The Rise and Fall of S. 720: A Testament to Civil Society

by Rose Asaf

Introduction

In the summer of 2017, Senator Cardin from Maryland introduced S. 720, the Israel Anti-Boycott Act. The legislation serves as a response to a United Nations Human Rights Council resolution from March 24, 2016, which called for the severing of economic ties with Israeli entities functioning past the 1949 Armistice Line. S. 720 also seeks to wholly implement the United States-Israel Strategic Partnership Act of 2014 and amend the Export Administration Act of 1979 and the Export-Import Act of 1945. American civil society harshly condemned the legislation as an attack on free speech rights, which caused it to lose popular support and traction in the Congress. I begin this paper by providing a brief history of the Boycott, Divestment and Sanctions (BDS) movement and of Israel’s place in America’s political arena. Then, I examine the UN resolution and the acts cited in the text of S. 720. Next, I highlight the various sources of support and opposition of S. 720. Finally, I address the implications of the rise and fall of the Israel Anti-Boycott Act of 2017.

BDS and Israel in American Politics

In 2005, Palestinian civil society organizations asked the international community to heed their call for a Boycott, Divestment and Sanctions (BDS) movement to nonviolently pressure the Israeli government to abide by international law. In an open letter that was released on July 9, 2005, the Palestinian civil society organizations justified their call for the BDS movement by pointing to the then thirty-eight-year occupation of the West Bank, Gaza Strip, and Golan
Heights. While Israel withdrew from the Gaza Strip a little over one month after the release of the letter, the region was still occupied when the letter was first posted. Also condemned in the letter is the “construction of the colonial Wall,” or what Israel calls a “security fence” along the 1949 Armistice Line, which was found illegal by the International Court of Justice in 2004.

Invoking the success of BDS tactics in apartheid South Africa, the letter’s endorsers end their call by encouraging the maintenance of BDS until three demands are met. First, Israel must end “its occupation and colonization of all Arab lands and dismantle the Wall.” Next, “the fundamental rights of the Arab-Palestinian citizens of Israel to full equality” must be recognized. And lastly, Israel must grant “the rights of Palestinian refugees to return to their homes and properties as stipulated in UN resolution 194.”

Since its conception, the BDS movement has inspired both broad support and outrage from all sides. Growing considerably from 2005, BDS now finds itself under the umbrella of big tent activist and political groups in America, including the Movement for Black Lives, the Democratic Socialists of America, and the U.S. Green Party. The incorporation of BDS into larger movements has been paralleled by increasingly aggressive attempts to thwart activism through political apparatuses, as is exemplified by S.720. The Israel Anti-Boycott Act of 2017, however, is by no means the first of its kind. In 2015, when President Obama signed the Trans-Pacific Partnership (TPP), his signature was conditional on a U.S.-proposed amendment that sought to curtail the BDS movement in Europe.

Thus, the inclusion of anti-BDS language in the TPP represents an internationalist approach to the mitigation of BDS. However, in the summer of 2016, Governor Cuomo of New York issued an executive order that hyper-localized the countermovement. In an op-ed to the Washington Post entitled “If you boycott Israel, New York state will boycott you,” Governor
Cuomo introduces, explains, and justifies his executive order that prohibits state agencies, authorities, or state-funded companies and institutions from participating in BDS. As the headline of the article implies, any entity meeting the listed criteria that is found to be boycotting Israel will be put on a public list and all state funds will be revoked.

While Cuomo was criticized by both Palestinian and free speech activists for this move, he received widespread applause, as well. Thus, it seems far more politically untenable to harbor anti-Israel sentiments in America than it is to create a McCarthy-style blacklist of companies. Senator Sanders of Vermont, for instance, had his Judaism called into question when he refused to talk at the annual American Israel Public Affairs Committee’s (AIPAC) Policy Conference and openly criticized Israel’s asymmetrical retaliation against the Palestinian people. In the same vein, some have deemed Minnesota Congressman Keith Ellison anti-Semitic on account of his criticism of Israel. There exists in American politics a clear and growing tendency to conflate anti-Semitism and criticism of Israel, which discourages the latter.

Relevant Legislation

While BDS activism likely motivated S. 720, the bill’s legislative origins construct themselves upon a 2016 UN resolution, the United States-Israel Strategic Partnership Act of 2014, the Export Administration Act of 1979, and the Export-Import Act of 1945.

On March 24, 2016, the United Nations Human Rights Committee (UNHRC) adopted an expansive resolution that delineates the body’s recognition of Israel’s various violations of international law, including but not limited to Israeli settlements in the Occupied Palestinian Territories, the construction of the aforementioned separation wall, and general human rights abuses of Palestinians. Toward the end of the resolution, the UNHRC urges all states to
implement the Guiding Principles on Business and Human Rights and calls upon businesses to comply with these principles, as well. The principles prohibit business entities from working with companies that are located beyond the 1949 Armistice Line, as any Israeli entities beyond this line are in violation of international law.

