Testimony of Richard Klingler[1] Before the Senate Committee on the Judiciary, Subcommittee on Crime and Drugs

"Evaluating the Justice Against Sponsors of Terrorism Act, S. 2930"

July 14, 2010

Chairman Specter and other members of the Subcommittee, thank you for inviting me to present my views regarding S. 2930, the Justice Against Sponsors of Terrorism Act ("the Act" or "JASTA").

The Act is an important counter-terrorism initiative and focuses on redressing injuries incurred within our borders, where our nation's sovereign interests are greatest. The Act is required in large part due to the Second Circuit Court of Appeals' unfortunate and clearly erroneous construction of the Foreign Sovereign Immunities Act ("FSIA") and application of the Due Process Clause, as well as by the Administration's narrow construction of a FSIA exception to sovereign immunity for suits addressing tortious acts, including acts of terrorism. The Act would ensure that victims of terrorism will secure redress for acts of terrorism committed on U.S. soil, even if initiated abroad, and would increase the prospect of holding those responsible to account for their actions. This applies not only to victims of past acts of terror, but also to those who are, unfortunately, very likely to join their ranks, and it applies to those who would

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foster and support terrorist organizations as well as to those who more directly commit acts of terror.

The Act would also increase the nation's ability to deter and prevent further attacks of terrorism. Although civil litigation plays only a small part in countering terrorism, relative to the efforts of our armed forces and intelligence, diplomatic, and law enforcement officials, its role is not negligible. The Act would increase the scope of civil litigation directed against those who materially support terrorism, which may prove especially effective when directed against the financiers of terror and by providing incentives to foreign states to ensure that those closely affiliated with them neither seek to harm expatriate communities within the United States nor further the efforts of terrorist organizations. And, the Act would increase the likelihood that federal courts will extend their powers broadly to entertain suits against those who would support terrorist actions directed against the United States and its interests.

There are always risks to our nation's foreign relations and potential conflict with international legal principles when civil liability is expanded against foreign sovereigns and for acts undertaken abroad. In this case, however, those risks are considerably reduced because the Act focuses the expanded litigation on redressing and preventing injury occurring within this nation's borders, where its sovereign interests are greatest. Those risks are further reduced by certain additional provisions of the Act, by a series of legal principles available to the judiciary to accommodate legitimate, conflicting interests, and by measures the Executive Branch may take to manage risks to foreign relations in particular cases. There are, in addition, clarifications of the sovereign immunity exception created by the Act that may reduce these risks, especially in relation to injuries unrelated to acts of violence and terrorism.

The following sections elaborate these and related points. Section I addresses the Second Circuit's decision that prompted the need for the Act, as well as the Administration's response to that decision and construction of FSIA's tort-related sovereign immunity exception. Section II provides an overview of the Act's key provisions that would enhance our counter-terrorism capabilities. Section III addresses the principal legal policy considerations implicated by the Act.

I. Background: The Second Circuit's Decision and the Administration's Response.

The Act responds to limitations on suits against foreign states and other supporters of terrorism that arise from a recent decision of the Second Circuit Court of Appeals. Although that court's reasoning is at odds with decisions of certain other courts and has been disavowed by the current Administration, it significantly curtails efforts by victims of terrorism to pursue claims against supporters of terrorism, including most foreign states. In response, the Administration has offered its own, very narrow interpretation of when victims of terrorism can sue foreign states that support acts of terrorism. An overview of that Second Circuit decision and the Administration's response to it thus provides the basis for understanding the need for and implications of the Act.

The Second Circuit's Decision. The Second Circuit's decision addressed an aspect of cases brought by various victims of the terrorist attacks of September 11, 2001 against foreign government bodies, government officials, and others alleged to have contributed to the attacks. In particular, the September 11 victims' claims for damages were based in state tort law and 18 U.S.C. § 2333 (a statutory tort), and the Second Circuit's decision addressed those claims as they applied to certain Saudi defendants, including the Kingdom of Saudi Arabia, five Saudi princes

(four acting in their personal and official capacities, and one in his personal capacity), and a Saudi charitable commission, which claimed the status of an organ of the Kingdom. As summarized by the Second Circuit, the claims "include a wealth of detail (conscientiously cited to published and unpublished sources) that, if true, reflect close working arrangements between ostensible charities and terrorist networks, including al Qaeda" *In re Terrorist Attacks on September 11, 2001,* 538 F.3d at 76. The court also noted that "[t]he United States government has listed several of the charities (or their branch offices) as 'Specifically Designated Global Terrorists,' and has taken steps to shut down their operations." *Id.* at 76-77.

