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Geoffrey R. Watson

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THE JERUSALEM EMBASSY ACT OF 1995

Geoffrey R. Watson*

Congress has voted to move the U.S. Embassy in Israel from Tel Aviv to Jerusalem. On October 24, 1995—the day of the Conference on Jerusalem here at the Columbus School of Law of The Catholic University of America—Congress passed the Jerusalem Embassy Act of 1995.¹ The President took no action on the Act, allowing it to enter into force on November 8, 1995.² The Act states that a United States Embassy to Israel should be established in Jerusalem by May 31, 1999, and it provides for a fifty percent cut in the State Department's building budget if the Embassy is not opened by that time.³ The Act permits the President to waive the budget cut for successive six-month periods if the President determines it is necessary to protect the "national security interests of the United States."⁴

In these pages and elsewhere, several contributors to this symposium have addressed the policy questions raised by the Act.⁵ I will focus on the Act's interpretation.

* Visiting Associate Professor of Law, Columbus School of Law, The Catholic University of America, 1995-present; Assistant Professor of Law, Seattle University School of Law, 1991-95; Attorney-Adviser, Office of the Assistant Legal Adviser for Near Eastern and South Asian Affairs, U.S. Dept. of State, 1989-91. I would like to thank Bob Destro and Alice Kaswan for their helpful comments.

1. Pub. L. No. 104-45, 109 Stat. 398 (1995). See 141 CONG. REC. S15535 (daily ed. Oct. 24, 1995) (Senate vote); 141 CONG. REC. H10691 (daily ed. Oct. 24, 1995) (House vote).

2. See *infra* notes 19-21 and accompanying text (describing the Administration's reasons for neither signing nor vetoing the Act). The Act became law ten days after the President received it, not counting Sundays. See U.S. CONST. art. I., § 7, cl. 2.

3. § 3, 109 Stat. at 399.

4. § 7(a), 109 Stat. at 400. The Act also requires the Secretary of State to report regularly on progress toward the establishment of an embassy in Jerusalem. See § 5, 109 Stat. at 399-400 (requiring a report to Congress within 30 days of enactment); § 6, 109 Stat. at 400 (requiring semiannual reports).

5. See, e.g., Marshall J. Breger, *Jerusalem Gambit*, NAT'L REV., Oct. 23, 1995, at 41, 44 (arguing that the "symbolic question of where the embassy lies" may "obscure, or indeed work against," the goal of a united Jerusalem under Israeli sovereignty); Samuel W. Lewis, *Reflections on the Future of Jerusalem*, 45 CATH. U. L. REV. 695, 697 (1995) ("[T]he passage of this law, while offensive to many Arabs, created no real turbulence in the ongoing peace process with Syria and the Palestinians."); cf. Marshall J. Breger, *Jerusalem, Now and Then: The New Battle for Jerusalem*, MIDDLE EAST Q., Dec. 1994, at 23, 34 (arguing

I.

The United States recognized Israel immediately upon its independence in 1948, and shortly thereafter the United States opened its Embassy in Tel Aviv, then the seat of the Israeli government.⁶ At that time, Israel had control of West Jerusalem, while Jordan had control of East Jerusalem. After the 1967 war, East Jerusalem came under Israeli control, as did the West Bank, Gaza, and the Golan Heights. Since then the United States, like most states, has taken the position that negotiations should determine the final status of Jerusalem.⁷ Moreover, since 1967 every U.S. President, both Republican and Democrat, has asserted that the United States Embassy should remain in Tel Aviv pending the outcome of such negotiations.⁸ These administrations have argued that moving the Embassy to Jerusalem would antagonize needlessly the Arab states and the Palestinians, who argue that al-Quds is their capital.⁹

that Washington should "jettison[] its outdated position that the sovereignty of Jerusalem is on the negotiating table"). Professor Breger has also addressed the constitutionality of S. 770, the forerunner to the Jerusalem Embassy Act. *See Breger, Jerusalem Gambit, supra*, at 43 (arguing that S. 770 was unconstitutional).

6. *See* Testimony of Lawrence S. Eagleburger, Under Secretary of State for Political Affairs, before the Sen. Comm. on Foreign Relations, Feb. 23, 1984 [hereinafter Testimony of Lawrence S. Eagleburger], *excerpted in* MARIAN NASH LEICH, OFFICE OF THE LEGAL ADVISER, DEPARTMENT OF STATE, PUB. NO. 10120, 1 CUMULATIVE DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1981-1988, at 483 (1993) [hereinafter 1 U.S. DIGEST 1981-1988] (noting that the United States was the first country to recognize Israel).

7. *See, e.g., U.S. Middle East Policy: Hearing before the Sen. Comm. on For. Rel.*, 96th Cong., 2d Sess. 8 (1990) (statement of Secretary Vance) ("[T]he final status of the city must be settled in the context of negotiations for a final peace."), *excerpted in* MARIAN NASH LEICH, OFFICE OF THE LEGAL ADVISER, DEPARTMENT OF STATE, PUB. NO. 9610, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1980, at 103 (1986); 1 U.S. DIGEST 1981-1988, *supra* note 6, at 478 ("Following the Arab-Israeli 'Six-Day War' of June 1967, the position of the United States was and continues to the present time to be that the final status of Jerusalem should be determined through negotiations . . ."); ELEANOR C. MCDOWELL, OFFICE OF THE LEGAL ADVISER, DEPARTMENT OF STATE, PUB. NO. 8908, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1976, at 634 (1977) (restating the U.S. view that "unilateral attempts to predetermine [Jerusalem's] future have no standing").

