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Senate Committee on the Judiciary

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Hearing on S. 2930
"Evaluating the Justice Against Sponsors of Terrorism Act"
Dirksen Senate Office Building
Room 226

Chairman Specter and other distinguished members of this Committee:

I am honored to have been invited here to testify concerning S. 2930, the "Justice Against Sponsors of Terrorism Act," intended "to deter terrorism, provide justice for victims, and for other purposes." This is an important legislative effort, and I commend you, Senator Specter, and your co-sponsors Senators Schumer and Graham, for seeking to rectify serious deficiencies in the manner in which the United States courts are handling claims by victims of acts of terror that take place on U.S. soil, and in particular claims of the individuals and companies damaged by the attacks of September 11, 2001.

My testimony does not attempt to deal comprehensively with all the issues posed by the legislation. This is not out of any lack of respect for this distinguished Committee or the importance of its work, but simply because I received the invitation to comment on the bill last week. These comments therefore focus on what appear to be the bill's key provisions, and on the broader question of how best to compensate victims and deter terror – issues concerning which I may be able to contribute based on my experiences as a prosecutor, district judge, State Department Legal Adviser, negotiator, teacher and scholar of international law, and private attorney.

First, I agree with the premise of S. 2930 that civil actions for damages may deter some sponsors of acts of terrorism in the United States and elsewhere. Saudi princes who support Al Qaeda with money are not, like suicide bombers, immune from concern over being held liable for the foreseeable consequences of that support. They and others like them who give money to people committed publicly to shedding the blood of American civilians (and destroying freedom and tolerance everywhere) would likely be deterred from doing so if they were in fact held financially accountable.

No one knows better, however, than the Members of this Committee, that the effort to create viable, civil penalties against terrorists and their sponsors in the U.S. courts has been frustrating and largely ineffectual. The Executive branch of our own government, regardless of party, has opposed this effort and has sought largely successfully in the U.S. courts to limit the effectiveness of the laws Congress has adopted for this purpose.

This continuing difficulty that Congress has had in fashioning effective remedies that both compensate and deter results, not from any lack of ingenuity or resolve on the part of this Committee or the U.S. Congress, but rather from the inherent difficulties and dangers that arise when one state unilaterally attempts to modify important aspects of the law relating to sovereign immunity issues. These difficulties are therefore likely to continue to undermine efforts to secure financial redress for victims of state sponsored terrorism whether or not this Committee succeeds in securing passage of the proposed legislation being considered here today. Therefore, with the Committee's permission, I will – after commenting on provisions of S. 2930 – urge an alternative approach. Rather than continuing to attempt to carve exceptions out of widely recognized immunities for the purpose of permitting suits for damages caused by terrorist acts – which despite the best intentions have thus far led to few recoveries and no discernible deterrent effect – Congress should adopt a plan that provides prompt and adequate compensation to all U.S. victims of the full range of terrorist conduct, and that authorizes and enables the Executive to deter terrorism through all appropriate means including recovery of the amounts paid and the use of preventive force.

Comments on the S. 2930

The proposed legislation is designed to clarify several issues on which the Second Circuit Court of Appeals ruled in 2008 in an action brought by thousands of individuals who suffered losses in the September 11, 2001 attacks. A panel of that Court upheld on foreign sovereign immunity grounds the District Court's dismissal of all the claims brought by plaintiffs against the Kingdom of Saudi Arabia, three Saudi princes, a Saudi banker, and a Saudi High Commission. The Second Circuit decision was based on several conclusions that conflict with those reached by other Courts of Appeal, and that differ from positions taken by the Solicitor General of the United States and the Department of State. Nonetheless, the Solicitor General opposed the grant of certiorari by the U.S. Supreme Court to review the Second Circuit's decision, for various reasons, and certiorari was denied.

The Second Circuit decision reached several important conclusions that S. 2930 seems intended to clarify. They affect primarily: (1) the application of the Foreign Sovereign Immunity Act ("FSIA") to officials acting within the scope of their official duties; (2) the scope of the tort exception to the FSIA; (3) the standard of proof required to establish liability of officials and their states who contribute to groups or individuals who commit acts covered by the terrorism and tort exceptions; and (4) the basis upon which personal jurisdiction should be found to exist over officials of foreign states in such cases.

