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## JASTA Straw Man? How the Justice Against Sponsors of Terrorism Act Undermines Our Security and Its Stated Purpose

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# JASTA STRAW MAN? HOW THE JUSTICE AGAINST SPONSORS OF TERRORISM ACT UNDERMINES OUR SECURITY AND ITS STATED PURPOSE

KATHERINE HOLCOMBE\*

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## I. INTRODUCTION

On September 11, 2001 at 8:46:40 a.m., American Airlines Flight 11 crashed into the North Tower of the World Trade Center in New York City.<sup>1</sup> Sixteen minutes and thirty-one seconds later, United Airlines Flight 175 struck the South Tower, killing all on board and an unknown number of people in the tower.<sup>2</sup> Approximately fifty-one minutes six seconds after the second plane hit, American Airlines Flight 77 crashed into the Pentagon travelling at 530 miles per hour.<sup>3</sup> All on board, including many military personnel in the Pentagon, were killed.<sup>4</sup> In a fourth plane, United Flight 93, passengers were aware their plane had just been hijacked and took a vote to retake the plane to save their lives.<sup>5</sup> Calls with family members ended as the cockpit voice recorder captured the sounds of passengers trying to break through the cockpit door.<sup>6</sup> Family members reported they

1. NAT'L COMM'N ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, xv (2004) (summarizing investigatory findings from the 9/11 attacks, including over 1,200 interviews and 2.5 million pages of documents).

2. *See id.* at 8 (evincing flight contained 56 passengers according to the flight manifest).

3. *See id.* at 9-10 (noting that Barbara Olson, wife of then Solicitor General Ted Olson, was aboard Flight 77 and reported to her husband via phone that the plane had been hijacked sometime between 9:16 A.M. and 9:26 A.M.).

4. *See id.* at 9 (stating that the Secret Service was notified at 9:34 A.M. that an unknown aircraft was heading towards the Pentagon).

5. *See id.* at 13 (citing five calls to family members on the ground of passengers' intent to revolt against the hijackers).

6. *See id.* at 14 (2004) (emphasizing the sound of breaking glass, loud thumps, crashes, and shouts).

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could hear the voices of their loved ones on Flight 93 fighting among the din.<sup>7</sup> Shortly after 10:02:23 A.M., a hijacker can be heard saying, “Pull it down! Pull it down.”<sup>8</sup> The sound of passengers fighting to regain the plane is audible until the aircraft plows into an empty field at 580 miles per hour.<sup>9</sup>

Hours after the collapse of the Twin Towers, the idea that the September 11th (“9/11”) attacks had “changed everything” permeated American popular and political discussion.<sup>10</sup> According to President George W. Bush, the attacks on September 11th were the beginning of a “new kind of war” and justified the hegemony of the United States as a global police power.<sup>11</sup> The Bush administration also argued that because the circumstances were new, the policies that addressed terrorist attacks like 9/11 should be new as well.<sup>12</sup> Like many tragedies, the events of 9/11 became a rhetorical bookend, marking the end of business as usual and the beginning of a profound shift in U.S. national security public policy and foreign relations.<sup>13</sup>

Courts began to question whether a new kind of war also justified a new legal regime.<sup>14</sup> Families of the 9/11 victims turned to the judiciary for judgment and restitution from those they held responsible.<sup>15</sup> Although Al-Qaeda and Osama Bin Laden took credit for the attacks, suspicion also fell on Saudi Arabia when it was discovered that fifteen of the nineteen hijackers were Saudi citizens.<sup>16</sup> Families of 9/11 victims alleged that the

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7. *See id.* at 13-14 (reporting that the hijackers responded to this attack by rolling the plane and knocking the passengers off balance).

8. *See id.* at 14 (reporting that the hijackers were recorded yelling, “praise for Allah”).

9. *See id.* (noting that the passengers’ attempts to retake the plane prevented the hijacker’s from reaching the White House, their original target).

10. *See* MARILYN B. YOUNG ET AL., *SEPTEMBER 11 IN HISTORY: A WATERSHED MOMENT?* 2 (Mary L. Dudziak, ed., 2003) (arguing that 9/11 became a pretext for justifying absolute sovereignty for the United States and limiting sovereignty for others).

11. *See id.* at 3 (positing that some saw Bush’s characterization of war as justifying a softening of constitutional restraints).

12. *See id.* (noting similar arguments followed World War I and World War II arguing for softening of constitutional restraints regarding tactics to fight communism).

13. *See id.* at 3-4 (suggesting that while the theory that 9/11 changed the world may be debatable, the attack did enable policies that otherwise would have appeared overly aggressive).

14. *See id.* at 7 (arguing that after 9/11 courts were faced with how the law should respond to times of crises).

15. *See In re Terrorist Attacks on Sept. 11, 2001*, 714 F.3d 659, 665 (2d Cir. 2013) (comprising one of the three cases that became known the *Terrorist Attacks Litigation*).

16. *See* Julian Hattem, *Congress Publishes Redacted 28 Pages From 9/11 Report*, THE HILL (July 15, 2016, 2:05 PM), <http://bit.ly/29CIRYj> (reporting the Saudi

Saudi royal family, banks, and charitable organizations provided financial support to the Al-Qaeda hijackers through donations to extremist mosques that promoted jihad.<sup>17</sup> Many of these theories arose from a 2002 report by the House and Senate intelligence committees that suggested Saudi involvement, which became known as the “28 pages.”<sup>18</sup> However, an independent Congressional commission found no evidence that Saudi government or Saudi officials funded the attacks.<sup>19</sup>

In July of 2016, the “28 pages” were released, reigniting public interest in establishing a connection between Saudi Arabia and the events of 9/11.<sup>20</sup> Against this backdrop, Senator Chuck Schumer of New York and Senator John Cornyn of Texas proposed the Justice Against Sponsors of Terrorism Act (JASTA).<sup>21</sup> JASTA was framed as a vehicle to hold accountable the state sponsors of terrorism who had previously escaped liability through “errors” in the U.S. legal system.<sup>22</sup> By “errors,” drafters meant the immunities afforded to Saudi Arabia under the Foreign Sovereign Immunities Act (FSIA) and the Antiterrorism Act’s (ATA) condition that litigants prove Saudi Arabia was the primary cause of the 9/11 terrorist attacks.<sup>23</sup> Although JASTA was framed narrowly as a means for 9/11 victims to hold Saudi Arabia liable under new rules, it amends longstanding principles of sovereign immunity and relations between

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citizenship of fifteen of the hijackers fueled suspicions that inflamed U.S.- Saudi relations).

17. See Rowan Scarborough, *Saudi Government Funded Extremism in U.S. Mosques and Charities: Report*, WASH. TIMES (July 19, 2016), <http://bit.ly/29TPDcf> (emphasizing that follow-up investigations were unable to confirm the Saudi kingdom or its agents helped or knowingly financed the attack).

