

NLWJC - Kagan

Counsel - Box 023- Folder 009

Jerusalem Provision

THE WHITE HOUSE

WASHINGTON

July 24, 1996

MEMORANDUM FOR JACK QUINN
ALAN KRECZKO
KATHY WALLMAN

FROM: ELENA KAGAN *AK*

SUBJECT: JERUSALEM PROVISION

Martha Foley recently called with another status report on this issue. She said that Bill Danvers had learned from Sen. Lieberman's staff that the Senator does not want to meet with the Administration on this issue. She also said that the Department of State is now amenable to waiting until conference to deal with the issue, on the theory that any Administration efforts before then would be counterproductive. So, according to Martha, we're now just in a holding pattern. Alan: If you have any different information or views, you should let Jack know.

*{ -
Thanks
JK*

EXECUTIVE OFFICE OF THE PRESIDENT

22-Jul-1996 09:33am

TO: Elena Kagan
FROM: Martha Foley
Office of the Chief of Staff
SUBJECT: RE: jerusalem language

Yes, there have been some developments. Let's talk by phone when you have a chance...

Let Jack know -

- Liberman - Suit come!

- State - will deal w/ This issue in court -
not until then. All agree -

Wait - holding pattern

(no impu any pressure
on State)

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514
3794

514-4173

Dawn

- ~~religion thing/Fed~~
- ✓ - get with the Jerusalem
any. — CACCOMB
- ~~apology.~~

lower public
than letter

cost/burden?
State

and somewhat up to talk to Lieberman?
Dellinger/Quinn?
To talk about issues.

Need to be correct
not

that we addressed in
or that we were going to challenge
or that we were going
to not comply.

Really uncast? Clearly uncast.

not very strong language.
Can ^{when to} simply? < Maybe so.

If empty, anyone has
abil to challenge?

(NO)

If just empty, anyone
(any) has abil to
challenge? (HARD)

**U.S. DEPARTMENT OF JUSTICE
OFFICE OF LEGAL COUNSEL
WASHINGTON, D.C. 20530**

FACSIMILE TRANSMISSION SHEET

DATE: July 15, 1996

FROM: Dan Koffsky, Donna M. Cole, Asst.

OFFICE PHONE: 202/514-2030

TO: Alan Kreczko

OFFICE PHONE: 456-9111

NUMBER OF PAGES 02 (W/O COVER SHEET)

FACSIMILE NUMBER: 456-9110

REMARKS:

Per our discussion.

Memorandum



Subject
Foreign Operations Appropriations

Date
July 8, 1996

To
Roz Rettman
Office of Management and Budget

From
Randolph D. Moss *RD*
Deputy Assistant Attorney
General

This memorandum sets out the comments of the Office of Legal Counsel on the foreign operations appropriations bill, H.R. 3540, in the version reported by the Senate committee.

Sections 514, 569, 572(b), and 577 of the bill would require the United States to use its "voice and vote" to take particular positions in international organizations. The Constitution, however, commits to the President the responsibility for formulating the position of the United States in international fora. See, e.g., Department of Navy v. Egan, 484 U.S. 518, 529 (1988) (the Supreme Court has "recognized 'the generally accepted view that foreign policy was the province and responsibility of the Executive'" (quoting Haig v. Agee, 453 U.S. 280, 293-94 (1981)); Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 705-06 n.18 (1976) ("[T]he conduct of [foreign policy] is committed primarily to the Executive Branch."); United States v. Louisiana, 363 U.S. 1, 35 (1960) (the President is "the constitutional representative of the United States in its dealings with foreign nations"). See also Ward v. Skinner, 943 F.2d 157, 160 (1st Cir. 1991) (Breyer, J.) ("[T]he Constitution makes the Executive Branch . . . primarily responsible" for the exercise of "the foreign affairs power."), cert. denied, 503 U.S. 959 (1992); Sanchez-Espinoza v. Reagan, 770 F.2d 202, 210 (D.C. Cir. 1985) (Scalia, J.) ("[B]road leeway" is "traditionally accorded the Executive in matters of foreign affairs."); Earth Island Inst. v. Christopher, 6 F.3d 648, 652-54 (9th Cir. 1993). These provisions, therefore, should be revised to make clear that they are only precatory.

