginning the process of moving our embassy to Jerusalem.” The Bush administration cited logistical and security considerations with the Allenby Barracks property as reasons “we are **not in a position to establish an embassy in Jerusalem at this time.**” These included the size of the property only meeting some of the post-September 11 setback standards for embassies. To meet these security requirements, the United States exchanged

diplomatic notes with Israel in which Israel offered “several parcels that would significantly improve the site’s security profile,” located to the north and east (presumably in land occupied by Israel in East Jerusalem in 1967) of the Allenby Barracks. But beyond these practical and security concerns, the Bush administration also proffered a political explanation for invoking the waiver. Citing the president’s roadmap to peace and Israel’s impending removal of settlements and military bases from the Palestinian Gaza Strip, the State Department argued that **“moving the embassy at this time would prevent us from continuing to play a helpful role, would deepen the Israeli-Palestinian crisis, and most likely lead to major security problems for our diplomatic missions abroad.”**³⁴

“Moving the embassy at this time would...deepen the Israeli-Palestinian crisis, and most likely lead to major security problems.”

-State Department, June 2004

The Bush administration also clashed with Congress over another of its attempts to mandate presidential recognition of Jerusalem as Israel’s capital. Section 214 of the FY2003 Foreign Relations Authorization Act (PL 107-228) stipulated that “none of the funds authorized to be appropriated by this Act may be available for the publication of any official government document which lists countries and their capital cities unless the publication identifies Jerusalem as the capital of Israel.” It also mandated that for the “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.”³⁵

In a signing statement, President Bush maintained that this section of the act

“impermissibly interferes with the President’s constitutional authority to conduct the Nation’s foreign affairs and to supervise the unitary executive branch.” It could also “impermissibly interfere with the President’s constitutional authority to formulate the position of the United States, speak for the Nation in international affairs, and determine the terms on which recognition is given to foreign states.” Despite this Congressional action, the president

Information Act Case No. F-2015-04804, Doc No. C05821923, available at:

https://foia.state.gov/searchapp/DOCUMENTS/OctNov2016/F-2015-04804/DOC_0C05821923/C05821923.pdf

³⁵ Section 214, Public Law 107-228, September 30, 2002, available at:

<https://www.gpo.gov/fdsys/pkg/PLAW-107publ228/pdf/PLAW-107publ228.pdf>

³⁴ “Report Pursuant to Section 6 of Public Law 104-45,” Department of State, June 16, 2004, Freedom of

concluded, “US policy regarding Jerusalem has not changed.”³⁶

This issue came to a head during the Obama administration in a case—*Zivotofsky v. Kerry*—which was ultimately decided by the Supreme Court. The parents of US citizen Menachem Zivotofsky sued the State Department because it refused to list his place of birth as “Jerusalem, Israel” in his passport, contrary to the option to do so as provided by Congress in PL 107-228. The Obama administration argued that “the State Department’s passport policy reflects its determination that recording ‘Israel’ in passports of US citizens born in Jerusalem would be perceived internationally as a ‘reversal of US policy on Jerusalem’s status.’” It maintained that such a move could “significantly harm” US national security and “cause irreversible damage” to the ability of the United States to broker Israeli-Palestinian peace.³⁷

Aside from these political considerations, the Obama administration argued that the president has the exclusive authority to recognize foreign governments, which included the right to determine the scope of foreign governments’ sovereignty over territories.

“Neither President Truman nor any later United States President has issued an official statement or declaration acknowledging any country’s sovereignty over Jerusalem.”

-Supreme Court, June 2015

The Supreme Court agreed with the government, noting that “in contrast to a consistent policy of formal recognition of Israel, **neither President Truman nor any later United States President has issued an official statement or declaration acknowledging any country’s sovereignty over Jerusalem.**” The law passed by Congress made “clear that Congress wanted to express its displeasure with the President’s policy” of not recognizing Jerusalem as Israel’s capital, by “commanding the Executive to contradict his own, earlier stated position on Jerusalem. **This Congress may not do,**” the Supreme Court concluded in declaring the law to be unconstitutional.³⁸

