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STATEMENT OF

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DEPUTY LEGAL ADVISER

ON

S. 2465: A BILL TO PROVIDE A NEW CIVIL CAUSE OF ACTION IN FEDERAL COURT FOR TERRORIST ACTS ABROAD AGAINST UNITED STATES NATIONALS

BEFORE THE

SUBCOMMITTEE ON COURTS AND ADMINISTRATIVE PRACTICE

OF THE

SENATE JUDICIARY COMMITTEE

JULY 25, 1990

INTRODUCTION

Thank you Mr. Chairman. I am very pleased to have this opportunity to testify today concerning S. 2465, a bill that will add to the arsenal of legal tools that can be used against those who commit acts of terrorism against United States citizens abroad. I especially want to thank Senator Grassley for giving us the opportunity to discuss earlier drafts of the legislation with his staff, and for revising the bill to accommodate many of our concerns. We can support the bill if the Committee can accommodate one additional concern, which I will discuss here.

THE EXISTING LEGAL FRAMEWORK AGAINST TERRORISM

From a policy viewpoint, we support this legislation as a useful addition to our efforts to strengthen the rule of law against terrorists. The keynote of our counterterrorism policy has been to treat terrorists as criminals, regardless of their motives, and, in cooperation with other countries, to use the law to bring terrorists to justice.

Recent Federal legislation establishes federal criminal jurisdiction over certain terrorist acts against Americans overseas.

These domestic laws implement and are buttressed by international Conventions on anti-hijacking, aircraft sabotage, the taking of hostages, crimes against internationally protected persons (such as diplomats), and the protection of nuclear materials. In each of these conventions, the states party to them have agreed either to prosecute suspected violators, or to extradite them to a nation which will prosecute. Two additional conventions dealing with terrorist acts committed at or against airports and terrorist acts committed at or against maritime vessels have recently been concluded.

Other countries have tightened up their legislation and begun putting terrorists on trial and sending them to prison instead of letting them quietly slip away. My testimony provides several examples from last year, including the conviction in Germany of Mohammed Ali Hamadei for the hijacking of TWA Flight 847 and the murder of U.S. Navy diver Robert Stethem.

This legal framework, together with increased international cooperation against terrorism, has begun to pay off. In 1989, the overall level of international terrorism declined by almost 38 percent to 528 incidents from 862 terrorist incidents in 1988; those killed in such incidents decreased by 27 percent, and those injured decreased a full 57 percent. These figures do not mean we have won the battle against terrorism, but they show that we are making progress.

While we have made a start in prosecuting the perpetrators of terrorist acts, it is still unfortunately the case that the victims of terrorism generally remain uncompensated. Last month, a federal district court held that U.S. admiralty laws could be used to sue for terrorist acts on board ships. In Klinghoffer v. Palestine Liberation Organization, a federal court ruled that Mr. Klinghoffer's daughters, as well as other passengers of the Achille Lauro, can sue the PLO in federal court under its admiralty jurisdiction for Abul Abbas' act of terrorism.

Just as our criminal laws have sent an important signal to those who would engage in terrorism, this case signals for the first time that individual terrorists and their organizations may now be subject to civil liability in the United States.

This bill, S. 2465, expands the Klinghoffer opinion. Whereas that opinion rested on the special nature of our admiralty laws, this bill will provide general jurisdiction to our federal courts and a cause of action for cases in which an American has been injured by an act of terrorism overseas.

We view this bill as a welcome addition to the growing web of law we are weaving against terrorists. It may be that, as a practical matter, there are not very many circumstances in which the law can be employed. Few terrorists travel to the United States and few terrorist organizations are likely to have cash assets or property located in the United States that could be attached and used to fulfill a civil judgment.

The existence of such a cause of action, however, may deter terrorist groups from maintaining assets in the United States, from benefiting from investments in the U.S. and from soliciting funds within the U.S. In addition, other countries may follow our lead and implement complimentary national measures, thereby increasing obstacles to terrorist operations.