18. See *28 Pages of the 2002 Congressional Inquiry Into the Sept. 11 Attacks*, N.Y. TIMES (July 15, 2016), <http://nyti.ms/2goFQjZ> (discussing possible Saudi involvement in the attacks).

19. See Editorial, *The Risks of Suing the Saudis for 9/11*, N.Y. TIMES (Sept. 28, 2016), <http://nyti.ms/2eP9TAL> (questioning the value of suing the Saudis without causal evidence linking them to 9/11).

20. See Hattem, *supra* note 16 (characterizing the 28 pages as a political foil containing only coincidental connections between the Saudis and the 9/11 hijackers).

21. See H.R. 3143, 113th Cong. (2013) (providing the early framework of JASTA that would become Public Law No: 114-222).

22. See Press Release, Senator Charles E. Schumer, “Justice Against Sponsors of Terrorism Act” – Legislation, Long Sought By 9/11 Families, Will Allow Victims of 9/11 & Other Terrorist Attacks to Foreign Countries & Others that Funded Al-Qaeda, Isis (Sept. 17, 2015) [hereinafter Press Release] (arguing the Act will correct “egregious errors” within the courts by circumnavigating the immunities afforded to Saudi Arabia under the FSIA).

23. See *id.* (stating JASTA allows victims “like the September 11<sup>th</sup> victims” to pursue foreign states that funded the attacks).

states.<sup>24</sup> Additionally, it allows private litigants to sue foreign states for a terrorism claim, leapfrogging the executive's foreign policy prerogative and congressional evaluations of which states should be listed as state sponsors of terror.<sup>25</sup>

This comment argues that JASTA's intended purpose to provide "justice" to victims of terrorism, though publically popular, fails to protect U.S. citizens in the broader context of national interests.<sup>26</sup> Further, JASTA violates principles of sovereign immunity, and interferes with the executive's ability to shape foreign policy as the states' external representative.<sup>27</sup>

Part II will highlight the importance of sovereign immunity, its history, and how the FSIA, ATA, and JASTA interact with the doctrine.<sup>28</sup> Part III will argue that JASTA cannot legally accomplish what it intends to do.<sup>29</sup> It will also show that the executive's claim settlement power is not precluded by JASTA in practice or in fact, but it places the executive at odds with Congress, and undermines the executive's ability to effectively manage foreign policy.<sup>30</sup> Part IV will advocate that Congress repeal JASTA and consider a soft-power diplomatic approach that promotes collaboration with other states to combat terrorism.<sup>31</sup> Finally, Part V will conclude that

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24. See Chet Nagle, Opinion, *JASTA: The Anti-Saudi Law Will Hurt Us, Not Them*, DAILY CALLER (Sept. 26, 2016), <http://bit.ly/2gypEJz> (reporting the Dutch Parliament's characterization of JASTA as a "gross and unwarranted breach of Dutch sovereignty" and Sheikh Jamal Al-Shari's promise to sue the U.S. government in Iraq should JASTA become law).

25. See Veto Message from the President – S.2040, THE WHITE HOUSE (Sept. 23, 2016), <http://bit.ly/2cZh99D> [hereinafter Veto Message] (noting JASTA takes foreign policy matters from professionals and gives them to private litigants and courts).

26. See Amir Taheri, *JASTA: Misconceived and Stillborn, Can it Survive?*, ASHARQ AL-AWSAT (Oct. 5, 2016), <http://bit.ly/2g4S14Q> (describing JASTA as "politically cost-free for Congress to send a signal" about being tough on terrorism).

27. See U.S. Const. art. II; see also *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 319-20 (1936) (concluding the President of the United States had "plenary" powers in the foreign affairs field that are not dependent upon congressional delegation).

28. See *infra* Part II (examining the principle of sovereign immunity and how the FSIA, ATA, and JASTA have curtailed its protections in the United States).

29. See *infra* Part III (arguing that JASTA, as drafted, is legally ineffective).

30. See *Dames and Moore v. Regan* 453 U.S. 654, 688 (1981) (upholding the executive's intervention into federal court litigation against Iran through President Carter's executive claims settlement power to negotiate the return of American hostages); see also *Republic of Iraq v. Beaty*, 556 U.S. 848, 866-67 (2009) (upholding President Bush's veto of a legislative act barring immunity for Iraq on the basis that it would destabilize Iraq and principles of sovereign immunity).

31. See *infra* Part IV (advocating that JASTA be repealed because it violates

JASTA is political legislation that unjustifiably puts the United States at risk.<sup>32</sup>

## II. BACKGROUND

### A. *Tracing the History of the Sovereign Immunity Doctrine*

Historically, the United States afforded foreign states and governments complete or “absolute” immunity from suit in domestic courts.<sup>33</sup> This was considered the basic law of nations, and was grounded in recognition of the “perfect equality and absolute independence of sovereigns.”<sup>34</sup> In the early part of the 20th Century, the Supreme Court made clear that if the Executive Branch expressed its views regarding whether immunity should be granted, courts were bound to accept those views.<sup>35</sup> Courts thus looked to the political branches for guidance in determining whether to exercise jurisdiction over a foreign sovereign.<sup>36</sup>

As states began engaging in commercial activities around the turn of the century, the idea of blanket immunity began to erode in customary international law.<sup>37</sup> In response, the U.S. shifted to a “restrictive” approach to sovereign immunity around 1952.<sup>38</sup> The restrictive approach distinguishes between public acts (*jus imperii*) of a foreign state, for which immunity is generally accorded, and private acts (*jure gestionis*) for which

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international law and reduces the likelihood of collaboratively fighting terrorism).

32. See *infra* Part V (concluding that JASTA is legally feeble because it does not fully address the legal barriers of the FSIA or the ATA and sets dangerous foreign policy precedent).

33. See *Schooner Exch. v. McFaddon*, 11 U.S. 116, 136 (1812) (holding that sovereigns possess equal rights and equal independence, and thus jurisdictions should be mutually relaxed over one sovereign in another territory).

34. See *id.* at 137 (suggesting that to haul a foreign sovereign into court would be a serious affront to its sovereignty).

35. See *Ex Parte Peru*, 318 U.S. 578, 589-90 (1943) (stating that if the executive announced a policy of immunity then this policy was binding on the courts); see also *Mexico v. Hoffman*, 324 U.S. 30, 35 (1945) (holding that it is not for the courts to deny an immunity which the government sees fit to allow).

36. See *Hoffman*, 324 U.S. at 35 (reiterating issues of foreign policy, such as immunity, generally fall within the executive rather than the legislature or judiciary).

37. See BARRY E. CARTER & ALLEN S. WEINER, *INTERNATIONAL LAW* 538-40 (6th ed. 2011) (citing to the Acting Legal Adviser Jack B. Tate’s so-called “Tate Letter” contending that international trade and greater contact between states justified this distinction).

