

9/11 Bill: Foreign Policy by Plaintiffs Lawyers? Ugh!

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Firefighters work beneath the destroyed mullions, the vertical struts which once faced the soaring outer walls of the World Trade Center towers, after a terrorist attack on the twin towers in New York, on Sept. 11, 2001.

You've got to wonder how many members of Congress who voted on Wednesday to override President Obama's veto of a bill allowing the families of 9/11 victims to sue Saudi Arabia actually think it's a good idea.

It's not hard to figure out the political calculation. Anyone who voted against this bill could count on being tarred in the next election for favoring terrorism sponsors over American victims and denying their families justice.

But how many members--the ones who have actually given the issue any thought, that is--truly believe it was a good idea to narrow the scope of foreign sovereign immunity?

Because it's not.

The Justice Against Sponsors of Terrorism Act lets private citizens haul foreign governments into court here based on allegations that the country's actions abroad made it responsible for an attack on U.S soil.

It goes without saying that my heart, everyone's heart, goes out to the families that lost loved ones on 9/11. But this law is not the answer.

You don't have to be clairvoyant to predict that other countries are going to undercut U.S. sovereign immunity in return--and we're a much bigger target.

As CIA Director John Brennan said Wednesday, "If we fail to uphold this standard for other countries, we place our own nation's officials in danger. No country has more to lose from undermining that principle than the United States."

Our soldiers, diplomats and representatives overseas--this makes them more vulnerable. Because now that we've taken a whack at sovereign immunity--a bedrock of international law--it's that much easier for other countries to do the same.

Don't think it won't happen.

In Spain, for example, Judge Baltasar Garzón in 2009 filed criminal charges against six former Bush Administration officials including Attorney General Alberto Gonzales, Department of Defense General Counsel William Haynes II, Office of Legal Counsel head Jay Bybee and OLC deputy John Yoo for greenlighting torture at Guantanamo Bay.

The case was eventually dismissed by Spain's national court for lack of jurisdiction, but it shows how U.S. government officials can find themselves in the crosshairs overseas.

And Spain is a friendly country. How is this new law going to play in places that are not our allies?

Consider drone strikes in Pakistan, Afghanistan, Yemen and Somalia. Would a civilian there who saw family members killed, or who was injured or had property destroyed view the attack as an act of terrorism? And be eager to sue the United States in response if given the chance?

We're opening that door.

Then there's Russia. In 2015, according to a report by the Law Library of Congress, Russia passed a law "based on the reciprocity principle."

When deciding whether to lift a foreign country's legal immunity, "Russian courts must consider the degree of immunity the Russian Federation enjoys in a foreign state."

Talk about setting ourselves up.

It's not even clear the law will accomplish its purpose at home.

The Foreign Sovereign Immunities Act already permits suits against foreign states designated by the State Department as state sponsors of terrorism—currently Iran, Sudan and Syria.

Even this limited exemption has proven to be difficult. In April, the U.S. Supreme Court ruled that almost \$2 billion in frozen Iranian assets must be turned over to American families who won a judgment against the country for its role in the 1983 bombing of a U.S. Marine Corps barracks in Beirut.

Iran punched back. **It sued the U.S. in June in the International Court of Justice in The Hague, alleging that the judgments violate an old investment treaty.** Iran wants the international court to order the U.S. government to extend full legal immunity to Iranian assets and pay reparations.

It would be ironic, and not in a funny way, if at the end of the day we got stuck paying Iran.

Now, everything is about to get even more complicated. Because the Justice Against Sponsors of Terrorism Act amounts to privatizing national security policy.

Think about it: how is a plaintiff's lawyer supposed to know if a foreign state sponsored an attack? Especially if the motivation behind making such a determination is to get monetary damages?

University of Virginia School of Law professor Paul Stephan put it well in testimony before the House Judiciary Committee in July.

This act allows “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,” he said. “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.”

He concluded, “**Outsourcing to private litigants** the profound determination of whether a foreign state has supported an attack on us simply makes no sense.”