8. *See, e.g.,* 1 U.S. DIGEST 1981-1988, *supra* note 6, at 479 ("Like its predecessors, the administration of President Ronald Reagan held . . . that the U.S. Embassy should remain in Tel Aviv pending a negotiated resolution of Jerusalem's status."); Letter from Warren Christopher, Secretary of State, to Robert Dole, Senate Majority Leader (June 20, 1995), *reprinted in* 141 CONG. REC. S15469 (daily ed. Oct. 23, 1995) (arguing against moving the Embassy); *see also* Testimony of Lawrence S. Eagleburger, *supra* note 6, *excerpted in* 1 U.S. DIGEST 1981-1988, *supra* note 6, at 484-85 (arguing against proposals to move the United States Embassy to Jerusalem).

9. *See Palestine National Council, Declaration of Independence, Nov. 15, 1988*, U.N. GAOR, 43d Sess., Annex III, Agenda Item 37, at 13, U.N. Doc. A/43/827/S/20278 (1988); *see also* John Quigley, *Sovereignty in Jerusalem*, 45 CATH. U. L. REV. 765, 780 (1996) ("Palestine has a valid claim to Jerusalem.").

Congress, on the other hand, has repeatedly expressed its view that the United States Embassy to Israel should be moved from Tel Aviv to Jerusalem.¹⁰ Congressional supporters of the move argue that Jerusalem is the capital of Israel, and that the U.S.'s refusal to maintain an embassy in Jerusalem undermines America's support for Israel. They point out that Israel is one of the few countries in the world in which the United States does not maintain its embassy in the host state's capital.¹¹ They dismiss

10. See, e.g., Pub. L. No. 100-459, § 305(A), 102 Stat. 2186, 2208 (1988) (providing that each new diplomatic facility in Israel, Jerusalem, or the West Bank must "equally preserve[] the ability of the United States to locate its Ambassador or its Consul General at that site, consistent with United States policy"). As to State Department implementation of this law, see 1 U.S. DIGEST 1981-1988, *supra* note 6, at 485-86. Examples of bills calling on the President to move the Embassy include H.R. Con. Res. 281, 103d Cong., 2d Sess. (Aug. 11, 1994); S. 2508, 100th Cong., 2d Sess. (June 13, 1988); H.R. Con. Res. 78, 99th Cong., 1st Sess. (Mar. 6, 1985).

11. Supporters of the Act sometimes say there are *no* other cases in which a United States Embassy is not located in the host's capital city. See, e.g., Letter from 93 United States Senators to Warren Christopher, Secretary of State (Mar. 20, 1995), *reprinted in* 141 CONG. REC. S15476 (daily ed. Oct. 23, 1995) ("Israel is the only nation in which our embassy is not located in the functioning capital."). In fact, there are several other cases in which the United States maintains an embassy in a place other than the capital city. The United States Embassy to Belize is in Belize City, not in the capital city of Belmopan. The American Embassy to Benin is in Cotonou, not the capital city of Porto-Novo. The United States Embassy to Cote d'Ivoire is in Abidjan, not the capital, Yamoussoukro. The United States Embassy to Micronesia is in Kolonia, not the capital Palikir. Compare United States Department of State, Country List Organized by Geographic Area/Bureau (avail. at [gopher://dosfan.lib.uic.edu:70/0F-1%3A6979%3A1geolist.txt](http://dosfan.lib.uic.edu:70/0F-1%3A6979%3A1geolist.txt)) (listing embassy locations) with United States Department of State, Office of the Geographer, Independent States in the World (avail. at [gopher://dosfan.lib.uic.edu:70/0F1%3A7916%3A96/02/16%20Independent](http://dosfan.lib.uic.edu:70/0F1%3A7916%3A96/02/16%20Independent)) (listing capitals). See generally 1 COUNTRIES OF THE WORLD 157 (Brian Rajewski ed., 1996) (providing information on capitals of Belize and Benin); *id.* at 163 (Cote d'Ivoire); *id.* at 181 (Micronesia).

In many (perhaps most) cases, the situation appears to be temporary. For example, Nigeria moved its capital recently to Abuja, in the north part of that country, but the United States Embassy to Nigeria is still in Lagos. A branch office of the American Embassy has been opened in the new capital. See *id.* at 183-84.

In a few cases, location of an embassy is a matter of choosing between different seats of government, so it is not possible to locate the embassy in one "capital" city. For example, the United States maintains its Embassy to Bolivia in La Paz, the executive capital, not in Sucre, the legislative and judicial capital. See *id.* at 157. Similarly, the United States Embassy to the Netherlands is in the Hague, the seat of government, rather than Amsterdam. See *id.* at 182. Furthermore, the United States Embassy to South Africa shuttles between Pretoria and Cape Town, because the South African government itself changes seats depending on the season. See *id.* at 191.