(1). Application of the FSIA to Officials. The Second Circuit joined the majority of other Circuit Courts in holding that the FSIA applies to officials of foreign governments, thus granting them immunity for all official acts with the exceptions provided in the

statute. The Executive disagreed, and the Supreme Court has since then ruled in Samantar that the FSIA governs only the immunity of states; officials obtain their immunity for official acts exclusively from rules developed through international practice, as applied by the State Department.

This Committee no doubt will take the Samantar decision into account in revising S. 2930. Section 4 of the bill as written would amend the FSIA to provide that, "except as provided under section 1605A", claims based on the acts or omissions of officials or employees of a state or organ of a state, "while acting within the scope of his office or employment, shall be asserted against the foreign state or organ of the foreign state." This provision seems to imply that the FSIA does apply to foreign officials acting within the scope of their office, granting them personal immunity for all such acts other than those covered by section 1605A, i.e., "torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act" (28 U.S.C. 1605A(a)(1). This language may be read to confer an immunity on officials for their official conduct, other than as listed in section 1605A. The Committee could drop this provision, or should at least add language making clear that the FSIA is not intended to confer immunity on officials where it would not otherwise exist.

If the Department of State is to perform the task of deciding whether officials are entitled to immunity, I hope it adopts and adheres to clear standards, so that its decisions are more consistent and principled than those issued on the immunity of states prior to adoption of the FSIA. The Congress could, on the other hand, decide to include officials under the FSIA, in order to ensure objective determinations made by independent courts. But that should be done, if at all, only after full consideration of the relevant issues, and

the inclusion in the statute of the standards and exceptions Congress considers appropriate.

(2). The Tort Exception. The Second Circuit rejected application of the tort exception to state immunity, 28 U.S.C. 1605(a)(5), on the ground that Congress must have meant to exclude terrorist torts from this exception when it created the exception from immunity for terrorism-related claims, 28 U.S.C. 1605A. As the Solicitor General pointed out in her brief to the Supreme Court, it is simply wrong to contend that the exception for terrorism-related claims (which applies only if the state involved is on the State Department list of state sponsors of terrorism) would be rendered meaningless if such claims were also made part of the tort exception. The tort exception applies only to injuries from torts occurring within the territorial U.S., while the terrorism exception applies to injuries from the listed acts of terror wherever they may occur. Section 3 of S. 2930 corrects the Court's misreading of the tort exception by adding expressly to that provision the list of terrorism-related torts currently in the terrorism exception.

The other important change by the proposed legislation to the tort exception would be its rejection of the notion, supported by both the Second Circuit and the Solicitor General, that the tort on which suit may be brought must be committed in its entirety within the U.S. The tort alleged by plaintiffs in that litigation – material support for groups despite the knowledge that they would likely attack the U.S. – was in the view of the Court and the Executive one which took place outside the U.S., even though it may have enabled attacks to be made within the U.S. The bill would exempt from immunity the newly listed terrorist conduct "regardless of where the underlying tortious act or omission is committed," including the tort of "the provision of material support or

resources . . . for such an act . . . ." This is an important change, and one that is completely justified by international law and the purpose of protecting against torts aimed at U.S. nationals within U.S. territory. It must be frustrating to this Committee and to the Congress that the Executive would attribute to you an intention to leave the American people unprotected by the tort exception from a tort committed outside the U.S. that is acknowledged to have been intended to support a group intent on causing damage inflicted by torts within the U.S. The bill appears to drive home this point in Section 5, by amending the Anti-Terrorism Act of 1991 to extend liability to aiding and abetting, providing material support, or conspiring with persons who commit acts of terrorism.

The only question I have regarding this aspect of the bill is whether the changes can properly be applied to "dismissed actions," or despite the existence of the doctrine of "claim preclusion," and especially whether Congress may properly order that an action dismissed for lack of subject matter jurisdiction "shall" on motion be "reinstated." I am aware of precedents that uphold the application of new jurisdictional rules to pending cases, but not to cases that have been dismissed, and I am uncomfortable with the notion of Congress ordering a dismissed case to be reinstated. If a new jurisdictional rule can lawfully be retroactively applied, then it should suffice for Congress to say that it is intended to apply retroactively and to allow parties dismissed under the old rule to attempt to gain the benefit of the new rule by commencing a new litigation based on the new rule. An additional problem here is that this ground was not the only basis upon which the Court dismissed the 9/11 cases against certain Saudi defendants, and it may lead to unseemly appearances of inter-branch conflict for Congress to be seen as instructing the courts on the appropriate ruling to make in particular cases, even if only

on motions for reinstatement. It seems questionable as well for Congress to apply the new statute of limitation retroactively; while the longer period provided in S. 2930 may be justified, it seems fundamentally inconsistent with the principle of repose by proposing to reopen a limitation period that has expired. What limitation period would not be subject to such a change?