Although the Obama administration maintained the United States’ consistent seven decade policy of not recognizing Israel’s sovereignty over Jerusalem, it may have taken steps which would facilitate a Trump administration initiative to move the US Embassy to Jerusalem should it

decide to do so. In 2010, the United States opened a Consular Section building on Flusser Street in Jerusalem’s former no-man’s land (see Map 5, below) to replace a consular building on Nablus Road in East Jerusalem, which had been in use since 1952.³⁹ In 2014, the United States purchased the adjacent land on which stands the Diplomat Hotel. The hotel is privately owned

³⁶ “Statement on Signing the Foreign Relations Authorization Act, Fiscal Year 2003,” September 30, 2002, Presidential Papers, Administration of George W. Bush, 2002, p.1697, available at:

<https://www.gpo.gov/fdsys/pkg/PPP-2002-book2/pdf/PPP-2002-book2-doc-pg1697-2.pdf>

³⁷ “Brief for the Respondent,” *Zivotofsky v. Kerry*, Supreme Court of the United States, No. 13-628, September 22, 2014, p. 5, available at:

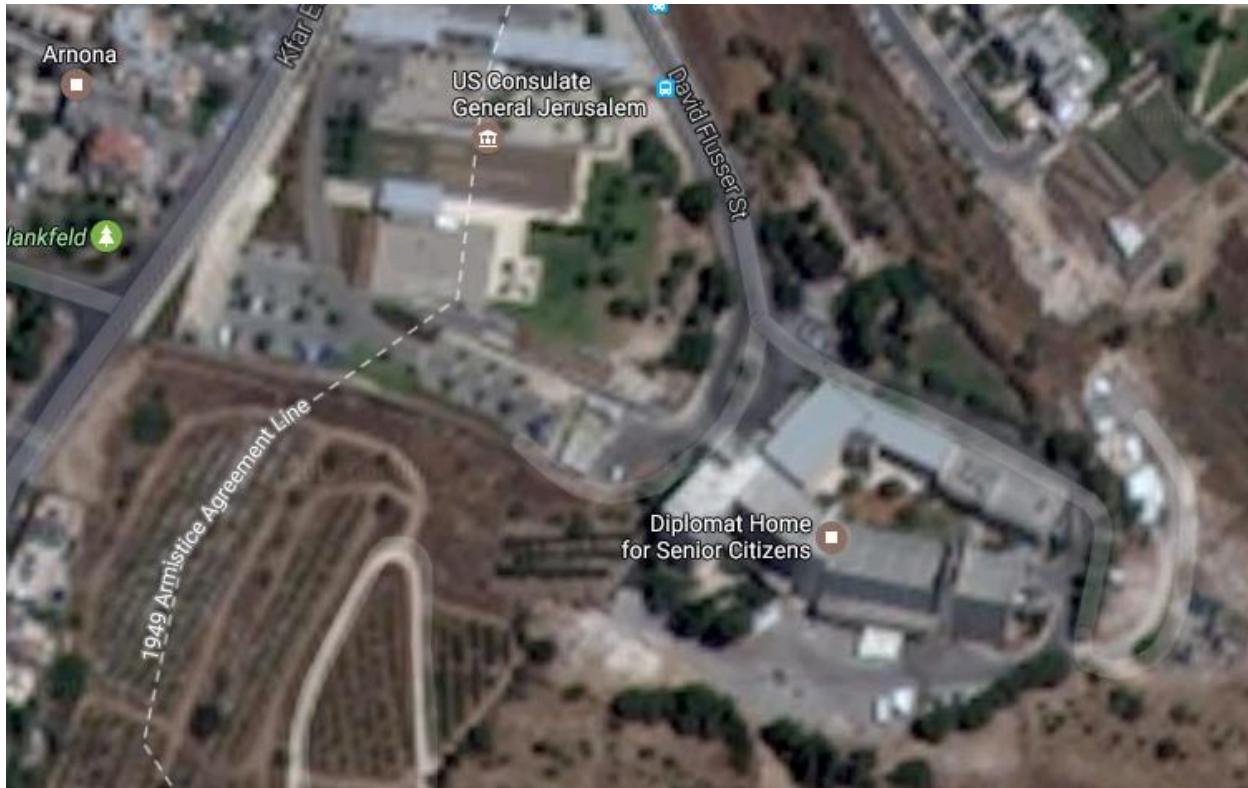
<https://www.justice.gov/sites/default/files/osg/briefs/2014/01/01/2013-0628.mer.aa.pdf>