Moreover, the bill may be useful in situations in which the rules of evidence or standards of proof preclude the U.S. government from effectively prosecuting a criminal case in U.S. Courts. Because a different evidentiary standard is involved in a civil suit, the bill may provide another vehicle for ensuring that terrorists do not escape justice.

While the Department supports the objective of the bill, we have discussed with the Committee's staff, (we favor adding a new provision to the Bill. This provision would state that the Bill's other provisions shall not apply in suits against the United States, foreign states as defined in the Foreign Sovereign Immunities Act, or any officer or employee thereof. The effect of this provision would be to maintain the status quo as regards sovereign states and their officials: no cause of action for "international terrorism" exists against them.

The Department opposes creating this civil cause of action against foreign states. Use of the U.S. judicial system to bring charges of terrorism against foreign states or officials has obvious potential to create serious frictions and tensions with other nations.

Most if not all foreign states would view the assertion by U.S. courts of jurisdiction to review allegations against them of committing or aiding terrorist acts outside the United States as inconsistent with international law. We are concerned that unilateral extension of such jurisdiction by us would undercut our effort to build multilateral cooperation against terrorism. We also believe that the provisions of this Bill should not apply to suits against foreign officials. This is necessary to prevent plaintiffs from circumventing the immunity of foreign states by alleging terrorism against foreign government officials.

We would be concerned about the reciprocal implications of any bill that permitted U.S. courts to adjudicate allegations of terrorism against foreign states or their officials. Such legislation could lead courts in hostile states to entertain suits alleging that legitimate U.S. military activities constitute "terrorism."

Moreover, if the Bill were to permit civil suits against states or their officials alleging terrorism, individuals -- rather than the U.S. government -- would determine the timing and manner of making allegations in official U.S. fora about the conduct of foreign countries and their officers.

We believe that the United States can best manage a complex foreign policy with multiple objectives -- among the most important of which is combatting terrorism -- if the timing and manner of such serious allegations against foreign countries in official fora are left in the hands of persons who are responsible for the conduct of our foreign policy.

Finally, we are concerned over the prospect of nuisance or harassment suits brought by political opponents or for publicity purposes, where allegations may be made against foreign governments or officials who are not terrorists but would nonetheless be required to defend against expensive and drawn-out legal proceedings. Many foreign states are unlikely to enter the courts of other countries to defend against charges of intentional wrongdoing. This would exacerbate the problem of default judgments that exists under current law.

CONCLUSION

To conclude, Mr. Chairman, we support this legislation as a potentially useful addition to the arsenal of legal tools for the fight against terrorism subject to the concern indicated.

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QUESTIONS FOR ALAN KRECZKO
DEPUTY LEGAL ADVISOR, DEPARTMENT OF STATE
SUBMITTED BY SENATOR CHARLES E. GRASSLEY

QUESTION 1:

SHOULD GOVERNMENT OFFICIALS AND EMPLOYEES BE GRANTED IMMUNITY FOR EVERYTHING THEY DO, SOLELY BECAUSE THEY HOLD OFFICIAL TITLES OR ARE EMPLOYED BY A GOVERNMENT?

QUESTION 2:

ON PAGE SIX AND SEVEN OF THE TESTIMONY, THE DEPARTMENT PROPOSES ADDING A PROVISION TO THE BILL THAT WOULD:

> "STATE THAT THE BILL'S OTHER PROVISIONS SHALL NOT APPLY IN SUITS AGAINST THE UNITED STATES, FOREIGN STATES AS DEFINED IN THE FOREIGN SOVEREIGN IMMUNITIES ACT, OR ANY OFFICER OR EMPLOYEE THEREOF. THE EFFECT OF THIS PROVISION WOULD BE TO MAINTAIN THE STATUS QUO AS REGARDS SOVEREIGN STATES AND THEIR OFFICIALS: NO CAUSE OF ACTION FOR INTERNATIONAL TERRORISM EXISTS AGAINST THEM."