Of course, there are a number of countries in which the United States maintains no embassy at all, even though it does maintain diplomatic relations with them. Indeed, even the lack of diplomatic relations does not necessarily imply nonrecognition. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 203 cmt. d [hereinafter RESTATEMENT] (stating that "one government may recognize another yet refrain from assuming diplomatic relations with it") (citing U.S.-Cuba relations).

suggestions that moving the Embassy would damage the peace process, arguing that no one can realistically expect Israel to move its capital away from Jerusalem, and that pretending otherwise unnecessarily raises Palestinian hopes to the contrary.¹² In any event, they add, the Embassy can be located in West Jerusalem, where Israel's claim to sovereignty is less controversial.¹³ The Jerusalem Embassy Act of 1995, then, is just the latest shot in a longstanding battle between the legislative and the executive branches over the location of the United States Embassy to Israel.

The Act's immediate precursor was S. 770, which Senator Kyl introduced in May, 1995.¹⁴ That bill was different from the final Act in two ways: it mandated the commencement of construction of a Jerusalem Embassy in 1996, and it contained no provision for a presidential waiver of the bill's mandate. The Clinton Administration opposed the bill on policy and constitutional grounds.¹⁵ S. 770 had sixty-two co-sponsors in the Senate, not quite enough to override a presidential veto. Accordingly, Senator Dole introduced a new bill, S. 1322, that eliminated the requirement that construction begin in 1996.¹⁶ Thereafter, Dole and his co-sponsors reluctantly added the presidential waiver provision in order to allay concerns about the bill's constitutionality, and to preserve some presidential flexibility as a policy matter.¹⁷ In this form, overwhelming majorities in both Houses adopted the bill.¹⁸

The State Department sources cited above can also be found through its Web site, <http://dosfan.lib.uic.edu/index.html>.

12. See, e.g., 141 CONG. REC. S15476 (daily ed. Oct. 23, 1995) (remarks of Sen. D'Amato) ("Further delay in moving the U.S. Embassy to Jerusalem will only embolden the Palestinians who believe that they have a justified claim to the city.")

13. See, e.g., 141 CONG. REC. S15483 (daily ed. Oct. 23, 1995) (remarks of Sen. Boxer) (asserting that "our Embassy will be located within the pre-1967 West Jerusalem border, not in the more controversial eastern section").

14. S. 770, 104th Cong., 1st Sess. (May 10, 1995).

15. See Letter from Warren Christopher, Secretary of State, to Robert Dole, Senate Majority Leader (June 20, 1995), reprinted in 141 CONG. REC. S15469 (daily ed. Oct. 23, 1995) (arguing against S. 770 on policy and constitutional grounds); see also Memorandum from Walter Dellinger, Assistant Attorney General, to Abner J. Mikva, Counsel to the President (May 16, 1995) [hereinafter OLC Memorandum], reprinted in 141 CONG. REC. S15468 (daily ed. Oct. 23, 1995) (arguing that the bill is unconstitutional).

16. See 141 CONG. REC. S15166 (daily ed. Oct. 13, 1995) (introduction of S. 1322); *id.* S15176-79 (daily ed. Oct. 13, 1995) (remarks of Sen. Dole) (comparing S. 1322 to S. 770).

17. See 141 CONG. REC. S15467-68 (daily ed. Oct. 23, 1995) (remarks of Sen. Feinstein) (describing negotiations on the bill); 141 CONG. REC. S15521 (daily ed. Oct. 24, 1995) (remarks of Sen. Feinstein) (describing efforts to reach a compromise).

18. See 141 CONG. REC. S15535 (daily ed. Oct. 24, 1995) (93-5 in the Senate, with one not voting); 141 CONG. REC. H10691 (daily ed. Oct. 24, 1995) (374-37 in the House, with 5 voting "present" and 17 not voting).

The sponsors of the bill were also anxious to speed its passage through Congress before Prime Minister Rabin arrived at the Capitol Rotunda for a ceremony honoring the 3,000-

That same day the White House announced that the President would neither sign nor veto the bill, allowing it to go into effect by default.¹⁹ Press Secretary Mike McCurry released a statement reiterating the President's opposition to the legislation. The statement acknowledged the near-unanimous vote in the Congress and concluded that a veto "would only prolong a divisive debate and risk further damage to the peace process."²⁰ It added:

The President will not, however, sign this legislation. To do so would be inconsistent with his pledge to take no action which would undermine a peace process that shows so much promise of creating a better future for Israel and its neighbors. Therefore, when the bills passed this week become law, the President will use their waiver provisions to prevent the legislation from adversely affecting the Middle East peace process.²¹

Unlike some of the Administration's earlier statements on the bill, McCurry's statement did not charge directly that the Act was unconstitutional.