(3). Standard of Proof. Both the Second Circuit and the Solicitor General appear to have given less weight to the knowing support by states for terrorist groups than Congress considers appropriate. The bill attempts to deal with this problem by making findings to the effect that terrorist groups gain the ability to commit acts of terror by securing financial support; that any contributions to such groups facilitates their acts of terror; and that persons who provide material support for such groups should not be protected from civil liability. (Findings 5-7) I support these findings. They reflect reality. But to overcome the failure of even some U.S. officials and judges to understand these points, Congress may need to legislate with more particularity on the issue.

One approach is to consider fleshing out the definition of "material support" so that it is endowed with the legitimacy it deserves. This could be achieved by adding language that is directly taken from UN Security Council Resolution 1373, which prohibits states from extending any form of support to groups prepared to engage in terrorist acts in the territory of other states. The language is so eminently useful that I am attaching the Resolution to my testimony. In summary, it concludes that every State has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts.

(4). Basis for Personal Jurisdiction. The Second Circuit continues to adhere to its view that federal courts may exercise subject matter jurisdiction over foreign states and officials only if their contacts with the U.S. satisfy the standards of the due process clause of the U.S. Constitution. The decision seems to have had no relevance to the Kingdom of Saudi Arabia, and significant authority appears to be growing for the proposition that the due process clause is inapplicable to states, that often have offices in the U.S. and at the UN in New York, and conduct business of various sorts in this country. The problem is the language used by the Court relative to the individuals involved, where it dismissed for lack of personal jurisdiction even though it conceded that the complaint had alleged evidence that showed a reckless disregard of the fact that their contributions were likely to lead to terrorist attacks on Americans within the U.S. The Solicitor General properly rejected that view, supporting the view that it is sufficient that the defendant took "intentional . . . tortious, actions," knowing "that the brunt of the injury would be felt in the foreign forum." Calder v. Jones, 465 U.S. 783, 789-90 (1984).

It may well be useful for the proposed bill to address this issue, despite the fact that the FSIA is inapplicable to officials. Congress could make clear its view that the due process clause is inapplicable to states and that, insofar as it applies to states or officials who are sued under section 1605A, the relevant standard is properly stated in Finding 8 of S. 2930, i.e., "knowingly or recklessly" contributing "material support or resources, directly or indirectly, to persons or organizations that pose a significant risk of committing acts of terrorism that threaten the security of United States nationals or the national security, foreign policy, or economy of the United States . . . ." This is a sound standard for personal jurisdiction, and preferable to the standard proposed by the Solicitor

General. To ensure that the courts will take it seriously it should be included in a separate provision of the legislation, and not only as a finding.

Expedited Compensation and Effective Deterrence

I share the frustration felt by the sponsors of S. 2930, and therefore would support clarifying existing law along the lines proposed in the bill, though with the changes and observations made above. I would urge, however, that the distinguished and experienced Senators who support this bill agree to pursue a potentially more effective solution to the problem of compensating victims of state sponsored acts of terror than the current litigation model. My proposal is not new. Congress has previously considered creating a fund to compensate victims of terror, and in fact created such a fund to compensate victims of the 9/11 bombings. But to be successful the idea needs to be fashioned and implemented in a principled manner, at a time when Congress is not responding to a specific, urgent crisis.

The problem we have as a nation in responding to the effects of sovereign immunity results from a fundamental shift in the expectations of our people. The absolute immunity from suit of sovereign states and their high officials was unchallenged during the 18th and 19th centuries, because absolute immunity suited governments – which benefited from it – and people were prepared to accept it. This did not mean that states were able to avoid compensating foreign nationals whom they harmed. To the contrary, states were often held to account. But the accounting came after the behavior that led to the claims was long over, and after the states involved had agreed to come to terms on their differences. Very often, in settling their differences, states would agree to compensate each other's nationals, and they did so by setting up a claims procedure in

which people and companies were authorized to establish their claims before tribunals and thereafter recover damages in proportion to the funds available for compensation. This is what happened between Britain and the U.S. after the civil war; between Mexico and the U.S. in the early 20th Century; and in many other, significant situations.