The Second Circuit's decision upholding the dismissal of the September 11 victims' claims rested on three grounds with considerable implications for the nation's counter-terrorism policies. First, the court determined that FSIA permitted claims related to terrorist activity to be brought against a foreign state only if the claims fell within the scope of FSIA § 1605A, which authorizes certain claims against designated state sponsors of terrorism, and that such claims could not be brought as tort claims otherwise authorized by FSIA § 1605(a)(5),[2] even when the damage resulting from the act of terrorism arose in the United States. The Executive Branch has designated only a handful of states (not including Saudi Arabia) as state sponsors of terrorism. The result, under the Second Circuit's approach, is that a U.S. citizen can sue a foreign state for harm unintentionally caused by a car crash, but that FSIA bars claims against almost every foreign state that might seek to harm Americans within our borders, through acts of terror or otherwise.

[2] The court reached this conclusion despite the plain language of Section 1605(a)(5), which provides an exception to sovereign immunity for claims "in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state … ." 28 U.S.C. § 1605(a)(5).

In addition, the Second Circuit adopted a very narrow construction of when the Constitution's Due Process Clause permits suit against a person who facilitates or supports terrorist activities directed against the United States. It held that the Clause prohibits U.S. courts from asserting jurisdiction over persons who provide material support to terrorist organizations, even when they know that the organizations they are funding intend to attack the United States. Instead, victims could sue only those persons who "directed the September 11 attack or commanded an agent (or authorized al Qaeda) to commit them." *In re Terrorist Attacks on September 11, 2001*, 538 F.3d at 94. The courts were barred from entertaining a claim based on the allegation that the Saudi princes "intended to fund al Qaeda through their donations to Muslim charities" – "[e]ven assuming that the Four Princes were aware of Osama bin Laden's public announcements of jihad against the United States and al Qaeda's attacks on the African embassies and the U.S.S. Cole … ." *Id.* at 95. This construction was at odds with the approach of certain other federal courts and threatens to undermine the use of U.S. courts for civil actions directed against those who provide material support, and especially financial support, to terrorist organizations that threaten American citizens and interests. *See id.* ("Providing indirect funding to an organization that was openly hostile to the United States does not constitute this type of intentional conduct" needed to establish jurisdiction).

Finally, the court held that FSIA, which limits when a foreign "state" may be subjected to suit in U.S. courts, also governed claims against foreign government officials. *See id.* 87-90. This holding is of less importance for present purposes, because the Supreme Court recently

determined that this issue alone merited review and rejected the construction of FSIA advanced by the Second Circuit. *See Samantar v. Yousuf*, No. 08-1855 (June 1, 2010).[3]

The Administration's Response. Within days following the Administration's announcement that the President would extend his trip to Egypt to include his first visit to the Kingdom of Saudi Arabia, the Solicitor General filed the government's brief addressing *In re Terrorist Attacks on September 11, 2001*. That brief advised the U.S. Supreme Court not to review the Second Circuit's decision even as it expressly disagreed with each of the three aspects of the decision outlined above.

What the Administration omitted from its filing is as important as what the brief addressed. The Administration's brief did not address the injuries suffered by the September 11 victims or the events of that day, the public interest and U.S. policy interests in redressing those injuries through claims in federal courts, the effect of the Second Circuit's rulings on civil counter-terrorism suits (especially as they apply to financiers of terrorism), the Government's own prior positions at odds with the Second Circuit's determinations, the incentives created by the decision for supporters of terrorism, or the implications of limiting claims brought by victims of future acts of terrorism.