Since then the Clinton Administration has filed two reports with Congress, as the Act requires.²² The first report, dated December 8, 1995, set forth various options for the establishment of an embassy, ranging from constructing a new building to leasing an existing one.²³ The second report, dated March 1, 1996, elaborated on possible time-lines for opening an embassy. But it added that the President "would take no action which would undermine the peace process. Thus, as we consider how best to respond to the provisions of the Act, we should do so in a way that avoids

year anniversary of Jerusalem. See 141 CONG. REC. H10685 (daily ed. Oct. 24, 1995) (remarks of Rep. Gephardt) (stating "I can't think of a better anniversary gift" than to acknowledge Jerusalem as Israel's capital); *id.* H10687 (remarks of Rep. Engel) (citing the anniversary). Several House members complained that no hearings had been held on the bill. See, e.g., 141 CONG. REC. H10682 (daily ed. Oct. 24, 1995) (remarks of Rep. Hamilton); *id.* H10687 (remarks of Rep. Engel) (supporting the bill but complaining about the absence of hearings or a markup session).

19. See *Statement by the Press Secretary on Israeli Embassy Bill*, 1995 WL 622772 (WHITE HOUSE), Oct. 24, 1995. The Constitution provides that when the Congress is in session, a bill becomes law if it is not acted on by the President within ten days of its presentation to the President. See U.S. CONST. art. I, § 7, cl. 2.

20. *Statement of the Press Secretary*, *supra* note 19, at *1.

21. *Id.*

22. See Pub. L. No. 104-45, § 5, 109 Stat. 398, 399-400 (1995) (requiring a report within 30 days of enactment); *id.* § 6, 109 Stat. at 400 (requiring semiannual reports).

23. See Report Pursuant to Section 5 of Public Law 104-45, attached to Letter from Wendy R. Sherman, Assistant Secretary for Legislative Affairs, to Newt Gingrich, Speaker of the House (Dec. 8, 1995).

damage to the peace process."²⁴ Neither report made any explicit reference to the Act's constitutionality.

II.

The waiver authority in the Act raises two questions of interpretation. First, is there any limit to the number of successive waivers a President may invoke? A few congressional proponents of the Act have suggested that some such limit exists.²⁵ Second, how broad is the President's discretion to invoke the waiver? The Administration's recent statements, particularly McCurry's statement, imply that the President has broad discretion to invoke the waiver. During floor debate on the bill, however, many supporters of the legislation suggested otherwise.²⁶ These interpretive questions are, of course, related to the question of the Act's constitutionality. Where possible, statutes are construed consistently with the Constitution.²⁷ But interpretation of the Act begins with its text.

The first interpretive question, relating to successive waivers, is answered readily by the plain language of the waiver provision. Section 7(a)(2) provides for additional suspensions "at the end of any period" during which a suspension is already in effect.²⁸ This provision must mean that the President can issue an indefinite string of six-month waivers. It states quite plainly that the President may tack a new waiver period at the end of "any" existing period in which a waiver is in effect.

In a colloquy on the Senate floor, Senators Dole and Kyl tried to suggest otherwise. Senator Kyl asked whether the intent of the drafters was to give the President the "right to invoke the waiver in perpetuity?"²⁹ Senator Dole replied: "The waiver authority should not be interpreted to mean that the President may infinitely push off the establishment of the American Embassy in Jerusalem."³⁰ But Dole undermined his own posi-

24. See Report Pursuant to Section 6 of Public Law 104-45, at 4, attached to Letter from Wendy R. Sherman, Assistant Secretary for Legislative Affairs, to Newt Gingrich, Speaker of the House (Mar. 1, 1996).

25. See *infra* notes 29-30 and accompanying text.

26. See *infra* notes 33-35 and accompanying text.

27. See *United States v. Delaware & Hudson Co.*, 213 U.S. 366, 407 (1909) (asserting that courts have a "duty to adopt that construction which will save the statute from constitutional infirmity").

28. Pub. L. No. 104-45, § 7(a)(2), 109 Stat. 398, 400 (1995).

29. 141 CONG. REC. S15532 (daily ed. Oct. 24, 1995) (remarks of Sen. Kyl).

30. *Id.* (remarks of Sen. Dole). Earlier, when speculating about the possibility of adding waiver language to the bill, Senator Kyl also stressed that it would be a "temporary waiver only." 141 CONG. REC. S15470 (daily ed. Oct. 23, 1995) (remarks of Sen. Kyl). Senator Kyl stated: "We are not talking about the ability of the President to simply continue year after year after year" to waive the Act. *Id.*; see also 141 CONG. REC. H10681 (daily ed. Oct. 24, 1995) (remarks of Rep. Gilman) ("Congress does not intend for the

tion by adding: "If a waiver were to be repeatedly and routinely exercised by a President, I would expect Congress to act by removing the waiver authority."³¹ This statement implies that the Act does not prevent the President from waiving the Act in perpetuity—that a further act of Congress would be required to prevent the President from doing so. In any event, insofar as the colloquy contradicts the plain language of the statute, the latter must prevail. The President can link together an infinite series of waivers.

The second interpretive question is more difficult. Does the Act permit the President to waive its provisions for any reason, or is presidential discretion constrained? Furthermore, if it is constrained, to what extent? Section 7(a) of the Act provides that the President "may suspend" the fifty percent cut in the State Department's building budget for a period of six months if "necessary to protect the national security interests of the United States."³² By its terms, of course, the provision does constrain the President: the President must base the waiver on America's "national security interests." Still, the Administration's statements about the Act imply that the President will be free to invoke the waiver because potential damage to the peace process always threatens United States national security interests. If it follows the practice of prior administrations, the Clinton Administration will take the position that it has unfettered discretion to determine whether moving the Embassy jeopardizes American national security interests.