Expectations changed. Businesses got tired of allowing state owned companies to have immunity for purely commercial activities, and after plenty of legal controversy and politically driven results, Congress forced the U.S. into an orderly, law-oriented system in which commercial activities lost their immunity under judicially administered standards. This shift went smoothly and was effective, because most other states shared our view and had implemented the restricted immunity doctrine even before we did.

Expectations of Americans who had been harmed by terrorists also changed. Our people (and I suspect nationals of other democratic states) demanded to be compensated immediately after they had been injured, not years later after the underlying disputes had been resolved. Their demand makes sense from a human standpoint. People need compensation in order to repair their lives, which often end before major international problems are solved.

The turning point may well have been the seizure of American hostages in Iran. Our government put in place a compensation regime in the Algiers Accords, but we were insufficiently responsive to demands by the hostages and their families for compensation. Pathetically low amounts were paid based on lost time at work and other inadequate measures, and the hostages and their families were denied even the opportunity to assert claims based against Iran for the actual injuries they suffered from the clear violations of international law that had taken place.

Other terrorist acts followed, and instead of adjusting the compensation mechanisms that had been part of international law, by providing funds in advance of the settlement of international controversies, we purported to create causes of action against, and jurisdiction over, the states and the terrorists who attacked Americans. This effort was well motivated, but it has failed. The promise of recoveries has been largely unfulfilled, except for those lucky few who have been paid out of the U.S. Treasury, often without surrendering their claims as historical practice required. So, neither the objective of compensation nor that of deterrence has been achieved. And the process has greatly (and it turns out unjustifiably) complicated the conduct of foreign policy, encouraging other states to advance extravagant claims of jurisdiction, which adversely affect not only the U.S. but also China, Israel, and other states targeted by terrorist groups.

This Committee could more effectively achieve the aims of S. 2930 by fashioning a system promptly to compensate all victims of specified terrorist acts, without procedural and political complications, under a system that then allows the U.S. government to achieve deterrence by pursuing recoveries based on indemnity as part of a diplomatic process that includes all the other powers of government, including the use of preventive force. Congress has demonstrated its ability to fashion such a system and an effort should be made to encourage other states that have been attacked by terrorist groups, sponsored sometimes by the same states, to adopt the same process for compensating their own victims. The immunity of state sponsors can effectively be narrowed only through broader international recognition of additional bases for liability.

In adopting a compensation scheme for victims of state sponsored terrorism, Congress should also make clear its support for effective action against any state or official undertaking or knowingly supporting deliberate attacks against U.S. nationals anywhere for the purpose of terrorizing them and thereby forcing the U.S. government to capitulate to the terrorists' demands. This type of conduct has been prohibited by the Security Council in Resolution 1373, and should be punished universally, with the full support of all states of the United Nations system. While Resolution 1373 does not expressly authorize states to act to protect victims of illegal attacks, a carefully drafted legislative authorization for the use of force by the President in situations that meet the Resolution's requirements could well gain significant support from such states as India and Israel, which have suffered greatly from state-supported attacks. Actions for damages may, when successful, deter financiers. But such litigation has little or no bearing on the terrorists themselves, who after all need very little money to do very substantial damage.

Allowing lawsuits against terrorists and their sponsors is no substitute for an effective strategy for combating Al Qaeda and its like. Our current effort in Afghanistan to take the fight to that most dangerous of all existing terrorist groups is essential, and the President deserves our full support. But Al Qaeda is operating in many other states, and people unaffiliated with it in any official way are prepared to bring down planes, and to kill our civilians in Times Square and subways and other public places. We cannot be tied as a matter of policy to defending ourselves against such groups by launching long and costly wars in which we have to pay the price of building nations even where no nation has ever really existed. We have to reserve and exercise the right to attack those

who attack us, as well as their knowing supporters, in any state that fails to perform its international obligation to prevent such attacks, whether deliberately or due to its inability to control its territory. I believed and said this before the 9/11 attacks, and our failure now to pursue terrorists and their supporters in all the states from which they operate or train will certainly allow such attacks to continue.

In short, Mr. Chairman, while I support the underlying purpose of the proposed legislation, I urge you and your distinguished colleagues to adopt an approach with greater promise: one which would deliver compensation promptly, would make clear that all amounts paid could be sought by our government from states and individuals responsible, and would authorize and encourage the President to punish and put an end to state sponsored terrorist acts through unfettered diplomacy appropriately complemented with strength.