Nor did the Administration express any particular concern about the effect of the September 11 victims' suit on U.S. relations with Saudi Arabia or on the conduct of U.S. foreign relations. Instead, the Administration referred only to courts' traditional deference to Executive Branch determinations in light of "potentially significant foreign relations consequences" arising from suits against foreign states, and to Section 1605(a)(5)'s general role in avoiding "conflict

[3] In yet another recent case, the U.S. Supreme Court has also rejected one of the narrowing constructions of a counter-terrorism statute employed by the trial court to reject the September 11 victims' claims brought pursuant to 18 U.S.C. § 2333. *See Holder v. Humanitarian Law Project*, No. 08-1498 (June 21, 2010).

that would arise from asserting jurisdiction over a foreign government's actions taken in its own territory" and in deterring reciprocal foreign judicial action. Brief for the U.S., No. 08-640 at 4, 15.

Even though the Administration argued that the Second Circuit clearly erred in construing Section 1605(a)(5) as not authorizing suits concerning acts of terrorism, *id.* at 12-13, the Administration offered its own, narrow interpretation of Section 1605(a)(5). The Administration argued "that jurisdiction under the tort exception [Section 1605(a)(5)] must be based entirely on acts of the foreign state within the United States." *Id.* at 15. It inferred this result principally from Section 1605(a)(5)'s language addressing "the personal injury or death … occurring in the United States" and from lower court cases addressing acts occurring entirely abroad. *Id.* at 14-15. Of course, the injury and death resulting from the September 11 attacks clearly occurred in the United States, as a quick visit to the Pentagon, the former site of the World Trade Center, or Shanksville, Pennsylvania will confirm. The government put forth its narrow construction even as it acknowledged that the September 11 victims had alleged that Saudi intelligence officials and charities had operated in the United States and provided support to the September 11 hijackers and al Qaeda, *see id.* 16 n.4, and even though it had previously assured the Court of Appeals for the D.C. Circuit "in cases of terrorism on U.S. territory, such as the September 11 attacks, jurisdiction might properly be founded on both paragraphs (a)(5) and (a)(7) [Section 1605(a)(5) and 1605A]." Brief for the U.S., at 17 (May 9, 2004), *Kilburn v. Socialist People's Libyan Arab Jamahiriya* (D.C. Cir.).

As to the Second Circuit's application of the Due Process Clause, the Administration argued that the court's reasoning was incorrect: "To the extent that the court of appeals' language suggests that a defendant must specifically intend to cause injury to residents in the

forum before a court there may exercise jurisdiction over him, that is incorrect." Brief for the U.S., No. 08-640, at 19. Even so, the Administration asserted that the decision was "unclear" on this point and might be subject to a narrower construction, and thus did not merit review. *Id.* at 19-20.[4]

II. Overview of The Act's Principal Counter-Terrorism Provisions.

The Act seeks to buttress the nation's counter-terrorism policies and to assert the nation's legitimate sovereign interests in three principal respects.

First, responding especially to the Second Circuit's construction of FSIA § 1605(a)(5), the Act confirms and expands the ability of victims of terrorism and other tortious conduct to sue foreign states for injuries occurring in the United States. It does this by modifying Section 1605(a)(5). The Act would retain that Section's principal limitation permitting suit only in relation to "personal injury or death, or damage to or loss of property occurring in the United States," but would ensure that acts undertaken abroad but contributing to injury in the United States can serve as the basis for suit. *See* JASTA § 3(a). The modification also makes clear that Section 1605(a)(5) can support claims seeking redress for acts of terrorism. *See id.* Thus, the revised Section 1605(a)(5) rejects both the Second Circuit's limitation on suit grounded in the supposed exclusive remedy for acts of terrorism set forth in FSIA § 1605A and the Administration's newly discovered limitation based on the need for the "entire tort" to be undertaken in the United States. (Related provisions of the Act would extend the statute of limitations for bringing suit to remedy acts of terrorism and would revive aspects of the

[4] In a decision applying the Second Circuit's Due Process ruling to claims brought by the September 11 victims against other defendants, the district court recently rejected the Administration's proposed narrower construction and dismissed claims against dozens of defendants on jurisdictional grounds related to their status as supporters of terrorism. *See In re Terrorist Attacks on September 11, 2001*, 2010 WL 2484411, at *16 (S.D.N.Y.).

