

U.S. Policy on Israel Held Hostage by Threats and Outdated Arguments

Prepared written testimony of:

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“Moving the American Embassy to Jerusalem: Challenges and Opportunities”

November 8, 2017

Chairman DeSantis, Ranking Member Lynch, and honorable members of the Subcommittee, I am honored to be invited to testify before you today about implementing the Jerusalem Embassy Act, which will take full effect on Dec. 2, absent a presidential waiver issued prior to that date. I am a professor at Northwestern University Pritzker School of Law, where I teach constitutional and international law. I am also the head of the international law department at the Kohelet Policy Forum, a Jerusalem think-tank. I have written dozens of scholarly articles on various aspects of U.S. foreign relations law and the Arab-Israeli conflict, which have been published in leading law reviews and peer-reviewed journals. My scholarship has been frequently cited in leading foreign relations cases in federal courts, and I have testified repeatedly before Congress, as well as the European Parliament. I also co-wrote an amicus brief to the Supreme Court in *Zivotofsky v. Kerry*, the Jerusalem passport case.

My testimony today will explain the reasons behind the U.S. embassy's current location, and explain the structure of the Embassy Act. It will show that the Embassy's location outside of Jerusalem undermines U.S. foreign policy and helps isolate Israel. It will then consider the oft-repeated national security arguments in favor of delaying the Act's implementation. These arguments have not aged well since they were first rehearsed upon the law's passage 22 years ago. Moreover, they reward threats of violence, and allow U.S. policy to be held hostage by terrorists and aspiring terrorists.

1. What a waiver really means

I will begin by discussing the structure of the Jerusalem Embassy Act, and how it operates. Jerusalem is the only world capital whose status is denied recognition by the United States. To remedy that, in 1995 Congress passed the Jerusalem Embassy Act, which mandates moving the U.S. Embassy to a "unified" Jerusalem. The implementation of the law has been held in abeyance due to semiannual presidential waivers for "national security" reasons.

Crucially, the law already requires the embassy to Israel to be moved to that country's capital, Jerusalem. It is important to stress that the waiver available to the president under the Jerusalem Embassy Act of 1995¹ does *not* waive the obligation to move the embassy. That policy has been fully adopted by Congress in the Act (sec. 3(a)(3)) and is not waivable.

Congress, having total power over the spending of taxpayer dollars, does not have to pay for an embassy in Tel Aviv, regardless of the Executive branch's foreign policy preferences. Thus, the Act's enforcement mechanism is to suspend half of the appropriated funds for the State Department's "Acquisition and Maintenance of

¹ Jerusalem Embassy Act of 1995, Pub.L. 104-45, Nov 8, 1995, 109 Stat. 398.

Buildings Abroad” until the law’s terms are complied with. The waiver provision simply allows the president to waive the financial penalty for renewable six-month periods. The waiver does not change the underlying substantive obligation of having the embassy in Jerusalem as a condition for ongoing State Department funding.

Moreover, the law says nothing about “moving” the embassy. Rather, the requirement is to “officially open” an embassy, which can be done with a mere declaration upgrading the status of one of the existing consular facilities in the city. It does not require the physical relocation of the facility in Tel Aviv or any of its functions.

Under the structure of the Act, once a six-month waiver expires, the full force of the Act’s funding provisions take effect beginning the subsequent fiscal year (sec. 3(b)). Once a waiver period expires without a waiver being issued, no further waivers are possible. It is important to stress that literally nothing need be done to implement the Act – the president must simply refrain from signing a waiver. Such an action need not be interpreted as any kind of statement about or change in U.S. policy, a fact that gives the Executive significant diplomatic cover. That is because U.S. policy is already established by the Act. And that law does not allow for any waiver based on foreign policy concerns. Any arguments for further waivers based on concerns about the (apparently moribund) Israeli-Palestinian peace process, the reactions of Arab states, and similar concerns are entirely illegitimate and cannot be considered. The Act only allows the president to issue a waiver when it is “necessary” to protect national security.