APPENDIX A

United Nations S/RES/1373
(2001)

Security Council

Distr.: General
28 September 2001

Resolution 1373 (2001)

Adopted by the Security Council at its 4385th meeting, on 28 September 2001

The Security Council,

Reaffirming its resolutions 1269 (1999) of 19 October 1999 and 1368 (2001) of 12 September 2001,

Reaffirming also its unequivocal condemnation of the terrorist attacks which took place in New York, Washington, D.C. and Pennsylvania on 11 September 2001, and expressing its determination to prevent all such acts,

Reaffirming further that such acts, like any act of international terrorism, constitute a threat to international peace and security,

Reaffirming the inherent right of individual or collective self-defence as recognized by the Charter of the United Nations as reiterated in resolution 1368 (2001),

Reaffirming the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts,

Deeply concerned by the increase, in various regions of the world, of acts of terrorism motivated by intolerance or extremism,

Calling on States to work together urgently to prevent and suppress terrorist acts, including through increased cooperation and full implementation of the relevant international conventions relating to terrorism,

Recognizing the need for States to complement international cooperation by taking additional measures to prevent and suppress, in their territories through all lawful means, the financing and preparation of any acts of terrorism,

Reaffirming the principle established by the General Assembly in its declaration of October 1970 (resolution 2625 (XXV)) and reiterated by the Security Council in its resolution 1189 (1998) of 13 August 1998, namely that every State has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts,

Acting under Chapter VII of the Charter of the United Nations,

1. *Decides* that all States shall:

(a) Prevent and suppress the financing of terrorist acts;

(b) Criminalize the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts;

(c) Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities;

(d) Prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons;

2. *Decides also* that all States shall:

(a) Refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists;

(b) Take the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information;

(c) Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens;

(d) Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens;

(e) Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts;

(f) Afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings;

(g) Prevent the movement of terrorists or terrorist groups by effective border

controls and controls on issuance of identity papers and travel documents, and through measures for preventing counterfeiting, forgery or fraudulent use of identity papers and travel documents;

3. *Calls* upon all States to:
(a) Find ways of intensifying and accelerating the exchange of operational information, especially regarding actions or movements of terrorist persons or networks; forged or falsified travel documents; traffic in arms, explosives or sensitive materials; use of communications technologies by terrorist groups; and the threat posed by the possession of weapons of mass destruction by terrorist groups;

(b) Exchange information in accordance with international and domestic law and cooperate on administrative and judicial matters to prevent the commission of terrorist acts;

(c) Cooperate, particularly through bilateral and multilateral arrangements and agreements, to prevent and suppress terrorist attacks and take action against perpetrators of such acts;

(d) Become parties as soon as possible to the relevant international conventions and protocols relating to terrorism, including the International Convention for the Suppression of the Financing of Terrorism of 9 December 1999;

(e) Increase cooperation and fully implement the relevant international conventions and protocols relating to terrorism and Security Council resolutions 1269 (1999) and 1368 (2001);

(f) Take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum-seeker has not planned, facilitated or participated in the commission of terrorist acts;

(g) Ensure, in conformity with international law, that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts, and that claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists;

4. *Notes* with concern the close connection between international terrorism and transnational organized crime, illicit drugs, money-laundering, illegal armstrafficking, and illegal movement of nuclear, chemical, biological and other potentially deadly materials, and in this regard *emphasizes* the need to enhance coordination of efforts on national, subregional, regional and international levels in order to strengthen a global response to this serious challenge and threat to international security;

5. *Declares* that acts, methods, and practices of terrorism are contrary to the purposes and principles of the United Nations and that knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations;

6. *Decides* to establish, in accordance with rule 28 of its provisional rules of procedure, a Committee of the Security Council, consisting of all the members of the Council, to monitor implementation of this resolution, with the assistance of appropriate expertise, and *calls upon* all States to report to the Committee, no later than 90 days from the date of adoption of this resolution and thereafter according to

a timetable to be proposed by the Committee, on the steps they have taken to implement this resolution;

7. *Directs* the Committee to delineate its tasks, submit a work programme within 30 days of the adoption of this resolution, and to consider the support it requires, in consultation with the Secretary-General;

8. *Expresses* its determination to take all necessary steps in order to ensure the full implementation of this resolution, in accordance with its responsibilities under the Charter;