

Testimony of Michael B. Mukasey

House of Representatives – Committee on the Judiciary

Subcommittee on the Constitution and Civil Justice

Chairman Franks, Ranking Member Cohen, and members of the Subcommittee.

Thank you for inviting me to appear today to discuss S 2040, entitled the “Justice Against Sponsors of Terrorism Act.” The bill tries to deal with some issues relating to the sovereign immunity of governments and their officials in the courts of the United States, and its title promises something that I think no one in this room, and indeed no decent person, would oppose as a matter of principle, and that is justice against those who sponsor acts of terrorism. However, for reasons I will outline, I believe that this bill and others like it would deliver far more harm to the United States, its officials and members of its military, and its interests generally, than it would deliver any justice to sponsors of terrorism or good to the citizens of this country.

In summary, although I think it is unlikely to achieve anything approaching justice for victims of terrorism, it is almost certain to invite retaliation against our own government officials, soldiers and diplomats, and to be used to justify proceedings against our allies, including but certainly not limited to Israel. For those reasons, I think it would be imprudent to pass it.

I have had the chance to deal with issues relating to terrorism, and to some extent with issues relating to sovereign immunity, during my career, including service as a U.S. District Judge for the Southern District of New York from 1988 to 2006, where I presided

over several cases arising from the 1993 bombing of the World Trade Center in New York and related crimes, and later over cases arising from the attacks on 9/11 and other plots and acts that followed. I served as Attorney General of the United States from 2007 to 2009, when terrorism-related issues took up more of my time than any other single topic – literally from the opening daily briefing at FBI headquarters, and once a week at the White House, through the remainder of the day, including considering pending investigations, applications to the Foreign Intelligence Surveillance Court, and other issues presented by the war that has been launched against us by militant Islamists.

I have also written and spoken on these and related subjects since I left government in 2009. I have not been retained by anyone to appear here today. I am appearing on my own time and on my own dime because I am concerned at the negative effect I believe this bill would have on the interests of the United States and those of our allies.

I should say also at the outset that I am not a specialist in international law, and do not approach this legislation and this topic as a specialist. However, I have reviewed the testimony that was given before the Senate in July 2010 by John W. Bellinger III, who served as Legal Adviser for the State Department from 2005 to 2009, in addition to other positions he held earlier at the White House and in the Justice Department. In fact, he was serving as State Department Legal Adviser during the time that I served as Attorney General. He is a deservedly well respected specialist. I commend to your attention the testimony he gave exactly 6 years ago, on July 14, 2010, before the Subcommittee on

Crime and Drugs of the Senate Committee on the Judiciary. Although I may not agree with all the misgivings he expresses about legislation that is already on the books, I do share fully his misgivings about further legislation of the sort under consideration in 2010 and now, and I associate myself fully with his views.

There are, to be sure, technical problems with the legislation you are considering, and I will get to a couple of them later on. But the principal problems with this legislation are not technical. They arise from the simple fact that the United States is the most powerful nation in the world, and the nation most present in the world. It is most present in its diplomacy and in its military activities. I believe, and I think most of those in this room believe, that the United States is a force for good, one might even say the principal force for good – certainly compared to the other nations that seek to influence outcomes around the globe, including not only terrorist states like Iran but also adversaries like Russia and China.

This bill would invite retaliation by countries around the world, whether Turkey because of our support for the Kurds or Afghanistan because of death, or injury or property damage caused by drone strikes. Indeed, we have already seen threats of proceedings in friendly countries like Belgium and Spain against U.S. officials associated with acts that some in those countries disapprove of. It had to be pointed out to the Belgians that we could move NATO headquarters out of Brussels before they came to their senses and withdrew a threat to purport to exercise jurisdiction over our public officials. And we can certainly recall that there was a Spanish magistrate not long ago

who suggested he could exercise what is known as universal jurisdiction and reach U.S. officials. All it would take would be one exception to sovereign immunity that we ourselves enact for a country hostile to U.S. interests to enact a statute purporting to impose liability on our officials, or those of our allies.

Do we really want members of our military who carry out lawful orders of their superiors subjected to punishment in foreign courts? Do we want that to happen to our diplomats? And make no mistake about it, there are public officials in foreign countries who would welcome our creating a breach in the wall of sovereign immunity that they could exploit to reach us, arguing that we are in no position to object.

It is not we alone who would be facing this danger. We would be weakening the doctrine of sovereign immunity for our allies as well, notably Israel. Israeli officials and members of its military have been threatened repeatedly with proceedings in foreign jurisdictions based on that country's acts in its own defense. The more exceptions we create to sovereign immunity, the more we endanger that country and its officials.

It also bears mention that there is already a law permitting actions against states that have been found by our executive to sponsor state terrorism, and there have been such actions, notably against Iran. Prevailing parties in some of those cases have judgments but have not collected on them because of obstacles thrown in the way by the Iranians. There is no assurance this bill would be any more successful.

As I mentioned before, there are technical issues with the legislation as well. The particular bill you are considering would create a new exception to the Foreign Sovereign Immunities Act for actions for money damages arising out of an act of international terrorism in the United States and “a tortious act . . . of the foreign state or of any official” acting anywhere in the world. The nature of the tortious act apparently need not itself constitute international terrorism. The bill purports to exclude from its reach and from the jurisdiction of U.S. courts “acts [by foreign countries and officials] that constitute mere negligence,” although how that determination would be made without trying the case is impossible to imagine. In other words, under that bill, it would take a trial of the issue to determine whether the court had jurisdiction – a logical impossibility.

Further, the bill would permit a court to stay proceedings upon certification by the Secretary of State that good faith settlement negotiations are underway between the United States and the foreign state, with the implication that the United States government would have the authority to take settlement negotiations out of the hands of the plaintiffs in the litigation.

The technical problems with the bill, however, pale beside the overwhelming policy objection to it, and to any similar legislation, which is that it would obviously result in substantial harm to our public officials and members of our military, those of our allies, and therefore our own interests.

For the reasons outlined above, and in the July 14, 2010 testimony of John Bellinger, to which I referred earlier, HR 3815, or any similar legislation, should not be passed.