Statement of Paul B. Stephan, University of Virginia, before a Hearing of the House Judiciary Committee's Subcommittee on the Constitution and Civil Justice on S. 2040, the "Justice Against Sponsors of Terrorism Act" on July 14, 2016

Good morning. My name is Paul Stephan, and I am the John C. Jeffries, Jr., Distinguished Professor of Law and the John V. Ray Research Professor of Law at the University of Virginia. I have been teaching and writing about the foreign relations law of the United States for all of my 37 years on the Virginia faculty. I served as Counselor for International Law to the Legal Adviser of the Department of State in 2006-2007, where I worked on many sovereign immunity issues. Currently I am a coordinating reporter for the American Law Institute's Fourth Restatement of the Foreign Relations Law of the United States, which includes sovereign immunity. I appear here on my own behalf, and nothing I say should be taken as representing the views of the University of Virginia School of Law, the State Department, or the American Law Institute. I have no clients with any interest in this proposed legislation and represent no one. Rather, I am here before you in the role of a disinterested student of foreign relations law who hopes to help this body in its deliberations.

I speak here in opposition to the bill under consideration (JASTA). I wish to make three points. First, this bill, were it adopted as law, would likely harm the United States by increasing its exposure to litigation abroad. Second, this bill is not likely to achieve its stated aim, which is to hold foreign states accountable for material support for terrorism and to provide justice for their victims. Third, this bill would privatize the national security of the United States, contrary to any sensible antiterrorism policy. Existing law

already provides a right for victims of state-sponsored terrorism to seek compensation through litigation. What this bill would do is strip the Executive Branch of its proper authority, as provided by this Congress, to determine which states sponsor terrorism and give that power instead to private litigants. Such a grave matter as identifying states that are mortal threats to U.S. interests should not be left to private lawsuits.

It probably needs no saying – but I will say anyway – that the plight of victims of terrorism, most significantly those of the 9/11 attacks, demands our deepest sympathy and should engage our greatest efforts to see that they get justice. These people suffered death and awful injuries, and their families terrible loss, for nothing more than showing up to do their job. If I thought that this bill would bring justice to those families, I would vigorously support it. My concern is that the bill will not do this, and might instead sow the seeds of future threats to our people as well as harm our country's interests.

States have enjoyed immunity from lawsuits in the courts of other states since the foundation of the modern international legal system in the seventeenth century. Chief Justice Marshall, writing for the Supreme Court, recognized this principle as a matter of U.S. law in 1812. He observed that the "common interest impelling [sovereign states] to mutual intercourse, and an interchange of good offices with each other," requires this exemption from judicial jurisdiction.[1] Only a few years ago, in Germany versus Italy, the International Court of Justice confirmed the broad principle that international law requires all nations to immunize foreign states from litigation in their courts, absent a few

[1] Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116, 137 (1812).

narrow exceptions.[2] In particular, that Court ruled that a state could not allow private litigants to haul a foreign sovereign into court simply by alleging violations of international law, even grave human rights abuses. States always can waive this immunity, in particular instances or by treaty. But international law does not allow them to be forced into another country's courts against their will, except in a few narrow circumstances not applicable here.

No country benefits from this rule of international law more than does the United States. On the one hand, our extensive international engagements mean that we have property around the world that might be vulnerable to the execution of foreign judgments. I have not run the numbers, but I suspect that, given the extent of our global commitments and activities, the United States has more exposure to shrinkage of sovereign immunity than any other country. On the other hand, our worldwide interests and responsibilities mean that we do many things that foreign lawyers and judges do not like and might consider illegal. Over the past few years, suits in foreign courts against the United States have multiplied. Only the international legal regime of sovereign immunity protects us from serious material risk as well as distracting harassment.

JASTA erodes this protection. If enacted, it will be seen around the world as a clear violation of international law, as well as a bid to change that law to diminish immunity. You must remember that a breach of international law occurs as soon as a lawsuit commences, not when judgment is issued. Unlike the current terrorism exception in U.S.

[2] Jurisdictional Immunities of the State (Germany v. Italy), Judgment (Feb. 3, 2012), available at http://www.icj-cij.org/docket/files/143/16883.pdf.

law, JASTA does not limit litigation to cases where our government has determined that retaliation for terrorist support is justified. JASTA thus would undercut our ability to argue that the terrorism exception currently on the books constitutes a legitimate countermeasure permitted by international law.[3] Instead, it allows private parties to force a foreign sovereign into court, and thereby violates the international legal obligation to provide immunity from suit, upon the unsubstantiated claim of an aggrieved plaintiff. Such violations of existing international law encourage other states to do the same, thereby shrinking state immunity worldwide.