2. What the Embassy’s Status Means

It is important to understand the reasons for the Embassy’s current location outside Jerusalem, and its implications for U.S foreign policy. The current situation results in an American foreign policy stance that is both dangerous to Israel, discrediting to the U.S., and fundamentally incoherent. The U.S. embassy was never established in Jerusalem, because the U.S., upon Israel’s creation, refused to recognize any part of the city as under Israeli sovereignty. This policy was originally due to the United Nations General Assembly’s 1947 proposal, in Resolution 181, to partition Mandatory Palestine into three non-continuous Jewish sectors and four non-contiguous Arab sectors, each of which would become a separate country. In this arrangement, the greater Jerusalem area would be a “corpus separatum,” an internationalized city under no sovereignty. The General Assembly’s proposal had no legal force and was unworkable, and in any case completely rejected by the Arab states, who opposed a Jewish state within any borders. Thus, the proposed treatment of Jerusalem by Res. 181 should have been absolutely irrelevant in 1948, and it is nothing but a historical footnote today.²

² Abraham Bell & Eugene Kontorovich, *Palestine, Uti Possidetis Juris, and the Borders of Israel*, 58 *Ariz. L. Rev.* 633, 677-78 (2016).

In no other respect does the U.S. give any deference to Res. 181's proposed borders – it does not doubt Israeli sovereignty over the Tel Aviv neighborhood of Jaffa although it would have fallen under Arab sovereignty under the proposed partition plan. Even more absurdly, the deference to Jerusalem's *corpus separatum* status only operates against Israel. The borders of the proposed international city exceeded those of the city today, and in particular included significant parts of Bethlehem, so as to incorporate Christian holy sites. Yet the U.S. treats Bethlehem as part of the territory administered by the Palestinian Authority, instead of treating it as a sui generis entity as it does the Israeli-controlled parts of the *corpus separatum*. The insistence on maintaining the policy legacy of a hypothetical *corpus separatum* when it comes to Israel but not the Palestinians locks in a deeply anti-Israel bias in America's regional diplomacy. The refusal to locate the embassy in Jerusalem is both anachronistic and incoherent.

What is worse, by giving deference to pre-1948 border proposals, the Embassy's current location casts a permanent question mark on the U.S.'s acceptance of the State of Israel. It suggests – contrary to U.S. policy - that Israel's legitimate borders are somehow related to those proposed by U.N. G.A. Res. 181.

All this does concrete harm. By refusing to even give force to Israel's sovereignty within the 1949 Armistice lines, any U.S. brokering of a peace process loses all credibility. Moreover, this encourages Arab maximalism by implying that Israel is a uniquely probationary state, and suggesting they have some say in territory that was never under Arab control. The current arrangement requires the maintenance of a silly charade where U.S. officials must commute through the country's most difficult traffic to interact with the Israeli government, while being meticulously careful to not mention what country that government sits in. All this is deeply discrediting to U.S. diplomacy. America can hardly reassure Israel about its security concerns in any peace deal when it allows itself to be held hostage by threats of violence. Finally, it must be noted that the U.S. failure to implement the Embassy Act has done absolutely nothing to moderate the Palestinians' resistance to a negotiated diplomatic solution.

3. National security waiver and discredited predictions

The central argument against moving the embassy is that it would lead to violence, and in particular to attacks against American targets. As explained above, these are the only permissible arguments for waiver under the Act. But the basis of those warnings has been undermined by the massive changes in the region since 1995. In 1995, the Middle East was controlled by stable Arab autocracies that sought to suppress anti-U.S. actions, while at the same time being highly critical of U.S. support for Israel. Today, the Sunni Arab

states have found common cause with Israel and the U.S., and the specter of jihadist violence is no longer a threat, but a reality.