³⁸ “Opinion of the Court,” *Zivotofsky v. Kerry*, Supreme Court of the United States, June 8, 2015, p. 2, 28, available at:

https://www.supremecourt.gov/opinions/14pdf/13-628_3dq3.pdf

³⁹ Raphael Ahren, “Jerusalem of Trump: Where the president-elect might put the US embassy,” *Times of Israel*, December 13, 2016, available at:

<http://www.timesofisrael.com/jerusalem-of-trump-where-the-president-elect-might-put-the-us-embassy/>



Map 5. Google Map of the US Consular Building on Flusser St. and the adjoining Diplomat Hotel, located inside no-man's land.

and leased to the Israeli Immigrant Absorption Ministry, which houses immigrants from the former Soviet Union there. According to *The Times of Israel*, ministry officials have reportedly told the Israeli Foreign Ministry that the building would not be available for US use until 2020.⁴⁰ The location of these two adjoining properties could possibly fulfill security setback and other requirements that would enable the United States to place its embassy there.

Conclusion

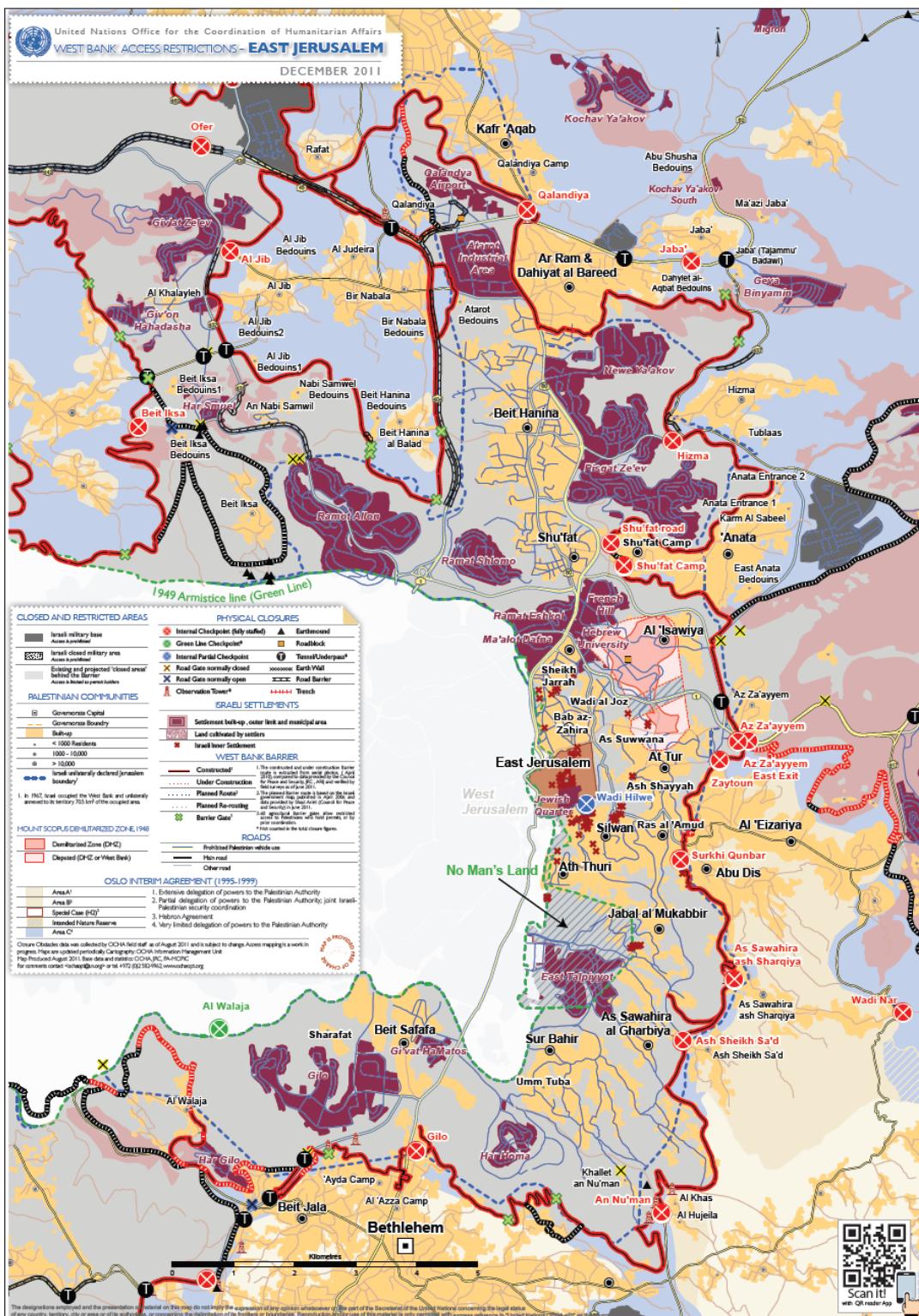
Although the Trump administration undoubtedly has the constitutional authority to declare Jerusalem to be Israel's capital and to

