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Senate's Israel Anti-Boycott Act Has Good Intentions, but Bad Results

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A bill sponsored by roughly half the members of Congress would — so we are warned by New York magazine, at least — "make it a felony for Americans to support the international boycott against Israel" and "make avoiding the purchase of Israeli goods for political reasons a federal crime."

Would the bill really do that? No, not as sweepingly as those passages suggest. But even shorn of the exaggeration, the Israel Anti-Boycott Act (S. 720), sponsored by Sens. Ben Cardin (D-MD) and Rob Portman (R-OH), is plenty bad enough. By punishing boycott participation grounded in political belief, it would infringe on individual liberty. I don't like the BDS ("Boycott, Divestment, and Sanctions") movement one bit, but sponsors of this bill — who include conservatives like Sens. Ben Sasse (R-NE), Mario Rubio (R-FL), and Ted Cruz (R-Tex.), as well as progressives like Sens. Kirsten Gillibrand (D-NY) and Claire McCaskill (D-MO) — need to face some tough questions about how it squares with the First Amendment.

The furor erupted following a July 17 ACLU letter in opposition to the bill and a widely noted Intercept column by Glenn Greenwald and Ryan Grim. By that point S. 720, drafted with the assistance of the American Israel Public Affairs Committee (AIPAC), had already picked up 43 Senate sponsors, 29 Republicans, and 14 Democrats. A similar bill in the House has 234 representatives, more than a majority in that chamber.

The bill would add new language to the 1979 federal law that already prohibits taking part in or assisting boycotts promoted by foreign governments (in practice, the Arab League's boycott of Israel). Among its key provisions, one would add a new prohibition on facilitating boycotts promoted by international governmental organizations (IGOs), such as the United Nations or European Union. Despite ongoing rumblings, neither the UN nor the EU have launched a boycott of Israel, but you never know what will happen in the future.

Neither the current law nor the bill, then, proposes to ban all participation in Israel boycotts: if your refusals to deal are strictly homegrown and no motive of assisting a government-led or future UN or EU boycott comes into them at any point, you'd still be okay. Is that especially comforting? The bill seems to contemplate liability even for persons who are neither agents of the EU or another foreign entity nor, say, multinational businesses trying to keep them happy: so

long as advancing some future boycott organized by such a body were part of your motive, you might be in trouble even if your actions followed the advice of some activist at your church or student group. And violations are subject to a minimum civil fine of $250,000, a ruinous sum for many.

Berkeley law lecturer David Schraub has attempted a line-by-line interpretation in a blog post — no easy matter, as some of the provisions are ambiguous and confusing.

Schraub points out that contrary to some of the early reports, neither old nor new versions ban (nor could they, given the First Amendment) "support" for a boycott in the everyday sense of sympathizing with it or speaking out in its favor. Instead, both ban a list of actions taken to advance a boycott. Some, such as refusals to deal, are commercial in nature, while others, such as relaying to a boycott authority information about one's own compliance, or details on the ownership, and employment profile of someone's company, can shade more into acts of communication.

Of particular concern, free-speech-wise: S. 720 creates new liability arising from "requests" both to join a boycott and to furnish information to facilitate boycotts. Although the meaning of the new language is far from clear, it likely means that the bill would ban a swath of previously legal speech about boycotts.

Also, to me, highly significant: for some courts, a key rationale in upholding the 1979 law as constitutional was that it functioned, in effect, as an anti-duress-payment law, in the same way that some laws ban the payment of kidnap ransoms. Since few American multinationals of that era found Arab League arm-twisting to be welcome, the law (or so it was argued) actually advanced their interests by taking a potentially coerced outcome off the table. But since there is no prospect of a group like the EU conducting a secondary boycott with similar coercive effect, the new bill cannot be rationalized even shakily this way. Its old rationale having eroded, the new law would much more frankly pivot to ban a class of foreign boycotts motivated by political belief.

One irony here is that several of the groups sounding the alarm about this are having to row back from their position in other controversies that refusal to deal is merely a commercial matter unrelated to conscience or ideological commitment, that anyone who buys or sells in the marketplace must covenant to buy or sell with all comers, and all the rest of what we hear in the wedding services cases. The ACLU points out that one business may decline to deal with Israel for "purely pragmatic reasons," such as shipping logistics, while another refuses to deal because it supports the boycott. Because only the second business is punished, it has in effect been punished for having taken an ideological stand. It's not a bad argument — but it might also seem to apply to the difference between a wedding vendor who turns down a job because she's doing another wedding that weekend, and one who turns it down to make some ideological point.

For libertarians, meanwhile, the answer should be easy. It is not a proper function of law to force Americans into carrying on foreign commerce they personally find politically objectionable, whether their reasons for reluctance be good, bad, or arbitrary. The outcry might make a good

occasion to revisit the 1979 law itself in light of principles of individual liberty; at a minimum, we should decline S. 720's invitation to extend it further.

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