38. See *id.* (arguing customary international law had shifted to distinguish between sovereign acts and commercial acts).

immunity is generally not available.<sup>39</sup> The “restrictive theory” narrowed the applicability of sovereign immunity, and initiated a judicial process to determine whether a claim against a foreign state involved a public or private act.<sup>40</sup> In practice, however, courts continued to reject jurisdiction that could potentially disrupt foreign relations.<sup>41</sup> This proved problematic when immunity was not consistently or predictably applied.<sup>42</sup> The Foreign Sovereign Immunities Act was drafted to codify the sole means for a U.S. court to obtain jurisdiction over a foreign state.<sup>43</sup>

### *1. The Foreign Sovereign Immunities Act (“FSIA”)*

Under the FSIA, foreign states are immune from jurisdiction of all U.S. courts unless one of the FSIA exceptions to general immunity applies.<sup>44</sup> Courts first consider whether the defendant is a “foreign state,” as that concept is defined under the FSIA.<sup>45</sup> If the action does fall into an enumerated exception and the defendant is determined to be a state, federal courts have both subject matter and personal jurisdiction.<sup>46</sup> In 2008, Congress expanded the FSIA’s exceptions through the “terrorism exception.”<sup>47</sup> The terrorism exception applies only when the foreign state is designated as a state sponsor of terrorism at the time of (or as a result of) the act in question.<sup>48</sup> The provision also requires that the claimant or victim be a U.S. citizen or an official or employee of the U.S. military at

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39. *See id.* at 539 (advising that a trend toward a restrictive theory of sovereign immunity is supported by the majority of states).

40. *See id.* at 540 (noting that this determination will either trigger or bar the defense of sovereign immunity).

41. *See e.g., Loomis v. Rogers*, 254 F.2d 941, 943-44 (D.C. Cir. 1958) (refusing to permit the attachment of a fund which contained proceeds from the sale of oil owned by Italy, despite having no formal suggestion of immunity from the State Department).

42. *See H.R. REP. NO. 94-1487*, at 7, 12 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6605, 6610 (indicating that the FSIA was meant to be the exclusive standard for resolving questions of sovereign immunity).

43. *See* 28 U.S.C. §§ 1602-1611 (1976) (making courts responsible for deciding issues of immunity).

44. *See id.* (reflecting the purpose of the Act to generally afford immunity unless specific exceptions can be established).

45. *See* 28 U.S.C. § 1603 (1976) (defining “foreign state” to include not only the state itself, but also a political subdivision, agency, or instrumentality of the state).

46. *See* 28 U.S.C. § 1330 (1976) (noting that this process would either trigger or bar the defense of sovereign immunity).

47. *See* 28 U.S.C. § 1605A (2008) (covering both acts of terrorism by a foreign state and providing material support for terrorism).

48. *See id.* (applying to Iran, Syria, and Sudan as of 2016).

the time of the claim.<sup>49</sup> If these elements are met, a court can exercise subject matter jurisdiction over the foreign state.<sup>50</sup>

In addition to providing a framework for what kind of suits can be brought against foreign states, the FSIA also provides broad immunities over the attachment of a foreign state's assets.<sup>51</sup> If a judgment is entered against a foreign state, courts must independently consider the extent to which a foreign state's property may be subject to attachment or execution.<sup>52</sup> This secondary analysis of immunity for the attachment of assets hints at the legislatures' awareness at the time of the FSIA's codification that seizing a foreign state's assets could seriously disrupt comity between states and should only occur under narrow circumstances.<sup>53</sup> Recent case law reflects a similar hesitation by courts to exercise jurisdiction, particularly where the Executive Branch has advised that doing so would harm U.S. interests.<sup>54</sup> In 2004 the Supreme Court indicated that the State Department's views concerning the exercise of jurisdiction over particular defendants might be entitled to deference.<sup>55</sup> The Court similarly ruled in a series of cases pertaining to sovereign immunity, suggesting that deference to the Executive Branch in cases that impact foreign policy still informs the Court's jurisprudence.<sup>56</sup>

## 2. *The Antiterrorism Act ("ATA")*

The ATA establishes a civil remedy for victims of international terrorism

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49. *See id.* (including in addition to U.S. nationals, members of the armed forces, government employees, and contractors).

50. *See id.* (assuming the claimant has standing).

51. *See* 28 U.S.C. at §§ 1610, 1611 (1976) (noting the FSIA provides narrower exceptions to immunity for the attachment and execution of assets than for sovereigns).

52. *See id.* (providing that a foreign state is entitled to a secondary analysis of whether its assets may be attached even when a state fails to appear).

53. *See* *Praven Banker Assocs. Ltd. v. Banco Popular del Peru*, 109 F.3d 850, 854-56 (2d Cir. 1997) (noting the narrower exceptions to immunity for the attachment of assets allows courts to exercise more discretion preserving diplomatic relations).

54. *See* *Republic of Austria v. Altmann*, 541 U.S. 677, 689, 701-02 (2004) (highlighting that while the FSIA's framework always applies, the executive's views merit great deference).

55. *See id.* at 696 (holding immunity reflects the current political realities and relationships and is a gesture of comity).

56. *See* *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003) (discussing the President's "vast share of responsibility for the conduct of our [U.S.] foreign relations"); *see also* *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004) (relying on the holding of *Altmann* as an indication that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy).

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and criminalizes harboring and providing material support for terrorists.<sup>57</sup> The ATA's focus on cutting off "material support" for terrorism suggests that it aims not only to compensate victims for their injuries but also to cut off vital sources of terrorist funding.<sup>58</sup> To that end, section 2333(a) provides treble damages to successful plaintiffs.<sup>59</sup>

Although the statute expressly empowers U.S. nationals to file a private cause of action, exactly who an individual may sue is ambiguous.<sup>60</sup> Rather than define the liable actor, section 2331(1) focuses on the nature of the act.<sup>61</sup> As a result, victims of terrorist attacks have attempted to hold banks, corporations, and countries liable for terrorist acts under the ATA.<sup>62</sup> Such cases have succeeded on some occasions, mostly where the defendant was a state sponsor of terrorism.<sup>63</sup> In practice, the Act's ambiguous language has also opened the door for plaintiffs to sue on a basis of secondary liability for acts of international terrorism.<sup>64</sup>

Whether the ATA allows for claims under secondary liability is a point of contention.<sup>65</sup> In *Rothstein v. USB AG*, the Second Circuit held that the ATA does not support civil aiding-and-abetting liability.<sup>66</sup> The Court reasoned that, because section 2333 does not speak to aiding-and-abetting liability, congressional intent to impose such liability should not be

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57. See 18 U.S.C. §§ 2331-2338 (1990) (providing civil remedies for American victims of international terrorism).

58. See, e.g., *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 690 (7th Cir. 2008); *Wultz v. Islamic Republic of Iran*, 755 F. Supp. 2d 1, 55-57 (D.D.C. 2010) (looking to the legislature describing the ATA as a "tool in the arsenal" against fighting terrorist states).