While the Palestinian issue was once at the forefront of Arab politics, today Israel's neighbors are preoccupied with a nuclear Iran and radical Islamic groups. For the Sunni Arab states, the Trump administration's harder line against Iran is far more important than Jerusalem. Indeed, with Saudi Arabia now under direct attack by Iranian-backed Shiite forces, the Sunni states have every reason to suppress any anti-American efforts. To be sure, implementation of the law could in principle serve as a pretext for attacks by groups like ISIS and al Qaeda. But these groups have already declared war against the U.S., and are fully motivated to carry out attacks to the extent of their capacity. The despicable attack on the U.S. consulate in Benghazi and the silly pretexts offered for it, serve as a powerful reminder of this point. While any attacks carried out after a waiver is not issued may be "dedicated" to the issue, this does not mean the expiration of a waiver will increase the capacity or determination of America's enemies. The U.S. cannot be threatened by what is already happening.

Invoking hypothetical threats as a reason for distorting U.S. foreign policy towards a key ally is itself deeply inconsistent with U.S. foreign policy and basic prudence. U.S. embassies in the Middle East routinely face concrete and specific threats.³ Indeed, in 1998, Islamic terrorists blew up the U.S. embassies in Dar El Salaam, Tanzania, and Nairobi, Kenya. These attacks were said to be a response to various aspects of U.S. foreign policy.⁴ But America did not respond by rethinking those policies, or by withdrawing its embassies from those cities. Instead, the Executive undertook to hunt down and punish the perpetrators, while Congress appropriated extraordinary amounts for improved security at diplomatic facilities around the world.⁵

Arguing that the U.S. not carry out its policy with regards to its closest ally in the Middle East amounts to an argument for treating Israel differently, and thus implicitly validates those who deny Israel's full status among the nations of the world.

Indeed, recent events have shown how hollow threats of retaliation in the wake of changing policies on Jerusalem are. In April of this year, Russia suddenly announced that it recognized Jerusalem as the capital of Israel.⁶ This made Russia the first and only country in the world to recognize Jerusalem as Israeli in any way – a major development.

³ For one of many examples, see Michael Edison Hayden, *US Embassy in Egypt warns of 'potential threat' from terrorist organization*, ABC News, (May 24, 2017), available at [https://www.abcnews.com/News/US-Embassy-Egypt-warns-potential-threat-terrorist-organization-2017-05-24](#).

⁴ Lawrence Wright, *The Looming Tower: Al Qaeda and the Road to 9/11*. (New York: Knopf 2016).

⁵ Susan Epstein, *Diplomatic and Embassy Security Funding Before and After the Benghazi Attacks*, Congressional Research Service Report (Sept. 10, 2014)

State Department Fact Sheet, *Funding for Embassy Security* (Aug. 4, 1999), available at https://1997-2001.state.gov/regions/africa/fs_anniv_funding.html.

⁶ Russian Foreign Ministry, *Statement regarding Palestinian-Israeli settlement* (April 6, 2017), available at http://www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/2717182.

It was an extraordinary change in policy for the Kremlin, which had always been a steadfast backer of the Palestinians.

Prior to Moscow's recognition announcement, experts would have predicted that such a unilateral recognition would provoke anger and violence from at least the Palestinians. Note what happened next: No explosions of anger at the Arab world. No end to Russia's diplomatic role in the Middle East. No terror attacks against Russian targets. Indeed, Moscow's dramatic Jerusalem reversal has largely been ignored by the foreign-policy establishment because it disproves their predictions of mayhem.⁷

Once the President fails to issue a waiver, the Palestinian Authority would have every incentive to downplay the significance of the move – as they did with Moscow's recognition – because to do otherwise would be to concede a fundamental diplomatic defeat. The Abbas government is unlikely to want to do that.

4. Conclusion

It is not surprising that the Palestinian Authority threatens dire consequences if the U.S. moves its Israeli embassy. It has found that such threats work. This means that waiving the Act based on such threats in fact invites further threats: the waiver creates its own predicate. The national security arguments for waiver in effect allow U.S. foreign policy to be taken hostage by terrorists, or anyone willing to make threats. America's stance on such an important issue cannot be dictated by terror. Instead, the U.S. should make clear that if the PA allows any action against Israel or the U.S. in response to a non-waiver, the U.S. will close PA offices in Washington.