S. 2465 CREATES A NEW CAUSE OF ACTION, BUT IT IS NOT THE INTENT OF THE BILL TO CREATE NEW FORMS OF IMMUNITY; THIS BILL SHOULD BE CONSISTENT WITH EXISTING LAW. THE SUGGESTED LANGUAGE APPEARS TO CREATE A NEW STRAIN OF "PER SE" IMMUNITY THAT WOULD IN FACT CHANGE THE STATUS QUO IN REGARD TO TRADITIONAL NOTIONS OF IMMUNITY. IS THE SUGGESTED LANGUAGE CONSISTENT WITH TRADITIONAL NOTIONS OF SOVEREIGN IMMUNITY? WOULD NOT THIS LANGUAGE CHANGE THE STATUS QUO?

QUESTION 3:

IT IS MY UNDERSTANDING THAT EXISTING NOTIONS OF IMMUNITY DO NOT PROVIDE ABSOLUTE IMMUNITY FOR OFFICIALS OR EMPLOYEES FOR THEIR EVERY ACT SOLELY BECAUSE THEY WORK FOR A GOVERNMENT. WHY SHOULD THE LAW BE APPLIED ANY DIFFERENTLY UNDER S. 2465.

QUESTION 4:

HOW ARE THE TERMS "OFFICIAL, OFFICERS, AND EMPLOYEES" DEFINED, AS USED IN THE SUGGESTED LANGUAGE? WHAT POSITIONS DO THESE TERMS CONTEMPLATE?

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Question 1

SHOULD GOVERNMENT OFFICIALS AND EMPLOYEES BE GRANTED IMMUNITY FOR EVERYTHING THEY DO, SOLELY BECAUSE THEY HOLD OFFICIAL TITLES OR ARE EMPLOYED BY A GOVERNMENT?

No. Government officials are not, and should not be, immune for everything they do solely because of their status as government officers or employees. Only in special circumstances, where the functions government officials (such as diplomats and heads of state) perform require extensive protection, are they entitled to nearly complete immunity.

No U.S. official is entitled to absolute immunity from the jurisdiction of U.S. courts. Even the President has absolute immunity only with respect to "acts within the 'outer perimeter' of his official responsibility." Nixon v. Fitzgerald, 457 U.S. 731, 756 (1982). No U.S. official or employee is immune, solely by virtue of his or her position or employment, from U.S. jurisdiction over suits unconnected with his official acts.

Government officials are entitled to more extensive immunity from the jurisdiction of foreign courts under both U.S. and international law. Diplomats, for example, are entitled to absolute immunity from the criminal jurisdiction of the state to which they are accredited and to virtually complete immunity from civil jurisdiction. Sitting heads of state have been held immune to other states' jurisdiction even in suits that have no connection to their official functions or position.

Most other foreign officials (non-diplomats), however, are accorded immunity by U.S. courts only for acts performed in the exercise of their official functions. In the U.S., the juridical basis for this conclusion has varied. Some courts have held that the immunity of foreign officials derives from general principles of international law. See, e.g., Chuidian v. Philippine National Bank, No. CV 86-2255-RSWL (D.C. Cal. 1988). We believe this view is correct, and have so informed the courts on occasion. Other courts have found that the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602 et seq., applies to individual officers of foreign states, despite legislative history suggesting the opposite conclusion. See, e.g., Kline v. Kaneko, 685 F.Supp. 386 (S.D.N.Y. 1988); Rios v.

Marshall, 530 F.Supp. 351 (S.D.N.Y. 1981); American Bonded Warehouse v. Compagnie Nationale Air France, 653 F.Supp. 861 (N.D. Ill. 1987).

Thus, under current law diplomats and heads of state are accorded immunity for nearly everything they do because of the special status functions they perform. Most foreign officials, however, are granted immunity only for their official acts. U.S. officials have even less immunity in U.S. courts.