September 11 victims' suit that were dismissed based on the Second Circuit's erroneous construction of FSIA. *See id.* §§ 3(c)-(d), 8.)

Second, responding to the Second Circuit's mistaken application of the Due Process Clause, the Act expresses Congress' understanding of the nexus between U.S. courts and those who support terrorist organizations hostile to the United States. The Act states the factual assessment that persons who provide material support to terrorists or terrorist organizations that threaten the United States and its interests also "necessarily direct their conduct at the United States, and should reasonably anticipate being haled into court in the United States to answer for such activities." *See* JASTA § 2(a)(8). This assessment reflects an application of the Due Process Clause standards set forth in the governing Supreme Court cases, *Calder v. Jones*, 465 U.S. 783, 789-90 (1984), and *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985). In addition, the Act urges federal district courts to construe the Due Process Clause to find personal jurisdiction over those who would otherwise be liable as abettors or supporters of terrorism under established counter-terrorism laws – 18 U.S.C. §§ 2339A, 2339B & 2339C, as enforced through civil suits pursuant to 18 U.S.C. § 2333. *See id.* § 6(a). Through both provisions, the Act seeks to ensure that federal courts do not unduly constrict their authority and impede the operation of counter-terrorism statutes.

Finally, the Act confirms that victims of terrorism may pursue federal statutory claims based on allegations of secondary tort liability. The Act accomplishes this by making express that 18 U.S.C. § 2333 authorizes suits by victims of international terrorism against those who conspire with, or aid, abet, or provide material support or resources to, the persons who directly commit those acts of terrorism. *See* JASTA § 5. The Seventh Circuit Court of Appeals in particular had already construed Section 2333 to support such claims against those who aided or

abetted, or supported, acts of terrorism. *See Boim v. Holy Land Foundation for Relief and Development*, 549 F.3d 685 (7th Cir. 2008) (en banc). Even so, Section 2333's language does not currently expressly address the issue, and the Second Circuit's sharp and unjustified distinction between primary and secondary liability for acts of terrorism could support a narrowing construction of Section 2333.

III. Legal Policy Considerations.

The Act would advance several important components of the nation's counter-terrorism policies, including ensuring access to justice for victims of terrorism, contributing to the deterrence and prevention of future attacks, and influencing courts' assertion of jurisdiction over supporters of terrorism directed against the United States. While any contraction of foreign sovereign immunity presents risks to the conduct of foreign relations and may create tension with principles of international law, those risks and tension are relatively limited here because the Act focuses on injury within the nation's borders, where our own sovereign interests are strong. There are, in addition, various means for limiting and managing the risks that remain.

A. Ensuring Access to Justice for Victims of Terrorism.

The most direct and important policy interest advanced by the Act is simply providing access to justice and an appropriate remedy for victims of international terrorism causing injury in the United States, and an accounting for those who support such acts of terrorism. Providing a remedy for such harm is a basic state law police power and, in the context of remedying harm from terrorism, a fundamental aspect of federal sovereign power. State tort law and federal tort statutes such as 18 U.S.C. § 2333 provide remedies for victims of terrorism for injuries occurring in the United States, and the issue presented by the Second Circuit's and the Administration's

construction of FSIA § 1605(a)(5) is whether foreign states should be exempt from the otherwise applicable state and federal law.

State and federal policies have traditionally and appropriately emphasized providing remedies to victims of terrorism, and this interest is particularly strong when harm arises within the nation's borders. The victims of the September 11 attacks hold a special place in our nation's counter-terrorism policy, and so will the victims of future attacks. To the victims of terrorism harmed in the United States, it does not matter whether the foreign official who writes the check that fostered the attack does so from within or beyond our borders, and it should not matter to our courts.

B. Decreasing the Likelihood of Attacks Against U.S. Citizens.

Expanding access to the courts for victims of terrorism also advances the public interest in decreasing the likelihood of terrorist attacks directed against U.S. citizens. It is important not to overstate the importance of civil and even criminal measures as mechanisms that influence terrorist organizations and their supporters, but so, too, should those measures not be understated: they serve as important measures that buttress the broader counter-terrorism efforts led by our military, diplomatic, intelligence, and law enforcement officials.