59. See 18 U.S.C. § 2333(a) (2012) (ensuring punitive damages are awarded by requiring treble damages and attorney's fees).

60. See *id.* (providing any U.S. national may sue but failing to describe who may be sued, thus leaving the action open ended).

61. See *id.* at § 2331(1) (defining "international terrorism" in the act's definition section and its elements but not the actor against whom a suit can be brought).

62. See Steve Vladeck, *The 9/11 Civil Litigation and the Justice Against Sponsors of Terrorism Act (JASTA)*, JUST SEC. (Apr. 18, 2016, 8:02 AM), <http://bit.ly/2goCAVB> [hereinafter Vladeck, *9/11 Litigation*] (outlining how litigants have capitalized on the lack of clarity in the ATA to hold banks liable that fund terrorism).

63. See *Wultz*, 864 F. Supp. 2d 24, 32-37 (D.D.C. 2012) (awarding damages to plaintiffs suing Iran).

64. See *Anti-Terrorism Act Liability for Financial Institutions*, SULLIVAN & CROMWELL LLP, 1 (Sept. 24, 2014), <http://bit.ly/2g4XJnd> (noting the surge in cases brought against banks in the last decade).

65. See *id.* at 4 (noting disagreement between the Second Circuit and other courts over secondary liability within the ATA).

66. 708 F.3d 82, 88 (2d Cir. 2013) (holding that the plaintiff's chain of inferences was too far attenuated to show proximate cause).

inferred.<sup>67</sup>

However, the Seventh Circuit interpreted a more expansive holding in *Boim v. Holy Land Foundation for Relief & Development*, characterizing aiding-and-abetting as “primary liability . . . [with] the character of secondary liability.”<sup>68</sup> Under this view, to be liable for terrorism an actor providing material support must know the money will be used in preparation for or in carrying out the tortious act on an American citizen abroad.<sup>69</sup> In other words, to establish liability, the plaintiff must prove intentional misconduct of a bank or other entity.<sup>70</sup> These decisions have made it difficult for plaintiffs to use the ATA as a means to hold Saudi Arabia civilly liable for the 9/11 attacks.<sup>71</sup>

### 3. Justice Against Sponsors of Terrorism Act

The Justice Against Sponsors of Terrorism Act (JASTA) was designed to change U.S. law pertaining to foreign sovereign immunity and make it easier for the 9/11 victims to sue the government of Saudi Arabia and foreign financial institutions suspected of providing material support to the 9/11 hijackers.<sup>72</sup> JASTA proposed to amend the FSIA and ATA so courts would not dismiss plaintiffs’ claims for lack of jurisdiction or failing to show primary liability.<sup>73</sup> Although much of what JASTA purported to do has been excised through subsequent revisions, the act does amend the ATA to allow aiding-and-abetting liability for acts of terrorism committed, planned, or organized by an organization designated as a foreign terrorist organization (FTO).<sup>74</sup> Additionally, it creates a cause of action against

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67. See *Anti-Terrorism Act Liability for Financial Institutions*, *supra* note 64 at 3 (discussing how the *Rothstein* holding will require proximate cause).

68. See Vladeck, *9/11 Litigation*, *supra* note 62 (summarizing the Court’s analysis in *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685 (7th Cir. 2008)).

69. See *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 693 (7th Cir. 2008) (holding that giving money to a terrorist organization is not intentional misconduct unless one either knows or is indifferent to this knowledge).

70. See *id.* (arguing that when the facts known of an organization show a high probability that it is engaging in terrorism, a person cannot plead ignorance to this risk).

71. See Vladeck, *9/11 Litigation*, *supra* note 62 (summarizing the legal history of 9/11 litigants’ attempts to hold Saudi Arabia liable for the attacks).

72. See *id.* (summarizing the legislative intent behind JASTA as a means to counter the existing sovereign immunity framework, particularly for 9/11 plaintiffs).

73. See Press Release, *supra* note 22 (advocating for JASTA to correct the “egregious” errors of the ATA and FSIA and create a cause of action that will allow families to “take their attackers” to court).

74. See 8 U.S.C. § 1189 (2012) (authorizing the Secretary of State to designate an organization as an FTO if the Secretary finds that it is a) foreign and b) engaged in

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foreign states for injury arising from an act of international terrorism, regardless of where the act occurred.<sup>75</sup> JASTA retains, however, immunity for claims falling under the FSIA for foreign sovereigns.<sup>76</sup>

In contrast to its legislative purpose, JASTA is relatively limited as a result of significant amendments to the bill that excised additional bars to immunity.<sup>77</sup> However, its existing provisions significantly undermine long-standing principles of sovereign immunity, which are integral to international law and comity between states.<sup>78</sup> Moreover, its passage indicates a disregard for these principles that has resonated internationally.<sup>79</sup>

### III. ANALYSIS

#### *A. JASTA is Imprudent Law Because It Cannot Meaningfully Alter Victims of Terrorism Chances for Reparation, Yet Opens the Door for Litigation that Undermines American Counter-Terrorism Policy.*

##### *1. JASTA Does Not Overturn Prior Judicial Decisions That Rejected Personal Jurisdiction Over Past Defendants in 9/11 Litigation Nor Significantly Changes Modes of Liability Under the ATA.*

JASTA's amendments to the ATA and the FSIA broadly change principles of sovereign immunity, which affects the law of nations while achieving little for the limited class of people the Act intends to serve.<sup>80</sup>

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terrorist activity as defined in § 1182(a)(3)(B)).

75. See JASTA, Pub. L. No. 114-222, § 4(b), 130 Stat. 852, 854 (2016) (amending the FSIA to include 28 U.S.C. § 1605B, or "JASTA claims").

76. See 18 U.S.C. § 2337(2) (1992) (barring suits against foreign states or agents acting under color of law).

77. See Steve Vladeck, *The Senate Killed JASTA, Then Passed It...*, JUST SEC. (May 18, 2016), <http://bit.ly/2f93jk8> [hereinafter Vladeck, *JASTA*] (arguing that redrafting JASTA largely denuded it of its legal effect).

78. See *Justice Against Sponsors of Terrorism Act: Hearing on S. 2040 Before the Subcomm. on the Constitution and Civil Justice of the H. Comm. on the Judiciary*, 114th Cong. 64 (2016) (statement of Paul B. Stephan, Professor of Law, University of Virginia Law School) [hereinafter Stephan Statement] (stating JASTA derogates from international law principles of sovereign immunity that are viewed as illegal internationally).

79. See *id.* (noting JASTA has caused furor even from U.S. allies).

80. See *id.* (arguing that while the version of JASTA passed in the House and Senate largely denudes the original bill, it still undermines international law).