In addressing a similar provision in an earlier bill, the President stated that his "constitutional authority over foreign affairs . . . necessarily entails discretion over these matters," and that he would "construe [the relevant provisions] as precatory." 30 Weekly Comp. Pres. Doc. 948, 949 (1994). We recommend that similar language be included in a signing statement if the current bill is enacted in its present form.

61647

Section 563 would impose a moratorium on the use of antipersonnel landmines. This restriction would raise a serious concern about infringement on the President's authority as Commander in Chief. Although Congress may decide upon the weapons available to the President, it may not dictate how those weapons are to be used in military operations. A major object of the Commander in Chief Clause is "to vest in the President the supreme command over all the military forces, -- such supreme and undivided command as would be necessary to the prosecution of a successful war." United States v. Sweeny, 157 U.S. 281, 284 (1895). As Commander in Chief, the President "is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy." Fleming v. Page, 50 U.S. (9 How.) 603, 615 (1850). Attorney General (later Justice) Robert Jackson explained that "the President's responsibility as Commander in Chief embraces the authority to command and direct the armed forces in their immediate movements and operations designed to protect the security and effectuate the defense of the United States. . . . [T]his authority undoubtedly includes the power to dispose of troops and equipment in such manner and on such duties as best to promote the safety of the country." Training of British Flying Students in the United States, 40 Op. Att'y Gen. 58, 61-62 (1941) (emphasis added). This provision should therefore be deleted.

Section 575 would direct that "all United States Government publications shall refer to the capital of Israel as Jerusalem." This provision, in effect, orders the President to take a particular position on the question of Israel's capital. Such a direction intrudes on the President's constitutional authority to formulate the position of the United States and speak for the nation in international communications and to determine the terms on which recognition is given to foreign governments. Issues Raised by Section 129 of Pub. L. No. 102-138 and Section 503 of Pub. L. No. 102-140, 16 Op. O.L.C. 18, 26-27 (1992) (preliminary print) (passport is communication to foreign governments and Congress therefore may not dictate content of communication); Memorandum for Abner J. Mikva, Counsel to the President, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, "Bill to Relocate United States Embassy from Tel Aviv to Jerusalem" (May 16, 1995). Section 575 should be deleted.

The appropriation for the Export-Import Bank (an unnumbered section of the bill) includes the proviso that "none of the funds made available by this or any other Act may be made available to pay the salary and other expenses of the incumbent Chairman and President of the Export-Import Bank unless and until he has been confirmed by the United States Senate." The incumbent now serves under a recess appointment. According to the Committee Report, Sen. Rep. 295, 104th Cong. 2d Sess. at 21 (1996), the Committee

took this "unprecedented step" because of its concern that "the recess appointment was made in order to avoid examination of the illegal use of retention allowances which allegedly were provided pursuant to the incumbent Chairman's direction."

We believe that this provision would create grave constitutional problems. Most significantly, by barring the payment of the incumbent's salary and expenses, the bill would invade the President's constitutional powers. The provision in question here would effectively frustrate the President's exercise of the recess appointment power. See U.S. Const. art. II, § 2, cl. 3. By forbidding the payment of "expenses," the bill would block payment not only of the incumbent's salary but also of the necessary expenses for the operation of his office. In addition, the provision could well have the effect of removing the incumbent from office. But the power of removal belongs to the President, see Myers v. United States, 272 U.S. 52 (1926), except where the official is impeached and convicted. See Morrison v. Olson, 487 U.S. 654, 685-86 (1988). Unless the President removes a recess appointee, the Constitution provides that his or her appointment lasts until the end of the next session of Congress, U.S. Const. art. II, § 2, cl. 3; and Congress has no power to shorten the constitutional term by legislation. Finally, there may also be a claim that the provision is unconstitutional as a bill of attainder. See United States v. Lovett, 328 U.S. 303 (1946).