The Act especially has the potential to influence those who provide financial support to terrorist organizations, whether they are associated with a foreign state or act independently. The Act accomplishes this through the proposed revisions to FSIA and the revision to the Anti-Terrorism Act of 1991. As recognized in the Act itself, increasing civil liability for providing financial support to terrorist organizations is an important component of impairing their capabilities and "'suits against financiers of terrorism can cut the terrorists' lifeline.'" JASTA § 2(a)(6) (quoting *Boim v. Holy Land Foundation*, *supra*). U.S. government officials have

repeatedly emphasized the importance of limiting financial support to terrorist organizations, including especially support from Saudi sources, and that counter-terrorism policy interest of course underpins a broad range of measures led by Treasury Department officials and law enforcement and intelligence officials in other departments and agencies.

The increased potential for civil litigation and liability can also be expected to influence the behavior of foreign states, although the degree of this influence is difficult to predict. The importance of civil suits often lies as much if not more in the public accounting, and the related publicity and disclosure associated with civil litigation, as it does in the potential for an adverse damages judgment. With the involvement of the federal judiciary, a foreign government can no longer expect that its actions directed against persons and interests in the United States will be handled as confidential, bilateral disputes between governments.

The influence on state behavior might be expected to be particularly significant in two important contexts. First, foreign states have a long history of interfering with their expatriate communities in the United States, including through acts of violence and terrorism. Indeed, prior to the Second Circuit's decision, courts had construed FSIA § 1605(a)(5) as permitting suits directed against foreign governments that had arisen in just this context. For example, in *Liu v. Republic of China*, 892 F.2d 1419 (9th Cir. 1989), the Republic of China's liability in a suit pursuant to Section 1605(a)(5) arose from acts of a senior intelligence officer, undertaken in Taiwan, who arranged for a killing to take place in the United States. Similarly, in *Letelier v. Republic of Chile*, 488 F. Supp. 665, 674 (D.D.C. 1980), Section 1605(a)(5) supported a claim against Chile based on Chilean officials' actions carried out within Chile that resulted in a killing in the United States. These undertakings are considerably more narrow and directed than broad

efforts to wage war against the U.S. government by terrorizing U.S. citizens, and civil suits and associated disclosure could serve to deter such interference.

Second, increased potential civil liability and associated publicity may well increase foreign governments' attention to the actions of persons and organizations that may be found to be organs or alter egos of the government itself. In many countries, the line between public and private sectors blurs, and the government has considerable discretion regarding how closely it regulates the activities of officials and organizations operating near that line. Saudi Arabia and the charitable organizations at issue in the September 11 suit in U.S. federal court nicely illustrate this point. The United States has, of course, for many years sought to increase the incentives for the Kingdom of Saudi Arabia and other countries to limit the activities of organizations that are both ambiguously affiliated with the government and closely affiliated with terrorist organizations (especially through the provision of financial support), and the prospect of civil suit could be expected to increase that incentive.

C. Protecting Federal Courts' Jurisdiction Over Supporters of Terrorism.

Congress cannot, of course, legislate to revise a court's interpretation of the Constitution, including the Due Process Clause's limitations on courts' assertions of personal jurisdiction. Even so, the Act's provisions addressing this issue are quite important because they can be expected to influence courts' application of established Due Process Clause standards in a manner that favors an outcome considerably different from the Second Circuit's narrow application.

The Act would accomplish this in two respects. First, it underscores Congress' view of the factual basis for concluding that those who provide material support to terrorist organizations that threaten the United States in fact direct their actions to the United States and can reasonably

expect a U.S. response – including being "haled into court in the United States to answer for such activities." *See* JASTA § 2(a)(8). That is, Congress is employing its superior fact-finding capabilities to indicate how it believes the established Due Process Clause test should be applied. It is not attempting to change or displace that established legal standard. In addition, the Act calls courts' attention to the close nexus between undertaking an act of terrorism directed against the United States, where personal jurisdiction is clear, and those who support and facilitate those acts. It does so through the Act's secondary liability provisions, which confirm that civil liability equally extends to those who abet or support terrorism. *See id.* § 6(a).