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For many 9/11 plaintiffs, it has no legal effect at all.<sup>81</sup> As initially drafted, JASTA would have amended the ATA to expressly allow personal jurisdiction over any individual for acts of international terrorism in which a U.S. citizen “suffers injury in his or her person, property, or business.”<sup>82</sup> This would have lessened the burden for plaintiffs who were required to show a foreign state has sufficient minimum contacts for personal jurisdiction by proving the state aimed its tortious conduct at the United States.<sup>83</sup> However, as enacted, JASTA’s personal jurisdiction amendment is eliminated.<sup>84</sup>

Excising *per se* jurisdiction is crucially significant for those JASTA purports to serve because U.S. courts have already dismissed several suits against Saudi officials for lack of personal jurisdiction.<sup>85</sup> By maintaining the ATA’s silence over personal jurisdiction, litigants have no new means to reopen lawsuits that were dismissed for failing to prove sufficient contacts between foreign defendants and the plaintiff.<sup>86</sup> For many litigants, this frustrates JASTA’s aim of amending “bad decisions” and offering redress for “improper” court decisions that dismissed 9/11 litigation for lack of jurisdiction.<sup>87</sup>

Two other proposed amendments to the ATA similarly fall short of JASTA’s legally improper aims of changing existing law.<sup>88</sup> First, as initially proposed, JASTA sought to amend the ATA by repealing the prohibition on suits against a foreign state, agency, or official acting under

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81. *See id.* (noting that without the personal jurisdiction provision, JASTA will not overrule prior judicial decisions that dismissed 9/11 victim’s civil suits).

82. *Compare* H.R. 3143, 113th Cong. (2013) (giving personal jurisdiction in U.S. courts for any claims in accordance with § 2333), *with* JASTA Pub. L. No. 114-222 (excising *de facto* jurisdiction from the Act thereby preserving prior judicial decisions that blocked jurisdiction).

83. *See Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (holding that a defendant must have sufficient minimum contacts with a place to establish personal jurisdiction).

84. *See* JASTA, Pub. L. No. 114-222, § 4(a), 130 Stat. 852, 854 (2016) (preserving the court’s analysis under the ATA of whether personal jurisdiction exists).

85. *See, e.g., In re Terrorist Attacks on September 11, 2001*, 392 F. Supp. 2d 539, 575-76 (S.D.N.Y. 2005) (granting defendant’s Prince Naif’s motion to dismiss, and noting the issue of personal jurisdiction was “relatively straightforward”).

86. *See* JASTA § 4(a) (creating no new basis for 9/11 litigants to challenge previous rulings).

87. *See id.* § 2 (stating JASTA would rectify the Second Circuit “improperly blocked” terrorism-related claims by requiring an unfair strict proximate causation test).

88. *See id.* § 4(a) (excluding the language from sections five and six of H.R. 3143, 113th Cong. (2013)).

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color of legal authority.<sup>89</sup> Second, it would have amended the ATA to allow aiding-and-abetting liability in cases arising from an act of terrorism “committed, planned, or authorized” by a state designated as a Foreign Terrorist Organization (FTO).<sup>90</sup> Because the ATA does not explicitly specify against whom liability may be pursued, this amendment would have clarified allowable modes of liability against sovereigns.<sup>91</sup> Further, the proposed change to the ATA would have overruled the Second Circuit’s ruling limiting ATA claims where defendants are not directly responsible for the underlying act of terrorism.<sup>92</sup>

As proposed, JASTA retains 18 U.S.C. § 2337(2), which prohibits ATA claims against “a foreign state,” such as Saudi Arabia.<sup>93</sup> Further, under section 4(a), JASTA makes it more difficult to hold foreign sovereigns liable under an aiding-and-abetting theory by limiting its application in a manner that excludes liable sovereigns.<sup>94</sup> Section 4(a) extends liability for “any injury arising from an act of international terrorism, committed, planned, or authorized by” an FTO to any *person* who knowingly aids and abets—provides substantial assistance.<sup>95</sup> A definition section follows this, stipulating that courts interpret “person” using the definition in U.S.C. Title 1 § 1, which does not include sovereigns.<sup>96</sup> Operationally, this excludes Saudi Arabia and other foreign states from aiding-or-abetting liability in most cases.<sup>97</sup>

However, JASTA would strip immunity for sovereigns for acts that fall within section 1605B, which creates “JASTA claims” (i.e. claims against a foreign state for physical injury or death caused by a terrorist act) regardless of where the tortious act occurred.<sup>98</sup> Nonetheless, JASTA

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89. See H.R. 3143, 113th Cong. § 6 (2013) (proposing to remove § 2337 of the ATA that bars suits against foreign sovereigns).

90. See *id.* § 4 (proposing to amend § 2333 of the ATA).

91. See JASTA § 4(a) (allowing for secondary liability in some instances).

92. See *Rothstein v. USB AG*, 708 F.3d 82, 88, 97-98 (2d Cir. 2013) (creating binding authority on all cases in the Second Circuit that bars ATA cases pursuing secondary liability).

93. See 18 U.S.C. § 2337(2) (1992) (barring suits against foreign heads of state and government officials acting under color of law).

94. See JASTA § 4(a) (diminishing JASTA’s usefulness to 9/11 litigants).

95. See *id.* (implying that the definitional inclusion effectively closes the door on a broader interpretation of “persons” that could have included foreign sovereigns).

96. See 1 U.S.C. § 1 (2012) (defining “person” to include corporations, companies, associations, firms, partnerships, societies, joint stock companies, and individuals).

97. See JASTA Pub. L. No. 114-222 § 4(a) (hinting that legislators may have been uneasy with allowing a private cause of action of secondary liability against head of state).

98. See JASTA Pub. L. No. 114-222 § 4(a) (2016) (allowing sovereigns to be sued

maintains a cause of action against a foreign state pursuant to the ATA's general bar on suits against foreign sovereigns.<sup>99</sup> The potential for claims under § 1605B is thus inhibited by the restrictive drafting of § 4, limiting aiding-and-abetting liability to private litigants.<sup>100</sup> In practice, claims pursued under JASTA against foreign sovereigns will require a showing of primary liability, a high bar for holding foreign sovereigns liable and an ongoing hurdle for 9/11 litigants.<sup>101</sup>

*2. Section Five Allows for Post Facto Executive Intervention to Stay JASTA Litigation, However, It Cannot Prevent Private Litigants From Initiating Suits*

Because JASTA is more of a political message than a coherent piece of legislation, the Act undermines itself by including a "Stay of Actions" that allows for executive intervention.<sup>102</sup> Specifically, under section 5, courts may grant a 180-day stay if the Secretary of State certifies that the United States is engaged in "good faith" discussions to resolve litigant's claim against the foreign state.<sup>103</sup> Although the initial stay request is discretionary, courts must grant 180-day extension(s) upon re-certification by the State Department, potentially in perpetuity.<sup>104</sup>

The Act gives no explicit parameters for what a court should consider when deciding whether or not to grant an initial stay.<sup>105</sup> However, JASTA's drafting implies that it is predicated on two actions that are both within the control of the executive: 1) the Attorney General must intervene to stay the action in whole or in part; and 2) the Secretary of State must certify that the U.S. is engaged in good faith discussions with the foreign state defendant.<sup>106</sup> Section 5 is silent as to what outcomes a "good faith

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on a theory of primary liability).