Again, Senators Dole and Kyl sought to make legislative history to narrow the President's discretion. Senator Dole opined that the President cannot invoke the waiver "simply because he thinks it would be better not to move our Embassy to Jerusalem or simply because he thinks it would be better to move it at a later time."³³ Dole added that the phrase "national security interests" is "much narrower" than the term "national interest." "No President should or could make a decision to exercise this waiver lightly."³⁴ Other legislators echoed the view that the waiver authority should be construed narrowly.³⁵ Conversely, at least one or two

President to utilize this waiver indefinitely . . ."); *cf.* 141 CONG. REC. H10685 (daily ed. Oct. 24, 1995) (remarks of Rep. Saxton) (asserting that the waiver authority "says to the President, if you need a *temporary* delay, we grant a waiver") (emphasis added).

31. 141 CONG. REC. S15532 (daily ed. Oct. 24, 1995) (remarks of Sen. Dole).

32. § 7(a)(1), 109 Stat. at 400.

33. 141 CONG. REC. S15531 (daily ed. Oct. 24, 1995) (remarks of Sen. Dole).

34. *Id.* It remains to be seen how Senator Dole will interpret the Act if he becomes President Dole.

35. *See, e.g.*, 141 CONG. REC. S15521 (daily ed. Oct. 24, 1995) (remarks of Sen. Feinstein) (asserting that the "national security interests" test is a "tough but fair standard" and suggesting that it might be met "if a successful conclusion to the Middle East peace process

legislators seemed to believe that the waiver provision permits the President to waive the Act's provisions in a fairly free manner.³⁶

The use of the term "national security interests" in other statutes may support the conclusion that the President has broad discretion to interpret the waiver provisions of the Jerusalem Embassy Act. Over the years, the executive branch has abided grudgingly by a whole panoply of statutes requiring certain actions unless the President certifies that the action is not in the country's "vital national interests" or "national security interests."³⁷ The statutes regulating international narcotics trafficking, for example, require the President to certify that certain foreign states are cooperating on the war on drugs as a condition of their continued receipt of foreign aid, but the law permits the President to permit continued aid to a decertified country if the President determines it to be in the country's "vital national interests."³⁸ In practice, the President has enjoyed discretion to determine those "vital national interests"—arguably a higher standard than the "national security interests" the President must cite to waive the Jerusalem Embassy Act.³⁹ Similarly, statutes on human

could be imperiled by the implementation of this act"); *id.* S15523 (remarks of Sen. Robb) (asserting that a waiver is permissible if the act would have "dire consequences on the peace process"); *id.* S15532 (remarks of Sen. Lautenberg) (asserting that the waiver provision gives an administration a "limited amount of flexibility").

Even some opponents of the legislation thought the waiver authority restricted the President's discretion to waive the Act. *See, e.g.*, 141 CONG. REC. H10686 (daily ed. Oct. 24, 1995) (remarks of Rep. Rahall) (asserting that the waiver authority "does not necessarily mean that the President may consider a breakdown of ongoing peace talks in the Middle East, or a breakdown of relations between Israel and the PLO, as being 'in the national security interests'"); *cf. id.* at S15526 (remarks of Sen. Chafee) (maintaining "there is still no guarantee that the Embassy move could be waived if the peace process is halted").

36. *See id.* at S15523 (remarks of Sen. Cohen) (describing waiver provision as "broad waiver authority"); *cf. id.* at S15534 (remarks of Sen. Daschle) ("Definitely, the whole concept of a peace process is in our national security interest."); *id.* (asserting that the waiver provision "will provide the President the flexibility to ensure that the peace process can move forward").

37. *See generally* Jeffrey A. Meyer, Comment, *Congressional Control of Foreign Assistance*, 13 YALE J. INT'L L. 69 (1988) (surveying and critiquing certification laws).

38. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 2005(a)(2)(A), 100 Stat. 3207, 3207-62.

39. *Cf. Meyer, supra* note 37, at 74 (describing past practice of Presidents in interpreting waiver provisions). According to Meyer,

Almost all of the early restrictions on foreign assistance allowed the President an unlimited power of waiver. Typically, the President could make a finding that a restriction did not serve "national security interests" and waive it without informing Congress or explaining his rationale. Where Congress did not allow a waiver, the President could still evade the effect of congressional restrictions because of their definitional vagueness. The President was not required to consult with Congress or refer to any objective standard in complying with such definitional limits.

Id. (footnotes omitted).

rights supposedly condition foreign assistance on human rights considerations, subject to presidential waivers.⁴⁰ Again, Presidents have asserted broad discretion to interpret these statutes. Presidents have been reluctant to find, for example, that any state engaged in a “consistent pattern of gross violations of internationally recognized human rights”⁴¹—a statutory finding that would curtail foreign assistance to the state in question—even though many states would seem to qualify.⁴² If past practice is any guide, the President will enjoy discretion to interpret whether moving the United States Embassy to Jerusalem implicates “national security interests.”