S. 720 responds to the UNHRC resolution by amending the Export Administration Act of 1979 (EAA) to extend its anti-boycott provisions to international government organizations rather than just foreign countries. Generally, the EAA vests the President with the power over U.S. exports, but the actual legislation is exhaustive, and most of its components do not pertain to this conversation. The relevancy of the EAA, however, situates itself in the same genealogy as S. 720. From and even before Israel’s declared statehood in 1948, the Arab League has boycotted Israeli businesses and products, which in many ways has influenced the current BDS movement as its de facto progenitor. Addressing the Arab League’s boycott, the EAA also grants the President the power to prohibit “any United States person from…agreeing to…support any boycott fostered or imposed by a foreign country against a country which is friendly to the United States.” As previously mentioned, S. 720 would extend this to include international organizations, such as the UN. Further, S. 720 amends the Export-Import Bank Act of 1945, which established the Export-Import Bank of the U.S. and is most well-known for its authorization of measures against any person who helps a non-nuclear state obtain any nuclear material or explosive device. S. 720 extends the measures authorized in the Export-Import Bank Act of 1945 to also consider for penalization persons participating in a boycott of Israel.

The amendments to existing legislation proposed in S. 720 work in tandem with its call to fully implement the United States-Israel Strategic Partnership Act of 2014, which includes multitudinous provisions that seek, through various avenues, to provide Israel with additional aid
and support. Altogether, S. 720 signals an effort to further establish the pro-Israel consensus that seems especially strong in the current Congress.

Reception

The Israel Anti-Boycott Act came under fire by the American Civil Liberties Union (ACLU) for its curtailment of free speech protections. In a letter sent to Senators, the ACLU implores members to pull support from the legislation that “would punish individuals for no reason other than their political beliefs.” The letter revealed that the legislation would “subject [violators] to a minimum civil penalty of $250,000 and a maximum criminal penalty of $1 million and 20 years in prison.” The ACLU letter drew considerable attention to S. 720. Most notably, Glenn Greenwald and Ryan Grim published an article in The Intercept entitled “U.S. Lawmakers Seek to Criminally Outlaw Support for Boycott Campaign Against Israel.” In their thorough and widely shared examination of the bill and its implications, Greenwald and Grim confirm the ACLU’s finding and expose that AIPAC abetted the drafting of the legislation.

AIPAC, known as America’s Pro-Israel Lobby, exerts considerable influence over U.S. politics. In their book, “The Israel Lobby and U.S. Foreign Policy,” University of Chicago Professors John Mearsheimer and Stephen Walt’s discuss the momentous power of AIPAC. Mearsheimer and Walt note that AIPAC, often seen as a representative for Jewish-Americans, is “run by hardliners, [unlike] the bulk of U.S. Jewry…[that] is more favorably disposed to making concessions to Palestinians.” The book also establishes the strength of AIPAC by considering two surveys conducted in 1997 and 2005 in which members of Congress and their staffs were asked to list the most powerful lobbying organizations in America. AIPAC came second in both polls, emphasizing the well-known and established strength of AIPAC. The authors suggest that
the immense influence of AIPAC derives from its assurance “that its friends get strong financial support.”

In fact, Senator Cardin, the sponsor of S. 720, received an astounding $218,793 from the pro-Israel lobby in the 2011-2012 campaign cycle, securing him as the fourth most endowed recipient of funds. Most, if not all, of the cosponsors of S. 720 have received some sort of funds from the pro-Israel lobby.

Amidst the public outrage over S. 720, Senator Cardin and co-sponsor Senator Portman released a letter in which they address some of the criticisms levied at their legislation. In the letter, they reject the claim that their bill restricts free speech. They state that the bill is limited to “commercial activity” and “is based on current law that has been constitutionally upheld.”

Underscored in their letter is the notion of intent. They state that individuals acting on their own accord will not be penalized, but if individuals’ participation in a boycott results from a call from an international organization or foreign government, they would be in violation of S.720. As critics have pointed out, the legality of intent is often ambiguous, which makes this consideration an especially perilous threat to the free speech rights protected by the First Amendment.

Cardin and Portman’s appeal was not strong enough to convince some of their colleagues in the Senate to support the bill. Senator Warren of Massachusetts is perhaps one of the most notable Senators to come out in opposition to the legislation. “I think the boycott is wrong,” she said to a room full of constituents, “but I think outlawing protected free speech activity violates our basic constitutional rights.” Another notable Senator, Kirsten Gillibrand of New York, was originally a cosponsor of the legislation. However, after being confronted by pro-BDS Jewish Voice for Peace activists, Senator Gillibrand reconsidered her support of the legislation and pulled her support from S. 720 in its current form.
Conclusion

The strength of the pro-Israel lobby is an undisputed fact in American politics, as its legislative priorities often enjoy wide bipartisan support in the Congress. While assessing the value of BDS is out of the scope of this paper, it is important to note the considerable resources that AIPAC and the pro-Israel lobby have exerted to resist it. More often than not, powerful lobbies are able to push through their legislative priorities with their resource abundance; however, if anything, the de facto defeat of S. 720 should serve as a testament to the power of an organized and outraged civil society. The health of America’s democracy cannot rely solely on the instituted checks and balances established in the Constitution. Civil society’s role in politics and possible influence over legislative decisions must not be understated, even when set against the millions of dark dollars that flow to political campaign funds. The collective efforts of the media, the ACLU, and grassroots activists were powerful enough to outweigh AIPAC, which is considered to be the second most powerful lobby in America. While America’s democratic resilience remains intact, threats to staples of American democracy, such as free speech, may sometimes come from the government, itself. In these rare yet perilous situations, the rise and fall of S. 720 lends itself to underscoring the necessity of civil society to serve as a necessary check on the government in maintaining democratic rights.
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