99. *See id.* (maintaining the ATA's general bar on suits against foreign sovereigns unless the claim can be characterized as a "JASTA" claim).

100. *See id.* (highlighting the Act's limitations).

101. *See id.* (indicating that § 4 particularly hinders 9/11 litigants of 9/11 who have based their case on an argument of indirect material support for the 9/11 hijackers).

102. *See id.* § 5(b) (providing for intervention by the Attorney General for staying the action, in whole or in part).

103. *See id.* § 5(c)(1)-(2) (indicating a safety valve for the executive to weigh in on foreign policy matters).

104. *See id.* § 5(c)(2)(B)(ii); *see also* Vladeck, *JASTA*, *supra* 77 (begging the question of whether a decision to block a stay from the executive might be deemed an abuse of discretion by the judiciary on issues of foreign policy, given the statutory protection of maintaining the stay).

105. *See* JASTA, Pub. L. No. 114-222 (2016) (providing no definitional section).

106. *See id.* § 5(b)-(c) (creating "an out" to the judiciary from deciding delicate foreign policy issues); *see also* Vladeck, *9/11 Litigation*, *supra* note 62 (noting that

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discussion” may lead to.<sup>107</sup> However, a sole executive agreement that terminates litigation is not unlikely, particularly as the President and the foreign state are presumably the only parties to such a discussion.<sup>108</sup> Thus, in practice, section 5 could partially redress executive control over sensitive foreign policy issues in the form of executive claim settlements, albeit only after a JASTA claim brings a foreign state to court.<sup>109</sup>

The President’s executive claim settlement power is like section 5’s “good faith discussions” in that both are characterized by a privately settled outcome between the President and a foreign state.<sup>110</sup> Interpreting section 5 as analogous to the President’s executive claims settlement power is also supported by judicial precedent and executive practice.<sup>111</sup> The Supreme Court has upheld executive claim settlement agreements in several cases, most famously in *Dames & Moore v. Regan* arising from the President’s use of this power during the Iranian hostage crises in 1979.<sup>112</sup> In *Dames & Moore*, the Court held that the President was permitted to use his claims settlement power to negotiate with Iran for the return of fifty-two American hostages in exchange for a stay of all claims in U.S. courts seeking to attach Iranian property.<sup>113</sup> This holding emphasizes the President’s suitability to balance private claims that implicate sensitive foreign policy issues with the interests of other nationals and the state.<sup>114</sup>

Furthermore, there is analogous precedent for giving the President

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case law in the federal circuit, such as the *Terrorist Litigation Cases*, shows that judges have thus far looked for any way possible to avoid reaching the merits of 9/11 suits).

107. See JASTA Pub. L. No. 114-222 at § 5(c) (leaving interpretation of a good faith discussion relatively unconstrained).

108. See Ingrid Wuerth, *Justice Against Sponsors of Terrorism Act: Initial Analysis*, LAWFARE (Sept. 29, 2016), <http://bit.ly/2fd2QAB> (noting that § 5 functionally codifies the principle of comity statutorily providing for the judicial power to stay rather than allowing it as a matter of federal common law).

109. See Veto Message, *supra* note 25 (arguing JASTA reduces the effectiveness of foreign policy by taking sensitive foreign policy matters away from the executive and national security professionals and placing them in the hands of private litigants and courts).

110. See Wuerth, *supra* note 108 (suggesting § 5 is an implicit endorsement of the President’s claim settlement power by its very nature).

111. See *e.g.*, *Dames and Moore v. Regan* 453 U.S. 654, 686-91 (1981) (allowing for an intrusion by the executive into federal court litigation during fragile negotiations with Iran regarding the return of hostages).

112. See *id.*

113. See *id.* at 683-89 (positing that claims settlement and foreign sovereign immunity doctrines are complementary and have supported executive actions).

114. See *id.* at 661-62 (arguing that good policy requires the claim of the individual to yield to the overriding demands of the group on some occasions).

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authority to preserve immunity for foreign states in delicate foreign affairs through executive intervention.<sup>115</sup> Within the 2008 National Defense Authorization Act (NDAA), amendments to the FSIA were drafted that listed Iraq as a sponsor of terror.<sup>116</sup> The legislation could have been utilized against Iraq for acts of terrorism during the Saddam Hussein regime.<sup>117</sup> The amendment would have exposed Iraq by creating a federal cause of action with a possibility of punitive damages to support claims that previously would have been foreclosed through sovereign immunity.<sup>118</sup> Over White House and Iraqi objections, Congress passed NDAA with the FSIA amendments, leading President Bush to veto the legislation.<sup>119</sup> After consultation with the executive branch, Congress re-passed NDAA but included a Presidential option to waive the provision with respect to Iraq.<sup>120</sup> In doing so, Congress implicitly recognized that policies that implicate national security and foreign relations rightly trigger the executive's powers to intervene.<sup>121</sup>

As section 5 does not explicitly preclude a "good faith discussion" leading to an executive settlement agreement, the executive could rely on precedent, such as *Dames & Moore* and Bush's veto of NDAA, on the basis that JASTA similarly imperils larger national interests.<sup>122</sup> For example, where *Dames & Moore* provided for the executive to stay the attachment of Iranian assets on unrelated private claims suits, a similar rationale should be employed to indefinitely stay 9/11 litigants' claims

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115. See H.R. 1585 110th Cong. § 1083 (2007) (reiterating the continued respect courts have shown for the executive's powers to settle sensitive diplomatic issues).

116. See *id.* (undermining foreign policy and commercial interests of the United States in Iraq by creating a cause of action against it).

117. See Press Release, Memorandum of Disapproval, President George W. Bush (Dec. 28, 2007), <http://bit.ly/2gsejPk> [hereinafter Memorandum] (citing concerns that the Development Fund for Iraq (DFI), the Central Bank of Iraq (CBI), and commercial entities in the United States in which Iraq has an interest would be threatened).

118. See *id.* (highlighting § 1083 includes provisions that "for the first time in history" would have exposed a foreign sovereign to punitive damages contrary to international legal norms and for the first time in U.S. history).

119. See *id.* (revealing a similar executive interest to the Obama Administration's interest in blocking legislation that disrupts relations between states and principles of sovereign immunity).

120. See *id.* (requiring the President to determine that: (A) the waiver is in the national security interest of the United States; (B) will promote relations between the U.S. and Iraq; and (C) Iraq continues to be a reliable ally of the U.S.).

121. See *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 320 (1936) (recognizing a difference in the role of government in foreign affairs and domestic affairs).