D. Risk of Interference with Foreign Relations.

Increased opportunities for suit against foreign sovereigns present a genuine risk of interference with U.S. foreign relations. Every foreign state, like every person, would prefer to be shielded from suit, and plaintiffs can bring meritless suits as well as those that are worthy. Litigation can involve disclosure of sensitive information, including information concerning dealings between the foreign state and the United States government. It can complicate bilateral and multilateral dealings that are important to the United States, and foreign states can threaten and undertake retaliatory measures.

Several aspects of the Act limit this risk. First, suit is authorized only where there is injury to persons or property "occurring in the United States." *See* 28 U.S.C. § 1605(a)(5); JASTA § 3(a). This important restriction considerably limits the events that may give rise to litigation. Plaintiffs can be expected to be creative in seeking to define the scope of this harm and the link between the foreign government action and the event causing harm (especially beyond the terrorism context), and potential clarifications of or revisions to the Act might focus on limiting the opportunities to expand the scope of suit in this manner – for example, by

focusing the Act's revisions even more on acts of violence and terrorism. Even so, it is clear that the injuries suffered in the September 11 attacks, and those that would have been incurred had the Christmas Bomber or Times Square Bomber proved successful, clearly fall within the core of the definition, whatever ambiguities may exist at the margins. In addition, permitting suits based on injuries "occurring in the United States" presents considerably fewer difficulties of international law, as described below, and thus should provide foreign states with considerably less basis to object than would suits addressing their actions not directed at the United States.

The Act also precludes suits against foreign officials based on their official actions. *See* JASTA § 4(a). Suits against officials individually can especially inflame or disrupt bilateral relations. The Act's limitation thus reduces the potential for foreign states to undertake retaliatory actions or to enlarge their courts' jurisdiction in response to U.S. litigation. The Act also focuses on tort claims for money damages. *See id.* § 3(a). This authorizes a traditional and relatively cabined judicial inquiry, generally presenting fewer difficulties than suits directed at enjoining or disclosing controversial government activities, or enforcing more open-ended rights.

Various judicial doctrines will also permit the defendant sovereigns and the courts themselves to limit somewhat the risk that litigation poses to U.S. foreign relations. For example, courts will continue to apply principles of international comity to matters of process as well as certain substantive issues, and certain federal common law limitations may also apply. While the scope of the political question doctrine and the act of state doctrine would present difficult and fact-dependent issues of application, those doctrines, too, may limit the scope and impact of litigation in particular circumstances.

Perhaps most important, the Executive Branch itself has various powers and means available to it to manage and limit the adverse impact of litigation on foreign relations. The

government files briefs in a range of cases involving issues of sovereign immunity, and it can do so to alert the courts to meritless litigation, to constructions of the FSIA and substantive statutes that present reduced risks to foreign relations, and to the particular foreign relations difficulties created by particular claims or issues. Courts have traditionally accorded considerable weight to these government filings. While it is understandable that the State Department might prefer a broader immunity provision that did not require it to participate as actively in litigation or manage as many potential diplomatic difficulties, it nonetheless has available to it this mechanism to mitigate harm to U.S. foreign relations. And, in more extreme cases, the President also has the power (buttressed and confirmed by the International Economic Emergency Powers Act and claims settlement practice) to terminate litigation in U.S. courts that adversely affects foreign relations, usually doing so in the course of providing an alternative remedy that presents fewer diplomatic difficulties. *See generally Dames & Moore v. Regan*, 435 U.S. 654 (1981).

E. Consistency with Principles of International Law.

Because the Act focuses on acts directed toward and injuries occurring in the United States, any tension it may create with principles of international law is relatively limited. When a state acts to address harm arising within its borders, international legal concerns are at their lowest level. *See, e.g., The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116, 136 (1812). The State Department endorsed this conclusion when it addressed the operation of Section 1605(a)(5) under the more expansive interpretation that the Second Circuit rejected, and it did so in the context of addressing suits against foreign states for acts of terrorism directed at the United States from abroad (such as those at issue in *Liu* and *Letelier*, *supra*). *See The Foreign Sovereign Immunities Act: Hearing on S. 825 before the Senate Judiciary Comm., Subcomm. on Courts and Admin. Practice,* Sen. Hrg. 103-1077 (June 21, 1994) (testimony of

Jamison S. Borek, Dep. Legal Adviser, Department of State) ("Under current law, there have been a few cases allowing actions for murder. It wasn't necessarily styled as terrorism, and that may be desirable because it is a little less inflammatory from the point of view of the government that is sued. But it is clearly much less troublesome in terms of international law and practice to allow suits for activities that occurred within the United States.").