Finally, I would recommend that the U.S. Embassy ultimately be moved to the site of the current U.S. Consulate in the Arnon Hanetziv neighborhood. Only this can give full effect to Congress's policy of moving the Embassy in a "unified" Jerusalem. This location is in what was a demilitarized zone under the 1949 Armistice Lines. The Palestinian claim to those areas of Mandatory Palestine conquered in an aggressive war by Jordan and Egypt do not apply to this area. However, it would signal that the U.S. does not regard these Armistice lines as creating no-go zones for Jews or Israelis.

Moving the Embassy to this location could catalyze the peace process by showing the Palestinians that there is a cost to their repeated refusal of Israel's offers of statehood, which the U.S. has supported. The Palestinians have been offered an independent state in the peace negotiations in 2000 and 2001, and Netanyahu was reportedly prepared to make far-reaching concessions in 2014. Each time, the Palestinians said no. Never has there

⁷ Eugene Kontorovich, *Russia Recognizes Jerusalem as Israel's Capital. Why Can't the U.S.?* (May 14, 2017).

been a national independence movement that has refused an independence offer on the grounds that it does not include all the territory the movement seeks. Imagine if the United States refused to accept peace with Britain because it did not give the newly independent colonies the northern border they sought. Yet the Palestinian rejection of successive proposals carries no negative consequences for them — it just raises the expectations from Israel in the next round.

One of the main reasons for the failure to reach a peace deal is the unspoken assumption that protracted and repeated Palestinian rejectionism costs them nothing diplomatically, while creating constraints for Israel. Moving the Embassy to Jerusalem, and in particular to the current major consular facility, would break this deadlock and open the doors to progress.

Thank you for giving me the opportunity to address these issues, and I welcome your questions.

Professor Eugene Kontorovich – career highlights

Prof. Eugene Kontorovich is a professor of international and constitutional law and Northwestern University's Pritzker School of Law. His prolific scholarship has been published in leading academic journals, and cited by federal and foreign courts in important international and foreign relations law cases.

He is widely recognized as a primary authority of legal and diplomatic issues related to the Israel-Arab conflict. His analysis about the legality of Israel's presence in Judea and Samaria have revolutionized discussions of this issue. He has been described by Haaretz as "a one-man legal lawfare brain trust" as well as "one of the cagiest commentators" on Israel.

Prof. Kontorovich is also a prominent constitutional law scholar, particularly in the field of U.S. foreign relations law. His writings have played an important role in developing the constitutional and intellectual case against excessive U.S. involvement in international legal institutions. His frequent commentary has provided some of the basic intellectual support for a range of current issues ranging from the case against early voting to the illegality of the Iran deal.

He has been deeply engaged in numerous public policy initiatives. Most recently, Prof. Kontorovich is the policy mastermind of the wave of state laws opposing boycotts of Israel, which have been adopted in 14 states in the past 18 months. He wrote a Supreme Court amicus brief in the Jerusalem passport case. He is regularly called on to advise legislators and cabinet members in the U.S., Israel, and Europe on questions pertaining international law.

Prof. Kontorovich's is a regular contributor to the *Washington Post's* Volokh Conspiracy blog, and his essays and op-eds have appeared in the *New York Times*, *Wall Street Journal*, *Los Angeles Times*, *USA Today*, *POLITICO*, and many other leading publications. He is regularly sought out for legal commentary by the nation's major news organizations.

He attended college and law school at the University of Chicago, and later taught there. He clerked for Judge Richard Posner on the United States Court of Appeals for the Seventh Circuit. In a previous career, he was a newspaperman at *Wall Street Journal*, and *New York Post*. He has been honored with a fellowship at the Institute for Advanced Study in Princeton, in 2011-12, and with the Federalist Society's prestigious Bator Award, given annually to a young scholar (under 40), for outstanding scholarship and teaching.

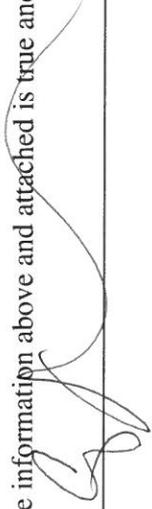
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