move the US embassy there, neither the president nor Congress—by passing legislation introduced in the current Congressional session to remove the president's waiver authority from the Jerusalem Embassy Act—should take any action in this regard for the following reasons:

- Since 1947, the United States has consistently refused to recognize any country's sovereignty over any part of Jerusalem. Until 1967, the United States supported the internationalization of the city, as called for in the UN partition plan. Since 1967, the United States has maintained that Jerusalem should remain an undivided city whose status can only be determined in negotiations with all relevant parties. Changing this policy would entail a radical upending of seven decades of considered, bipartisan policy.

⁴⁰ Tamar Pileggi, "Trump's team already exploring logistics of moving embassy to Jerusalem—report," *Times of Israel*, December 12, 2016, available at: <http://www.timesofisrael.com/trumps-team-already-exploring-logistics-of-moving-embassy-to-jerusalem-report/>

- **Recognizing Israel's sovereignty over Jerusalem would signal a legitimization of Israel's ethnic cleansing of West Jerusalem and its denial of Palestinian refugee rights.** Israeli forces established their control over what became West Jerusalem in 1948 through a campaign of terrorism and massacres which resulted in the ethnic cleansing of nearly all Palestinians from that portion of the city. To date, Palestinian refugees have been denied by Israel their right of return, a policy which the United States supported in 1949. Neither have Palestinian refugees been compensated by Israel for their loss of properties, including a large portion of the parcel of land originally designated for a US diplomatic facility in West Jerusalem.
- **Recognizing Israel's sovereignty over Jerusalem would signal a legitimization of Israel's separate-and-unequal regime in the city.** Even though Israel de facto annexed East Jerusalem and parts of the West Bank in 1967 and de jure annexed them with its basic law of 1980, Palestinians living in these parts of the expanded Jerusalem municipality are not citizens of Israel. Instead, they are only granted permanent residency rights which do not afford them representation in Israel's parliament. In addition, the Jerusalem municipality blatantly discriminates against Palestinian residents through city planning, municipal services such as sanitation and transportation, and housing and education all designed to privilege Israeli Jewish residents of Jerusalem, both those living in the western part of the city and those living in illegal settlements in East Jerusalem. Israel often revokes the tenuous residency rights of Palestinians, forcing them out of Jerusalem, and demolishes Palestinians homes there, all in an effort to implement a city master plan to retain a permanent demographic balance of the city at a 60-40 percentage in favor of Israeli Jews.
- **Recognizing Israel's sovereignty over Jerusalem would signal a legitimization of Israel's violations of the Fourth Geneva Convention.** Under international law and US policy, East Jerusalem is under Israeli military occupation and the Fourth Geneva Convention must guide Israel's conduct there. Accordingly, the transfer of Israeli civilians into occupied East Jerusalem is a violation of international and a war crime as defined by the International Criminal Court. Israel may not requisition or demolish property in East Jerusalem except for overriding security considerations. Israel may not alter the laws or customs of occupied territory. Parts of the wall that Israel has built in the West Bank cut through portions of East Jerusalem. In 2004, the International Court of Justice issued an advisory opinion that this wall is illegal under the terms of the Fourth Geneva Convention and customary international law, that it must be torn down, and compensation paid to those adversely affected by it.



Map 6. Map of East Jerusalem with Israeli settlements and wall. “West Bank Access Restrictions—East Jerusalem, December 2011,” UN Office for the Coordination of Humanitarian Affairs, available at: https://www.ochaopt.org/sites/default/files/ocha_opt_the_closure