In principle, the scope of the waiver authority also should be construed in light of international law. Statutes are presumed to be consistent with treaty obligations unless they “clearly and unequivocally” evince intent to the contrary.⁴³ In this case, however, international law probably does not demand any particular reading for at least two reasons. First, international law does not regulate which branch of government dictates the placement of its embassies. It speaks only of mutual consent of the “states” involved.⁴⁴ Second, whatever the status of Jerusalem under international law, the Embassy Act evinces a “clear and unequivocal” intent to recognize Jerusalem as the undivided capital of Israel and to move the United States Embassy there. It appears, then, that international law does not mandate a broad or narrow reading of the Act’s waiver provision.

More recent waiver provisions have sought to limit the President’s discretion by imposing numerical standards, reporting and consulting requirements, shortened authorization periods, and even “shadow fact-finding.” See *id.* at 83-85. But the President still has the “executive” authority to interpret the law. See *Bowsher v. Synar*, 478 U.S. 714, 733 (1986) (“[i]nterpreting a law enacted by Congress to implement the legislative mandate is the very essence of ‘execution’ of the law.”).

40. Cf. Foreign Assistance Act of 1974, § 502B, 88 Stat. 1795, 1815 (codified at 22 U.S.C. § 2304(a)(2) (1994)) (allowing such assistance if the President certifies that “extraordinary circumstances” exist); 22 U.S.C. § 2151n(a) (1994) (allowing an administration to waive a ban on aid to human rights violators if it will “directly benefit the needy people in such country”).

41. § 502B, 88 Stat. at 1815 (codified at 22 U.S.C. § 2304(a)(2) (1994)).

42. See David Carleton & Michael Stohl, *The Foreign Policy of Human Rights: Rhetoric and Reality from Jimmy Carter to Ronald Reagan*, 7 HUM. RTS. Q. 205, 211-27 (1985) (finding little correlation between the provision of U.S. foreign assistance and acceptable human rights practices); Stephen B. Cohen, *Conditioning U.S. Security Assistance on Human Rights Practices*, 76 AM. J. INT’L L. 246, 256-74 (1982) (critiquing the executive branch’s reluctance to find that states qualify under § 502B).

43. See *United States v. Palestine Liberation Organization*, 695 F. Supp. 1456, 1465 (S.D.N.Y. 1988).

44. Cf. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, art. 2, 23 U.S.T. 3227, 500 U.N.T.S. 95 (“The establishment of diplomatic relations between States, and of permanent diplomatic missions, takes place by mutual consent.”).

The United States Constitution, however, probably does require a broad reading of the waiver provision. Statutes must be construed to avoid constitutional infirmity, and a narrow construction of the waiver provision could constrain the President's powers in foreign affairs impermissibly. The Constitution vests the President with "executive power," the power to receive ambassadors, and, subject to the advice and consent of the Senate, the powers to make treaties and to appoint ambassadors.⁴⁵ It may be going too far to suggest, as the Justice Department has, that the President has the "exclusive" authority to conduct the Nation's diplomatic relations with other states.⁴⁶ The President's power to appoint ambassadors, for example, is shared, not exclusive, and that power certainly affects the "conduct" of diplomatic relations. But it is true, as Justice asserts, that the President holds the power to recognize foreign states and governments.⁴⁷ That power is exclusive.⁴⁸ It extends not just to states

45. U.S. CONST. art. 2, §§ 1-3.

46. See OLC Memorandum, *supra* note 15, reprinted in 141 CONG. REC. S15468 (daily ed. Oct. 23, 1995).

47. See *id.* (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964)) (stating that the President has the power of recognition); RESTATEMENT, *supra* note 11, § 204 (maintaining that the President has "exclusive authority to recognize or not to recognize a foreign state or government"); see also *United States v. Pink*, 315 U.S. 203, 229 (1942) (stating that the President has exclusive power to recognize states and to determine policy governing such recognition); *United States v. Belmont*, 301 U.S. 324, 330 (1937). The Jerusalem Embassy Act acknowledged the President's recognition power implicitly by stating that Jerusalem "should" (not "shall") be recognized as the capital of Israel. Pub. L. No. 104-45, § 3(a)(2), 109 Stat. 398, 399 (1995).

It is true that Alexander Hamilton suggested that the President's power to "receive" ambassadors is "more a matter of dignity than of authority" and "a circumstance which will be without consequence." THE FEDERALIST NO. 69 (Alexander Hamilton) (quoted in Malvina Halberstam, *Can Congress Move an Embassy?*, LEGAL TIMES, Oct. 9, 1995, reprinted in 141 CONG. REC. S15177 (daily ed. Oct. 13, 1995)). But Hamilton later maintained the contrary in the Pacificus-Helvidius debate, in which Hamilton defended President Washington's unilateral power to proclaim neutrality. See Raoul Berger, *The Presidential Monopoly of Foreign Relations*, 71 MICH. L. REV. 1 (1972) (cited in LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 220 n.7 (2d ed. 1988)). Historically, moreover, "presidents have made decisions on recognition, starting with George Washington's recognition of the French Republic." Halberstam, *supra*, reprinted in 141 CONG. REC. S15177, *supra*.