A state's ability to redress or prevent injury arising within its borders is particularly clear with respect to harm caused by terrorist attacks. Before and particularly after the September 11 attacks, international law has recognized the legitimacy of measures designed to prevent and punish material support for acts of terrorism directed toward the enforcing state, even when that support is provided abroad. *See, e.g.*, International Convention for the Suppression of the Financing of Terrorism, art. 7, cl. 2 (1999) ("A State Party may also establish its jurisdiction over any such offence when: (a) The offence was directed towards or resulted in the carrying out of an offence [of terrorism] … in the territory of or against a national of that State."); *see also, e.g.*, U.N. S.C. Res. 1373 (Sept. 28, 2001); U.N. S.C. Res. 1368 (Sept. 12, 2001); U.N. S.C. Res. 1390 (Jan. 28, 2002); U.N. S.C. Res. 1455 (Jan. 17, 2003); & U.N. S.C. Res. 1566 (Oct. 8, 2004). And, where the foreign state's actions are alleged to take place largely beyond that state's borders, as the September 11 victims claimed in relation to the Saudi government charity, potential tension with principles of international law is further reduced.

The civil liability that the Act would create is considerably less extensive and has less extraterritorial application than many of the principal provisions of U.S. counter-terrorism law and policy. For example, FSIA § 1605A imposes liability upon foreign state sponsors of terrorism in a far broader range of circumstances than would exist for claims under the revised Section 1605(a)(5), extending to acts undertaken by the foreign state abroad and causing harm

outside the United States. *See* 28 U.S.C. § 1605A. Other statutes and legal authorities similarly impose liability for undertaking or supporting terrorist acts committed abroad, although they do not all necessarily apply to officials and acts of foreign governments. *See, e.g.,* 18 U.S.C. §§ 2339A, 2339C (material support statutes); Torture Victims Protection Act, codified at 28 U.S.C. § 1350 note; 18 U.S.C. § 1114; Exec. Order 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001) (authorization to Departments of Treasury and State to block assets of persons providing material support to terrorist organizations).

F. Relationship Between the Section 1605(a)(5) and Section 1605A.

Contrary to the Second Circuit's reasoning and as recognized by the Administration, FSIA § 1605A does not and should not displace Section 1605(a)(5) as the sole basis for suits against foreign sovereigns for acts of terrorism. As described above, such suits have been brought under Section 1605(a)(5), and the scope and purpose of Section 1605A indicates that it is a specialized provision directed against a very limited class of sovereigns in a relatively wide range of contexts. Section 1605A applies only to suits against sovereigns designated by the Executive Branch as state sponsors of terrorism, which currently applies to a very small number of states (and excludes a broad range of foreign sovereigns with interests or associated entities or persons at times quite adverse to U.S. interests or to the interests of persons within the United States). Where it applies, Section 1605A extends to suit for injury occurring in the United States or, especially, abroad, and it provides for augmented execution, attachment, and other powers and remedies that are inapplicable to claims against sovereigns authorized by Section 1605(a)(5).

In addition, the designation of a state as a sponsor of terrorism carries with it a far broader range of consequences than simply subjecting it to suit authorized by Section 1605A. The designation is, instead, a far-ranging diplomatic, trade, and financial sanction, which makes

the designation process unsuitable as an instrument for managing the elimination of sovereign immunity from suit (even if Congress were inclined to delegate the matter to the Executive Branch rather than to address the scope of terrorism-related suits through revisions to Section 1605(a)(5)).

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Thank you for the opportunity to present my views to the Subcommittee regarding the Justice Against Sponsors of Terrorism Act.