Many states, our allies as well as our adversaries, have questioned the legality of acts undertaken by the Bush and Obama administrations in response to terrorist threats. If this bill passes, private litigants will have greater reason to bring suits advancing those claims. Moreover, diplomatic efforts to shut down such litigation largely would be unavailing, because even sympathetic allies would not be able to interfere with private suits before independent courts. Nor would we be in a good position to ask our allies to enact laws increasing sovereign immunity to bar such suits, given the message that enactment of this bill would send. At the end of the day, increasing the exposure of our antiterrorism efforts to foreign legal liability does not seem like a sound way to combat terrorist threats.

Let me make this point concrete. In response to the judgment of the International Court of Justice, the Italian courts proved defiant. They struck down an act of their

[3] See Paul B. Stephan, Sovereign Immunity and the International Court of Justice: The State System Triumphant, in Foreign Affairs Litigation in United States Courts 67, 80-82 (John N. Moore ed., 2013).

parliament according immunity, declaring that the rights of persons to litigate their claims in Italian courts overrode core principles of international law.[4] Italy, you may recall, is also the country whose courts have brought criminal prosecutions against U.S. officials involved in apprehending suspected terrorists. These prosecutions arguably violate Italy's treaty commitments to us. Enactment of JASTA will encourage the Italian courts, already inclined to disregard general rules of international law as well as specific treaties, to create even more exceptions to sovereign immunity, just as JASTA does. This would expose the United States to severe civil litigation risk for counterterrorism activities. Other countries will notice and respond accordingly.

I mention Italy, an ally with whom we may have a few disagreements. What about our adversaries, countries where the governments often call the shots in their courts? Cuba and Iran already have taken away our immunity from suit as means of rallying domestic and international sympathy against us. If this bill passes, what countries will be next, citing this legislation as justification for their hostile acts?

Moreover, this bill will have direct and undesirable effects in our own court, not simply indirect effects on the policies of other states. Under this bill, those opposed to U.S. policy as carried out by our allies can bring suits that, I believe, this Congress would not want. To be specific, this bill opens the door not just for claims against states that might provide covert support for terrorism, but also against states that overtly used their police and military in what they consider self-defense, but others may characterize as

[4] Italian Constitutional Court, Judgment n. 238 of October 22nd, 2014 (unofficial English translation by Alessio Gracis, available at http://italyspractice.info/judgment-238-2014).

terrorism. We already have seen litigation in this country against Israeli officials and contractors for missile strikes and other measures taken against that country's adversaries.[5] Once this legislation passes, plaintiffs will be able sue Israel directly, asking our courts to adjudicate the line between self-defense and unlawful use of force.

Of course, Section 3(a)(2) of JASTA contains an exclusion from its rejection of immunity for acts of war, as defined by 18 U.S.C. § 2331(4). But in the hands of a good plaintiff's attorney, this exclusion serves as an invitation to litigate what counts as acts in the course of armed conflict, with the goal of labeling demolition of homes, police responses to riots and similar conduct as terrorism rather than armed conflict. To repeat myself, under this bill, it is enough to plead terrorism to haul a sovereign state into court, whatever the ultimate outcome of the trial.

Next, it is very unlikely that this bill will achieve its stated purpose. Most states, when confronted with lawsuits in foreign courts that they regard as violating their rights under international law, refuse to appear. When default judgments result, they refuse to pay them. Because this bill affects only amenability to suit, and does not deal with the broader immunity that foreign-state-owned assets enjoy from execution and attachment, it does not affect the incentives of foreign states to refuse to appear and to leave plaintiffs to the typically futile task of trying to track down attachable assets. As a result, the lawsuits that the bill would permit are unlikely to unearth evidence that would identify,

[5] E.g., Matar v. Dichter, 563 F.3d 9 (2d Cir. 2009) (suit against head of Shin Bet for missile strikes against Palestinian targets); Corrie v. Caterpillar, Inc., 503 F.3d 974 (9th Cir. 2007) (suit against American contractor for supplying bulldozers used to demolish buildings in Occupied Territories).

much less punish, state sponsors of terrorism or to produce acknowledgments of culpability accompanied by compensation.