Question 2

ON PAGE SIX AND SEVEN OF THE TESTIMONY, THE DEPARTMENT PROPOSES ADDING A PROVISION TO THE BILL THAT WOULD

> **"STATE THAT THE BILL'S OTHER PROVISIONS SHALL NOT APPLY IN SUITS AGAINST THE UNITED STATES, FOREIGN STATES AS DEFINED IN THE FOREIGN SOVEREIGN IMMUNITIES ACT, OR ANY OFFICER OR EMPLOYEE THEREOF. THE EFFECT OF THIS PROVISION WOULD BE TO MAINTAIN THE STATUS QUO AS REGARDS SOVEREIGN STATES AND THEIR OFFICIALS: NO CAUSE OF ACTION FOR INTERNATIONAL TERRORISM EXISTS AGAINST THEM."**

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S. 2465 would change the status quo by creating a new cause of action. In our view, the question is whether to extend this cause of action to foreign officials, not whether to create a new "strain" of immunity. As a matter of jurisprudential theory, our proposed change would exempt sovereign states and their officials from the bill's scope, not entitle them to immunity. Existing law recognizes this distinction; for example, foreign government offices and their foreign employees are now exempt from certain tax and social security requirements, although they are not entitled to immunity from taxation under any treaty. See 26 U.S.C. § 3401(a)(5) (foreign governments need not withhold income tax from the salaries of their foreign national employees); 26 U.S.C. § 3121(b)(11) (foreign government offices exempt from withholding Social Security taxes from their employees' salaries); and 26 U.S.C. § 3306(a) and (c)(11) (foreign government offices exempt from paying federal unemployment tax on the salaries of their employees).

Existing theories of immunity are generally limited to "official acts" immunity in order to hold an official potentially liable for purely private acts, such as contract or family law disputes, or torts. Our proposal does not extend immunity into any of these areas; indeed, we note that most if not all "international terrorism" suits could be maintained as traditional tort actions (assault and battery), where a foreign government officials would have only official acts immunity.

Our proposal would, however, exempt foreign officials from this new cause of action. We believe this is necessary because of the nature of this cause of action: S. 2465 defines an "act of terrorism" as an intentional tort committed for political ends. No other tort of which we are aware requires a demonstration of this motivation, or a ruling by our courts of motivation and intent that have such potential to embarrass other states or to interfere in the Executive Branch's ability to conduct foreign affairs. Moreover, since in most foreseeable actions against a government official the defendant would have been acting in his or her official capacity, adopting our proposed amendment would not deprive plaintiffs of an opportunity to sue that would otherwise have existed.

Question 3

IT IS MY UNDERSTANDING THAT EXISTING NOTIONS OF IMMUNITY DO NOT PROVIDE ABSOLUTE IMMUNITY FOR OFFICIALS OR EMPLOYEES FOR THEIR EVERY ACT SOLELY BECAUSE THEY WORK FOR A GOVERNMENT. WHY SHOULD THE LAW BE APPLIED ANY DIFFERENTLY UNDER S. 2465?

We have indicated a concern that without an exception for foreign officials, the cause of action provided under S. 2465 could become a vehicle for court suits to harass foreign officials in the United States or to challenge the policies of foreign governments. Committee staff have been sympathetic to this concern. However, if the exemption is limited to "official acts" the litigation will still occur. To maintain the suit, the plaintiff would only need to allege that the defendant's terrorist actions were "non-official." Foreign officials will be subject to suit, and the litigation will revolve around whether the official's country has a policy of terrorism which made his support of terrorism "official" or "non-official."

Moreover, we are concerned that, unless our amendment is adopted, most litigation will be brought against officials of friendly governments. Far more British or Israeli officials travel to the United States than Iraqi or Syrian officials. Some of the practices of these governments in Northern Ireland and the West Bank respectively have been criticized by some American groups as "terrorism." Without an exemption in the bill, visiting officials of these governments would have to defend against suits alleging their involvement in terrorism and would have to defend, inter alia, on the grounds that their acts were "official," thereby bringing into the courts the policies of their countries.

We do not see sufficient reason to risk this litigation. We have no reason to believe that acts of terrorism are being committed against Americans by foreign officials acting in a non-official capacity. Furthermore, there is no exemption in the bill, and we are seeking none, for members of terrorist organizations. Exempting officials, including their nonofficial acts, will not benefit such organizations.

Question 4

HOW ARE THE TERMS "OFFICIAL, OFFICERS, AND EMPLOYEES" DEFINED, AS USED IN THE SUGGESTED LANGUAGE? WHAT POSITIONS DO THESE TERMS CONTEMPLATE?