122. See JASTA Pub. L. No. 114-222 § 5 (leaving interpretation of "good faith" discussion open ended).

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against Saudi Arabia so as not to endanger the operative framework of sovereign immunity.<sup>123</sup>

Further, the waiver option provided to Bush is analogous to how section 5 will function in practice, allowing the executive to intervene when sensitive foreign policy issues are at stake.<sup>124</sup> Since Congressional intent for executive intervention was inferred in *Dames & Moore* and authorized explicitly under remarkably similar circumstances in Bush's waiver provision, precedent and practice supports an interpretation of section 5 leading to executive claim settlement.<sup>125</sup>

Finally, allowing for executive claims settlement through section 5 of JASTA would not disrupt the framework of diplomatic protections afforded under the FSIA.<sup>126</sup> While the FSIA was enacted to codify immunities so that their application could be made dependably, it makes no reference to claims settlement agreements, subjecting its parameters only to existing international agreements, rather than future agreements.<sup>127</sup> This construction supports a reading of section 5 that indicates executive claims settlement is not barred.<sup>128</sup> Rather, section 5 implicitly invites an executive remedy that is independent from the congressionally and judicially fashioned remedies under JASTA.<sup>129</sup>

Section 5 places the executive in the position of mitigating damage to its diplomatic relationships *post facto* rather than preemptively interceding cases that could have serious foreign policy implications.<sup>130</sup> It is improper

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123. See *Dames & Moore v. Regan*, 453 U.S. 654, 684-85 (1981), (enshrining the historical right of the executive to settle the claims of its nationals against foreign governments for the purpose of keeping peace with those governments).

124. See JASTA § 5(c) (providing for executive intervention and stay of litigation that is functionally analogous to Presidential intervention in the form of claims settlement).

125. See *Dames & Moore*, 453 U.S. at 654; see also Memorandum, *supra* note 117 (registering successfully the executive's concerns over how NADAA would disrupt relations with not only Iraq, but also the international community, and a grant for executive waiver).

126. See 28 U.S.C. § 1604 (1992) (clarifying that the FSIA is subject to international agreements).

127. See *id.* (subjecting the FSIA framework to "existing international agreements" to which the United States is a party at the time of enactment).

128. See JASTA Pub. L. No. 114-222 § 4(a), 130 Stat. 852, 854 (2016) (recalling that JASTA amends the FSIA and should thus now be considered part of its framework).

129. See Wuerth, *supra* note 108 (tracing the likelihood of "discussions" leading to an agreement that could easily call for the termination of litigation).

130. See *id.* (begging the question of how "good faith" discussions would happen in practice when diplomatic norms have been violated).

that, under JASTA, it is sufficient to plead terrorism to haul a sovereign state into court, whatever the merits or foreign policy ramifications.<sup>131</sup> However, while section 5 offers a degree of executive intervention, it does not prevent a foreign state being brought to a U.S. court at the behest of a private litigant.<sup>132</sup>

*3. Recovery Under JASTA Is Remote Because the FSIA Affords Broader Immunity to Foreign-State-Owned Assets and the Executive Rightfully Has Waiver Powers.*

Tension between the theories of absolute and restrictive immunity is at its highest within the FSIA's treatment of foreign assets.<sup>133</sup> Special protection for foreign assets held within the United States was codified within the FSIA because "the international community viewed execution against a foreign state's property as a greater affront to its sovereignty than merely permitting jurisdiction over the merits of an action."<sup>134</sup> At the time of the FSIA's enactment, Congress accepted the restrictive theory of sovereign immunity as an accepted practice of international law.<sup>135</sup> However, the enforcement of judgments against foreign states remained a controversial subject that courts, as well as policymakers, were hesitant to allow without due consideration.<sup>136</sup> This concern is reflected in the additional analysis required under the FSIA for immunity from pre-judgment attachment of assets and post-judgment execution.<sup>137</sup>

Under the FSIA, the property of a foreign state in the United States is presumptively immune so even if jurisdiction is established over a foreign state, a resulting judgment is not necessarily enforceable.<sup>138</sup> This reflects

131. See Veto Message, *supra* note 25 (noting JASTA permits litigation against states that have neither been designated by the executive branch as state sponsors of terrorism, nor taken direct action against the United States).

132. See JASTA § 5(b) (emphasizing intervention happens after a foreign state is made subject to the jurisdiction of a court of the United States).

133. See 28 U.S.C. §§ 1609-11 (1976) (providing narrower exceptions to immunity for attachments and execution than for jurisdiction).

134. See *Walters v. Indus. & Commer. Bank of China, Ltd.*, 651 F.3d 280, 289 (2d Cir. 2011) (quoting *Conn. Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 255-56 (5th Cir. 2002) (noting that judicial seizure of a foreign state's property may be regarded as an affront to its dignity and may affect U.S. relations with it)).

135. See 28 U.S.C. §§ 1602-1611 (1976) (providing that acts of state should be distinguished from commercial acts).

136. See *Walters*, 651 F.3d 280 at 289 (tracing the reasoning of the FSIA's broader protections to sovereign property than sovereigns themselves).

137. See 28 U.S.C. §§ 1609-11 (observing that the asymmetry between jurisdiction and execution immunity in the FSIA reflects a deliberate congressional choice).

138. See *id.* (setting forth the limited exceptions to the attachment of assets that are

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the statutory presumption in favor of immunity from attachment and execution.<sup>139</sup>

Under section 1609 of the FSIA, even when a court enters a valid judgment, the property of a foreign state is subject only to attachment and execution as specifically provided in sections 1610 and 1611.<sup>140</sup> Certain types of property such as embassies, consulates, and their bank accounts, are generally protected under the Vienna Conventions on Diplomatic Relations and Consular Relations.<sup>141</sup> Further, under section 1610(c), the FSIA prevents attachment or execution against foreign states until the court determines a reasonable period of time has elapsed following an entry of judgment against a foreign state.<sup>142</sup> This affords a foreign state time to react to the judgment and for the courts to exercise discretion in how a judgment will be collected or waived at the behest of the executive.<sup>143</sup>

In sum, the execution of judgments under the FSIA is in practice more aligned with absolute immunity.<sup>144</sup> This has not gone unnoticed by the Court, which observed that “the asymmetry between jurisdiction and execution” of attaching assets under the FSIA reflects a “deliberate congressional choice” to create a “right without a remedy” in circumstances where there is jurisdiction over a foreign state but its property is immune.<sup>145</sup>

However, in the last twenty years Congress has pushed back on the FSIA’s presumption of immunity for sovereign assets on several occasions reflecting less favor for soft power diplomacy tactics of the 20th-century.<sup>146</sup>

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narrower for assets than for sovereigns themselves).

139. See *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1125 (9th Cir. 2010) (shifting the burden to plaintiffs to establish an exception to immunity).

140. See 28 U.S.C. §§ 1610-11 (stating that the property of a foreign state is never automatically subject to attachment or execution based on the underlying judgment).

