

December 13, 2018

RE: ACLU Opposes the Inclusion of the Israel Anti-Boycott Act in the End-Of-The-Year Omnibus Spending Bill

Dear Member,

On behalf of the American Civil Liberties Union (ACLU) and our more than 3 million members, supporters and activists, we strongly urge you to oppose the inclusion of the Israel Anti-Boycott Act, previously H.R. 1697 and S. 720, in the omnibus spending bill because the newly proposed language violates the First Amendment. It is particularly alarming that Congress is considering attaching language from this bill to the spending package without releasing the revised text for discussion, debate, or markup.



Washington Legislative
Office
915 15th Street, 6th FL
Washington DC 20005
T: 202-544-1681
aclu.org

Susan Herman
President

Anthony Romero
Executive Director

Faiz Shakir
National Political
Director

We urge leadership to refrain from including this unconstitutional measure in the omnibus spending bill and urge all members to oppose including any language related to this bill without the appropriate procedures given its severity and constitutional repercussions.

The ACLU originally stated our opposition to this bill in July 2017, shortly after it was introduced by Representative Roskam and Senator Cardin.¹ We subsequently opposed revised versions of H.R. 1697 and S. 720, because they failed to resolve the First Amendment violations in the original bills.² It is now our understanding that Congress is considering attaching a newly revised version of the bill to the end-of-the year omnibus spending bill. This version, which purports to address the bill's free speech concerns, leaves intact key provisions which would impose civil and criminal penalties on companies, small business owners, nonprofits, and even people acting on their behalf who engage in or otherwise support certain political boycotts. Even worse, Congress intends to attach this bill to the omnibus spending package without holding a debate and has thus far failed to publicly release the text of the revised bill.

¹ See Letter to U. S. House of Representatives (July 17, 2017) (opposing H.R. 1697) available at <https://www.aclu.org/letter/aclu-letter-house-opposing-israel-anti-boycott-act>; Letter to U.S. Senate (July 17, 2017) (opposing S. 720) available at <https://www.aclu.org/letter/aclu-letter-senate-opposing-israel-anti-boycott-act>.

² See Letter to U. S. House of Representatives (July 10, 2018) (opposing revised version of H.R. 1697) available at <https://www.aclu.org/letter/aclu-letter-opposing-revised-version-israel-anti-boycott-act>; Letter to U.S. Senate (Mar. 6, 2018) (opposing revised version of S. 720) available at <https://www.aclu.org/letter/aclu-letter-revised-version-s720-israel-anti-boycott-act>.

The latest version of the bills being considered continues to ban participating in political boycotts of countries friendly to the United States when the boycott is called for by an international organization, like the United Nations, by amending the Export Control Reform Act, a new version of the Export Administration Act. While the bill's proponents suggest that First Amendment concerns have been resolved because they claim the bill applies only to commercial activity, such assurances ring hollow in light of the bill's intended purpose, which is to suppress voluntary participation in disfavored political boycotts.

Currently, the Export Control Reform Act, restricts participation in boycotts fostered or imposed by foreign countries, and has generally applied to U.S. persons seeking to do business with boycotting countries or companies located within their borders. The Israel Anti-Boycott Act would extend this prohibition to any actions intended to support boycotts called for by international governmental organizations, such as the United Nations Human Rights Council. Unlike the Export Administration Act, which was meant to protect U.S. businesses against economic coercion by foreign governments, the Israel Anti-Boycott Act itself coerces Americans by making it a crime for them to participate in boycotts they support.

The amended bill's title and statements of policy make clear that it primarily targets boycotts of Israel. The bill also prohibits furnishing information to the U.N. Human Rights Council for the establishment of a database of entities that operate beyond Israel's 1949 Armistice lines. This provision is squarely directed at the U.N. Human Rights Council's March 2016 resolution urging businesses to avoid supporting the establishment and maintenance of Israeli settlements in the occupied Palestinian territories and calling for the establishment of such a database. The bill would thus undoubtedly lead to new regulations imposing civil and criminal penalties for supporting U.N.-led boycotts of Israel or Israeli settlements in the occupied territories.

Political boycotts are constitutionally protected expression. The Supreme Court made that clear in *NAACP v. Claiborne Hardware*, when it upheld the First Amendment rights of black community members to boycott white-owned businesses in their pursuit for equality.³ Two federal courts have now held that political boycotts targeting Israel are protected for the same reasons that the boycotters were protected in *Claiborne Hardware*.⁴ Should Congress criminalize voluntary participation in U.N.-led boycotts of Israel and other countries, it will be on the wrong side of the Constitution.

The severity of this bill's impact cannot be underestimated. It should not be a federal crime to support a boycott of any country. Regardless of their views on the

³ *NAACP v. Claiborne Hardware*, 468 U.S. 886 (1982).

⁴ See *Jordahl v. Brnovich* --- F.Supp.3d ---, 2018 WL 4732493, at *13. (citing *Claiborne*, 458 U.S. at 911); *Koontz v. Watson*, 283 F. Supp.3d 1007 (D. Kan. 2018).

Israel-Palestine conflict, Members of Congress should oppose any effort to include this unconstitutional bill in the omnibus spending bill. Moreover, it is essential that at a minimum, Members have an opportunity to discuss, debate, and markup this bill, rather than including it in must-pass legislation with minimal notice of the language. We urge you to oppose the inclusion of the Israel Anti-Boycott Act or any related language in the end-of-the-year spending package.

If you have any additional questions, please contact Manar Waheed (mwaheed@aclu.org) and Kate Ruane (kruane@aclu.org).

Sincerely,



Faiz Shakir
National Political Director



Manar Waheed
Senior Legislative and Advocacy Counsel



Kate Ruane
Senior Legislative Counsel