48. E.g., *Sabbatino*, 376 U.S. at 410 ("Political recognition is *exclusively* a function of the Executive.") (emphasis added); RESTATEMENT, *supra* note 11, § 204 (stating that the President's recognition authority is "exclusive"); BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW* 462 (2d ed. 1995) (explaining that the President's recognition authority is "exclusive"); LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 93 (1972) ("[Congress] cannot itself (or effectively direct the President to) recognize foreign states or governments, or establish or regulate or break relations with them."); TRIBE, *supra* note 47, at 220 n.7 ("It is generally understood that the President has the substantive power to determine the recognition policies of the United States and that this power is effectively immune from congressional regulation") (citation omitted).

and governments, but also to claims of territorial sovereignty, such as claims to sovereignty over disputed cities like Jerusalem.⁴⁹ The President's exclusive recognition power implies that he has broad discretion to interpret the waiver provisions of the Jerusalem Embassy Act. His recognition power implies that he has broad latitude to determine whether moving the Embassy undermines the "national security interests" of the United States. A narrow interpretation of the waiver provision would impermissibly interfere with the President's exclusive recognition power.

Senator Dole and others who prefer a narrower reading of the waiver authority may acknowledge that the President has a power of recognition. But they will argue that this power, even if exclusive, does not include an exclusive power to decide on the location of a United States Embassy. They will point out that the location of an embassy does not necessarily imply recognition of that city as a state's capital.⁵⁰ They will conclude that moving the Embassy to Jerusalem does not usurp the President's recognition power, because the President can always clarify that the move does not change the United States' recognition policy—that Jerusalem's status should be resolved through negotiations. Indeed, the United States has done this in other circumstances. The United States maintained an embassy in East Berlin but made clear that the United States did not regard East Berlin as the capital of Germany.⁵¹ Even today the United States maintains a few embassies in cities other than the host state's capital city.⁵² In such cases the executive branch is perfectly capable of clarifying what it regards as the actual capital of the host state. Therefore, this argument runs, the Congress can set the location of an embassy without intruding on the President's recognition power, and the President's waiver authority can be invoked only in "dire" circumstances.⁵³

But actions speak louder than words, even (or perhaps especially) in diplomacy. Changing the location of the Embassy will inevitably create a

49. Cf. S.C. Res. 662, U.N. SCOR, 45th Sess., 2934th mtg. at 20, U.N. DOC. S/INF/46 (1990) (calling upon all states "not to recognize" Iraq's annexation of Kuwait).

50. See Breger, *Jerusalem Gambit*, *supra* note 5, at 42 ("[A]s Jewish groups have themselves often argued in regard to the embassy in Tel Aviv, the fact that a U.S. embassy is located in a particular city does not necessarily mean that the U.S. recognizes that city as a capital."); *supra* note 11 (citing examples in which the United States maintains embassies outside the host state's capital city). Nothing in the Vienna Convention on Diplomatic Relations, *supra* note 44, requires the Sending State to locate its embassy in the capital of the Receiving State.

51. See Breger, *Jerusalem Gambit*, *supra* note 5, at 42.

52. See *supra* note 11.

53. See 141 CONG. REC. S15523 (daily ed. Oct. 24, 1995) (remarks of Sen. Robb) (arguing that a waiver is permissible only if moving the embassy would have "dire consequences on the peace process").

changed perception of United States' recognition policy, regardless of presidential statements to the contrary. Indeed, international law recognizes that actions can themselves amount to indirect recognition.⁵⁴ And indirect recognition is, after all, the main point of the Jerusalem Embassy Act. Its sponsors seek to move the Embassy not because it would be more convenient for the Ambassador and staff to work in Jerusalem, though this might account for some support of the measure.⁵⁵ They seek to move the Embassy to demonstrate that the United States recognizes a united Jerusalem that is the capital of Israel.⁵⁶ Senator Dole's narrow interpretation of the waiver authority could undermine the President's recognition policy in a region of the world where the tea leaves of recognition are read very closely. As the Supreme Court has stated, the recognition power "is not limited to a determination of the government to be recognized. It includes the power to determine the policy which is to govern the question of recognition."⁵⁷ Put in terms of the Act's waiver provision, the President has broad discretion to determine whether moving the Embassy is in the "national security interests" of the United States.⁵⁸

Supporters of the Act stress that it does not require the President to open an embassy in Jerusalem, but instead merely creates financial incentive for the President to do so.⁵⁹ That is, the Act merely cuts certain State Department appropriations if the President fails to move the Embassy; it does not eliminate them altogether.⁶⁰ But Congress cannot use unconsti-

54. Cf. S.C. Res. 662, U.N. SCOR, 45th Sess., 2934th mtg. at 20, U.N. Doc. S/INF/46 (1990) (calling on states to refrain from "any action or dealing that might be interpreted as an indirect recognition" of Iraq's annexation of Kuwait).

55. See Lewis, *supra* note 5, at 303 (describing the Ambassador's daily trip from Tel Aviv to Jerusalem as an "inconvenience").