Telecon - Martha Foley

Recog. Power.

SAP - old one - did say ^{serious} const (SOP) concerns.

1. clearly unconst? how serious?

Bill's report says

2. can we refer to ^{empty} entire?

3. if we emptied, would anyone have standing?
standing - or strike it down?

What can we tell folks about
what will happen if this goes in
and we strike it?

hope: we can't ship;

but don't worry - cts will!

Bill Danvers.

Don Kotsky

Don Fox
514-~~5563~~
5539

Alan - telecon

she wants to approach McConnell: must-change
in bill?

St Dept / NSC - it must be on the list.
for policy reasons

DOT - no formal opinion.

Mexico embassy

Became law - declined to sign bill

waiver done.

No one would have
standing

change them up even more
it we do ✓ letter.
DAS
stir up isoul more.

Thursday

TITLE V

GENERAL PROVISIONS

The following explains changes the Committee is recommending to the general provisions contained in previous law, as well as new provisions recommended by the Committee:

Section 506 amends current law by referring to the new "Non-proliferation, antiterrorism, demining and related programs" account in lieu of "International organizations and programs".

Section 510 amends current law by updating the current provision.

Section 513 amends current law by deleting a proviso permitting the Chairman of the Export-Import Bank to make a determination with regard to financing for the expansion or establishment of production of commodities that are in surplus on the world market, the financing of which may cause substantial injury to U.S. producers of the same, similar, or competing commodity.

Section 515 amends current law by reconciling the list of accounts to the account structure in the act, by adding the Export-Import Bank to the list of accounts subject to notification, and by relating prior notifications to the authorization of funds.

Section 516 amends current law by updating the current provision.

Section 519 is a new provision that: (1) restates current prohibitions on abortion funding, (2) prohibits funding for abortion lobbying, and (3) requires that in determining eligibility for population planning assistance funds, nongovernmental and multilateral organizations shall not be subjected to requirements more restrictive than those applicable to foreign governments.

Section 521 amends current law to revise the list of countries for special notification by deleting the Dominican Republic, Nicaragua, Peru, and Russia. The requirement for special notification of activities for Russia is contained elsewhere in the act.

Section 525 amends current law by extending the current provision regarding reciprocal leasing for another year.

Section 537 amends current law by updating the current provision.

Section 538 amends current law by extending the limitations regarding excess defense articles for the Mediterranean for another year.

Section 542 amends current law to allow the President to direct the transfer of Department of Defense services and commodities to the Government of Bosnia and Hercegovina in an aggregate amount during fiscal years 1996 and 1997 of \$100,000,000. The section also deletes policy language that has since been overtaken by events.

Section 544 amends current law by prohibiting the obligation of funds contained in this act, as well as the obligation and expendi-

ture of prior year funds, for any country or organization that the Secretary of State determines is cooperating, tactically or strategically, with the Khmer Rouge in their military operations, or to the military of any country that is not acting vigorously to prevent its members from facilitating the export of timber from Cambodia by the Khmer Rouge. In addition, the Secretary is to submit two reports to the Committees on Appropriations that are to contain his conclusions as to whether there are any such countries, organizations, or militaries, and the reasons why he has come to the conclusion that there are or are not countries, organizations, or militaries for which assistance is prohibited because of the operation of this provision. This section also amends current law by updating the current provision.

Section 547 amends current law by updating the current provision.

Section 550 amends current law by updating the current provision, by adding certain countries eligible for assistance under the Partnership for Peace to be eligible to receive excess defense articles, and to repeal the sunset provision for this authority in current law.

Section 558 amends current law by updating statutory citations.

Section 561 amends current law by continuing the authority regarding crating, packing, handling, and transportation of nonlethal excess defense articles and makes the authority available for all excess defense articles transferred to certain countries eligible to participate in the Partnership for Peace.