This Committee would do well to heed the words of Judge Royce Lamberth, who has logged more time handling cases under the current terrorism exception to the Foreign Sovereign Immunities Act than any other judge:

> Today, the Court also reaches an even more fundamental conclusion: Civil litigation against Iran under the FSIA state sponsor of terrorism exception represents a failed policy. After more than a decade spent presiding over these difficult cases, this Court now sees that these cases do not achieve justice for victims, are not sustainable, and threaten to undermine the President's foreign policy initiatives during a particularly critical time in our Nation's history. The truth is that the prospects for recovery upon judgments entered in these cases are extremely remote. The amount of Iranian assets currently known to exist with the United States is approximately 45 million dollars, which is infinitesimal in comparison to the 10 billion dollars in currently outstanding court judgments. Beyond the lack of assets available for execution of judgments, however, these civil actions inevitably must confront deeply entrenched and fundamental understandings of foreign state sovereignty, conflicting multinational treaties and executive agreements, and the exercise of presidential executive power in an ever-changing and increasingly complex world of international affairs.[6]

[6] In re Islamic Republic of Iran Terrorism Litigation, 659 F. Supp. 2d 31, 37 (D.D.C. 2009).

I can update Judge Lamberth's remarks by pointing out that the most recent effort by Congress to enforce payment of the Iranian terror judgments, a provision of the Iran Threat Reduction and Syria Human Rights Act of 2012 codified at 22 U.S.C. § 8772, has led to a lawsuit filed by Iran against the United States in the International Court of Justice.[7] We must contemplate the unpleasant possibility that any money collected under Section 8772 ultimately will be paid by the United States.

I appreciate that the intended target of JASTA is Saudi Arabia, and I have no knowledge as to whether that state has attachable assets in the United States. This bill, however, is not limited to that country. If Congress wants to pursue that particular state, so be it. But JASTA ranges much more widely, and creates much more mischief to little apparent benefit.

Finally, there is something seriously wrong with privatizing American national security policy. State support of terrorism has consumed the Executive and Congress for many decades, going back at least to the 1970s. Significant legislative tools exist to punish states, including the imposition of severe sanctions. The lynchpin of all these efforts is that the Executive and Congress together determine which states sponsor terrorism. Once they make this determination, U.S. courts are open to claims for compensation.[8]

[7] "Iran institutes proceedings against the United States with regard to a dispute concerning alleged violations of the 1955 Treaty of Amity," Press Release of the International Court of Justice, June 15, 2016, available at http://www.icj-cij.org/docket/files/164/19032.pdf.

[8] 28 U.S.C. § 1605A(a)(1) (no immunity for claims based, among other things, on "provision of material support or resources" for specified acts of terrorism).

This bill, if enacted, would not alter the substantive rules imposing civil liability for state sponsorship of terrorism. Our law already provides right to compensation for victims of state-sponsored terrorism. What this bill does is allow a private litigant to leapfrog the political branches simply by alleging that a particular state sponsors terrorism, based on belief and hope rather than proof. It leaves the decision of when to discard sovereign immunity, with all the risks that this step entails, to private litigants acting on incomplete information and whose interests that do not necessarily match those of our nation as a whole. Under this bill, once a suit begins, the Executive loses control over the process. Although Section 5 of JASTA allows the judge to stay the suit, the bill still leaves it to the court and the litigants to decide whether to do so. If they regard the efforts of the Executive to unearth evidence of state support for terrorism as unsatisfactory, this bill gives them a green light to go forward.

State support of terrorism is a grave act, justifying in response strong economic sanctions and, in appropriate circumstances, armed force, as the United States undertook in Libya in 1986. Outsourcing to private litigants the profound determination of whether a foreign state has supported an attack on us simply makes no sense. The purpose of private litigation is mostly to get compensation, which is to say to get paid. Its job is not to decide as a matter of first instance whether grave assaults on U.S. security have occurred. We have an extensive national security establishment, including the intelligence and defense communities, to find these things out. Expecting private litigants to perform these vital tasks disrupts rather than furthers our antiterrorism efforts.

In sum, this bill, if enacted, would harm U.S. interests by putting the United States in violation of international law and eroding the protection that we now enjoy from hostile litigation overseas, would not advance the cause of identifying state supporters of terrorism, and likely would interfere with our current antiterrorism activities. It should be rejected.