56. Thus the three-part statement of policy in the Act provides that Jerusalem should remain undivided with the rights of ethnic and religious groups protected, that Jerusalem should be recognized as the capital of Israel, and that the United States Embassy should be established in Jerusalem by May 31, 1999. See Pub. L. No. 104-45, § 3(a), 109 Stat. 398, 399 (1995).

57. *United States v. Pink*, 315 U.S. 203, 229 (1942).

58. This conclusion is consistent with the practice of past Administrations. See OLC Memorandum, *supra* note 15, reprinted in 141 CONG. REC. S15468, S15469 (citing examples).

59. See, e.g., Memorandum from Gerald Charnoff et al., Shaw, Pittman, Potts & Trowbridge, to American Israel Public Affairs Committee (June 27, 1995) [hereinafter Charnoff Memorandum], reprinted in 141 CONG. REC. S15471 (daily ed. Oct. 23, 1995). "[T]here is an obvious and constitutionally significant difference between an appropriations law forbidding the President to take action which the Constitution leaves to his discretion and a law which merely sets out the negative financial consequences that will ensue if the President pursues a certain policy." *Id.* at S15472.

60. See § 3(b), 109 Stat. at 399.

tutional conditions to achieve indirectly what it cannot achieve directly.⁶¹ Proponents of the Jerusalem Embassy Act rely heavily on *South Dakota v. Dole*,⁶² in which the Supreme Court upheld a federal statute withholding five percent of highway funds from any state whose drinking age is less than twenty-one. The *Dole* Court stressed, however, that the condition involved only a “relatively small percentage” of the funds in question, and it reaffirmed warnings in earlier Court cases that a more coercive condition—one in which “pressure turns into compulsion”—might be unconstitutional.⁶³ The Jerusalem Embassy Act, by contrast, involves a fifty percent cut in funding—well past the point at which incentive becomes coercion, and pressure becomes compulsion.⁶⁴

In any event, the Court has since suggested that the rationale of *Dole* does not extend to separation-of-powers cases.⁶⁵ This suggestion makes sense. The powers of the federal government are not just separate; in some cases, they are nondelegable. Unlike highway funds, these powers cannot be bargained away. The President cannot give up the presidential power of recognition any more than the Congress can give up the congressional power of appropriations. Of course many foreign-affairs pow-

61. See, e.g., *United States v. Butler*, 297 U.S. 1, 73-74 (1936) (holding that where Congress lacks power to legislate, it “may not indirectly accomplish those ends by taxing and spending to purchase compliance”).

62. 483 U.S. 203 (1987); see Charnoff Memorandum, *supra* note 59, reprinted in 141 CONG. REC. S15741, S15742 (discussing and relying on *Dole*).

63. *Id.* at 211 (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937)).

64. Supporters of the Embassy Act also rely on *Oklahoma v. United States Civil Service Commission*, 330 U.S. 127 (1947). See Charnoff Memorandum, *supra* note 59, reprinted in 141 CONG. REC. S15471, S15472. In *Oklahoma*, the Supreme Court sustained a statute denying a state a small percentage of its highway funds if a state employee in a federally-funded job violated the Hatch Act. 330 U.S. at 140. But in that case the percentage of funds involved was probably even lower than in *Dole*. The statute withheld the equivalent of two years compensation of the state employee in question—a tiny percentage of the two million dollars in federal highway funds the state received during the six-month period in which the violations took place. See *id.* at 135. Under those circumstances, it is hardly surprising that the Court believed Oklahoma could (and did) resort to the “simple expedient” of not yielding to what she urges is federal coercion.” *Id.* at 143-44. Cf. also *New York v. United States*, 505 U.S. 144, 175 (1992) (holding that a congressional “incentive” to states to take title to radioactive waste “crossed the line distinguishing encouragement from coercion”).

65. See *Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 271 (1991) [hereinafter *MWAA*] (“Our reasoning [in *Dole*] that, absent coercion, a sovereign State has both the incentive and the ability to protect its own rights and powers, and therefore may cede such rights and powers, is inapplicable to the issue presented by this case.”) (citations omitted). The decision thus also reaffirmed that *Dole* itself was premised on a small incentive not amounting to “coercion.”

The *MWAA* Court invalidated a congressional transfer of airports to states because the transfer was conditioned on the appointment of members of Congress to an executive role—a Review Board that had veto power over the future of the airports. *Id.* at 276-77.

ers are shared. Shared powers serve democracy, perhaps at the expense of efficiency. But exclusive powers serve democracy too. When exclusive powers are exercised poorly, there is no doubt about whom to blame. The President, like the Congress, is elected. If the President's recognition policy is that bad, the President will pay for it at the polls.

III.

In sum, the waiver provisions of the Jerusalem Embassy Act should be interpreted broadly. The Act should be read to give the President broad discretion to determine whether moving the Embassy to Jerusalem implicates "national security interests of the United States." This construction of the Act is supported by its text and by practice under similar "national security interest" provisions in other statutes. The constitutional separation of powers also requires such an interpretation. The President, not the Congress, has the power of recognition, and the location of the United States Embassy to Israel has inescapable implications for United States recognition policy. The President, not the Congress, is entrusted with the responsibility to determine what that policy should be.