The use of these terms together is intended to encompass all persons employed by a foreign government, in whatever capacity. "Officers" would in general refer to high-level individuals who exercise substantial discretion and set policy, while "employees" would refer to lower level individuals, including policemen and soldiers, who carry out policies or orders.

QUESTIONS FOR ALAN KRECZKO
DEPUTY LEGAL ADVISER, DEPARTMENT OF STATE
SUBMITTED BY SENATOR HOWELL HEFLIN

Q. IN YOUR TESTIMONY, YOU REFERRED TO INTERNATIONAL CONVENTIONS DEALING WITH TERRORIST ACTS. IN YOUR OPINION, WOULD IT BE FEASIBLE TO IMPLEMENT AN INTERNATIONAL CONVENTION ON CIVIL REDRESS FOR CRIMINAL ACTS OF TERRORISM?

A. As I indicated in my written statement, few terrorists or terrorist organizations are likely to have cash assets or property located in the United States that could be attached and used to fulfill a civil judgment pursuant to S. 2465. Moreover, foreign countries are unlikely to enforce U.S. judgments regarding this novel type of U.S. civil jurisdiction. An international Convention for mutual enforcement of civil decrees related to terrorism might get around this problem. Such an international Convention, however, would have to overcome several significant obstacles:

--First, the world community has tried unsuccessfully in a number of different fora since 1972 to come up with an acceptable definition of terrorism. It is for this reason that international conventions have been adopted proscribing specific acts, which by their nature are typically committed by terrorists (e.g., hostage-taking; aircraft hijacking and sabotage; acts of violence against maritime vessels and fixed platforms; and violence against diplomats).

--Second, other states may not be willing to undertake such an obligation to enforce the civil decrees of the United States since, unlike most other countries, the decision regarding appropriate compensation for a tortious injury is made by a jury in the United States rather than by a judge. American monetary awards have tended to be much larger than those rendered by foreign courts for similar torts. Foreign states may be reluctant to enter into an obligation to enforce these higher awards.

--Third, we would need to be satisfied that the judgments of other countries would comport to our notions of fairness and due process before we could undertake to enforce them.

We note that one recent international convention does contain a provision on civil redress. The Torture Convention,

currently before the Senate for its advice and consent, requires States parties to create a cause of action for acts of torture committed in their country. (This Convention does not, however, contain a provision for mutual recognition of civil decrees related to such a cause of action.) We will consider whether it would be advisable to include a similar provision in future conventions related to terrorism.

Q. YOUR WRITTEN STATEMENT MADE NOTE OF THE FACT THAT UNDER THE COMPREHENSIVE CRIME CONTROL ACT OF 1984, THE TERRORIST RESPONSIBLE FOR THE HIJACKING OF A ROYAL JORDANIAN AIRLINER WAS CONVICTED IN U.S. COURT, AND SENTENCED TO 30 YEARS IMPRISONMENT. HAVE ANY OTHER INTERNATIONAL TERRORISTS BEEN CONVICTED UNDER U.S. STATUTES?

A. Fawaz Younis, the terrorist of which I made note in my written statement, was the first and, to date, only international terrorist convicted in the United States for acts committed abroad under domestic legislation implementing the Multinational Anti-terrorism Conventions (e.g., the Hague Hijacking Convention, the Montreal Sabotage Convention, the Hostage Taking Convention, and the Internationally Protected Persons Convention). However, a number of individuals belonging to international terrorist groups have been convicted for terrorism-related offenses committed in the United States. For example, several members of the Provisional Irish Republic Army (PIRA) were recently convicted in a Massachusetts court for attempting to export high-tech military equipment to the IRA; a member of the Japanese Red Army was convicted last year and sentenced to thirty years imprisonment for possession of anti-personnel pipe bombs in the United States; several years ago, a number of Sikhs were convicted for conspiring to murder former Prime Minister Ragiv Ghandi when he was in the United States in 1985; and over the past decade, there have been several successful federal prosecutions in New York, San Francisco, Baltimore, and North Carolina of individuals accused of running weapons to the PIRA.