Section 562 amends current law by extending the moratorium period contained in current law.

Section 563 amends current law by making this limitation notwithstanding any other provision of law.

Section 566 amends current law by making permanent the current prohibition on assistance to countries that restrict the transport or delivery of U.S. humanitarian assistance.

Section 569 is a new provision that requires the President to impose certain economic sanctions on Burma.

The Committee has retained two provisions from last year's bill sections 570 and 571, to authorize debt reduction for the poorest of the poor and to extend a program under which qualified Caribbean Basin and Latin American countries can buy back their debt from the United States at no budget costs. The Committee believes that such programs represent creative, and cost-efficient ways, of reducing burdensome debt levels, a hindrance to economic growth in many developing countries. The Committee is particularly pleased to note that several countries—including Jamaica, a successful participant in the Enterprise for the Americas Initiative—are working with the administration to gain access to the debt buyback program.

Section 575 is a new provision that requires that, beginning in fiscal year 1997, all United States Government publications shall refer to the capital of Israel as Jerusalem.

Section 576 amends current law to extend for another year the authority to adjust the status of certain aliens.

1 *LIMITATION ON FUNDS TO THE TERRITORY OF THE*
2 *BOSNIAC-CROAT FEDERATION*

3 *SEC. 574. Funds appropriated by this Act for activi-*
4 *ties in the internationally-recognized borders of Bosnia and*
5 *Herzegovina (other than refugee and disaster assistance and*
6 *assistance for restoration of infrastructure, to include power*
7 *grids, water supplies and natural gas) may only be made*
8 *available for activities in the territory of the Bosniac-Croat*
9 *Federation.*

10 *UNITED STATES GOVERNMENT PUBLICATIONS*

11 *SEC. 575. Beginning in fiscal year 1997, all United*
12 *States Government publications shall refer to the capital*
13 *of Israel as Jerusalem.*

14 *EXTENSION OF CERTAIN ADJUDICATION PROVISIONS*

15 *SEC. 576. The Foreign Operations, Export Financing,*
16 *and Related Programs Appropriations Act, 1990 (Public*
17 *Law 101-167) is amended—*

18 *(1) in section 599D (8 U.S.C. 1157 note)—*

19 *(A) in subsection (b)(3), by striking “and*
20 *1996” and inserting “1996, and 1997”; and*

21 *(B) in subsection (e), by striking out “Octo-*
22 *ber 1, 1996” each place it appears and inserting*
23 *“October 1, 1997”; and*

24 *(2) in section 599E (8 U.S.C. 1255 note) in sub-*
25 *section (b)(2), by striking out “September 30, 1996”*
26 *and inserting “September 30, 1997”.*

1 *TRANSPARENCY OF BUDGETS*

2 *SEC. 577. (a) LIMITATION.—Beginning three years*
3 *after the date of the enactment of this Act, the Secretary*
4 *of the Treasury shall instruct the United States Executive*
5 *Director of each international financial institution to use*
6 *the voice and vote of the United States to oppose any loan*
7 *or other utilization of the funds of their respective institu-*
8 *tion, other than to address basic human needs, for the gov-*
9 *ernment of any country which the Secretary of the Treasury*
10 *determines—*

11 *(1) does not have in place a functioning system*
12 *for a civilian audit of all receipts and expenditures*
13 *in the portions of its budget that fund activities of the*
14 *armed forces and security forces;*

15 *(2) has not provided a summary of a current*
16 *audit to the institution; and*

17 *(3) has not provided to the institution an ac-*
18 *counting of the ownership and financial interest in*
19 *revenue-generating enterprises of the armed forces and*
20 *security forces.*

21 *(b) DEFINITION.—For purposes of this section, the*
22 *term “international financial institution” shall include the*
23 *institutions identified in section 535(b) of this Act.*

24 *PROMOTION OF HUMAN RIGHTS*

25 *SEC. 578. A senior official, or former senior official,*
26 *of a government that receives funds appropriated by this*