141. See Vienna Convention on Diplomatic Relations, Art. 22, Apr. 18, 1961, 500 U.N.T.S. 95 (providing that the property of the mission be immune from search, requisition, attachment, or execution).

142. See 28 U.S.C. § 1610(c) (starting the “reasonable period of time” after notice has been given to the foreign state).

143. See, e.g., *Pravin Banker Assocs. Ltd. v. Banco Popular del Peru*, 109 F.3d 850, 853 (2d Cir. 1997) (granting two stays before granting summary judgment).

144. See *Schooner Exch. v. McFaddon*, 11 U.S. 116, 136 (1812) (defining the notion of sovereign immunity as consonant with the usages and accepted obligations of the civilized world).

145. See *Walters v. Indus. & Commer. Bank of China Ltd.*, 651 F.3d 280, 289 (2d Cir. 2011) (holding the “right without a remedy” is a reflection of Congress’s view of sovereignty expressed in the United Nations Charter that left the availability of execution up to the debtor state).

146. See, e.g., 28 U.S.C. § 1610(f)(3) (2003) (attempting to remove immunities

These efforts have been repeatedly curtailed by the executive, tasked with protecting the interests of the United States, and maintaining national security, which hinges on harmonious relations with foreign states.<sup>147</sup> Legislation like the Terrorism Risk Insurance Act of 2002 (TRIA) reflects Congress's efforts to scale back the protections afforded to foreign assets under the FSIA.<sup>148</sup> TRIA creates a cause of action that uses assets from a foreign state to satisfy a successful judgment against it for damages arising from an act of terrorism.<sup>149</sup> It also statutorily prohibits the President from categorically barring foreign assets for attachment through Presidential waiver, and requires him to make an "asset-by-asset" determination.<sup>150</sup> Like the ATA, the TRIA is designed in part to provide economic deterrence to foreign states that sponsor terrorist attacks.<sup>151</sup> It does this by using foreign assets to cover the costs of insurance the act provides.<sup>152</sup> The deterrence effect is questionable, as only certain assets are immune from waiver.<sup>153</sup> Moreover, most foreign states' assets are covered by the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations, allowing the President to block attachment if foreign policy goals so dictate.<sup>154</sup>

Whether assets can be attached or not creates an imbalance issue with the TRIA and the FSIA in general; some plaintiffs will be able to collect while similarly situated plaintiffs will not.<sup>155</sup> Further, attempts by Congress

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afforded to foreign state assets).

147. See Memorandum, *supra* note 117 (reflecting the Bush Administration's concerns about penalizing Iraq financially as the state was being rebuilt and relations were normalizing with the United States).

148. See Terrorism Risk Insurance Act (TRIA), Pub. L. 107-297, 116 Stat. 2322 (2002) (providing for the attachment of assets in order to satisfy judgments to the extent of damages a terrorist party has been adjudged liable).

149. See *id.* § 201(a) (providing a means for litigants to seek damages from a foreign state notwithstanding the immunities afforded to the attachment of assets under FSIA).

150. See *id.* § 201(b) (preserving a waiver for national security reasons, but making it harder for the president to utilize the waiver).

151. See 18 U.S.C. § 2333(a) (1992) (providing civil remedies in treble as well as attorney's fees to successful plaintiffs).

152. See TRIA § 107 (attempting to satisfy judgments for tortious claims arising out of terrorism by the liable state's assets).

153. See *id.* at § 201(b)(1) (allowing the President to waive the required attachment of assets against any property subject to the Vienna Convention on Diplomatic or Consular Relations).

154. See *id.* (recalling that the Vienna Convention is a pre-existing treaty obligation, breach of which would most certainly be seen as a violation of international law).

155. See Jeewon Kim, *Making State Sponsors of Terrorism Pay: A Separation of Powers Discourse Under the Foreign Sovereign Immunities Act*, 22 BERKELEY J. INT'L

to chip away at the FSIA's protection of foreign assets does not consider that foreign assets held in the U.S. are finite.<sup>156</sup> At the time of TRIA's passage, Iran, the most commonly sued state, had only had \$251.9 million in frozen assets, which is an insufficient amount to cover compensatory damages for existing judgments.<sup>157</sup>

Foreign states are not ignorant of how the United States proposes to satisfy judgments.<sup>158</sup> For instance, Saudi Arabia has made statements that it would remove its assets if Congress passed JASTA.<sup>159</sup> Therefore, when plaintiffs succeed in securing judgments, it is probable that not all will receive payment.<sup>160</sup> This creates inequities in how similarly situated nationals with similar claims are compensated because funds will eventually run out.<sup>161</sup>

Increasing the number of litigants dependent on finite attachable foreign assets to satisfy their judgment also undermines the basic tenant of remedy.<sup>162</sup> Plaintiffs initiate litigation in the hope that a court will find in their favor and will award them damages or reparations.<sup>163</sup> However, the

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L. 513, 523 (2004) (positing that the FSIA and amendments like TRIA are flawed because they frustrate victims and pits the executive against plaintiffs).

156. See *id.* at 524 (noting if plaintiffs are successful, the blocked assets of foreign states will eventually run out).

157. See *In re Islamic Republic of Iran Terrorism Litig.*, 659 F. Supp. 2d 31, 37 (D.D.C. 2009) (noting the amount of Iranian assets within the United States is approximately \$45 million, while outstanding judgments against Iran stand at \$10 billion dollars).

158. See *Gates v. Syrian Arab Republic*, 580 F. Supp. 2d 53, 75 (D.C. Cir. 2008) (noting that Syria feared that successful plaintiffs who had won judgments in federal court would seek to attach ancient artifacts belonging to Syria on loan to the Metropolitan Museum of Art).

159. See Mark Mazzetti, *Saudi Arabia Warns of Economic Fallout if Congress Passes 9/11 Bill*, N.Y. TIMES (Apr. 15 2016), <http://www.nytimes.com/2016/04/16/world/middleeast/saudi-arabia-warns-ofeconomic-fallout-if-congress-passes-9-11-bill.html> (reporting Saudi Arabia warned the Obama Administration it will sell off billions of dollars-worth of American assets held by the kingdom).

160. See *In re Islamic Republic of Iran Terrorism Litig.*, 659 F. Supp. 2d at 58 (holding that expanding exceptions to immunity means that liability in the form of billions of dollars will quickly become insurmountable for defendant states).

161. See Kim, *supra* note 155, at 524 (noting that the Deputy Secretary of the Department of the Treasury testified that the TRIA creates "gross inequities" for plaintiffs).

162. See *Rubin v. Islamic Republic of Iran*, 637 F.3d 783, 785 (7th Cir. 2001) (noting early on that the FSIA complicates our legal system by allowing plaintiffs to seek remedies that are necessarily barred for important foreign policy reasons).

163. See FED. R. CIV. P. 11 (requiring that factual contentions by the plaintiff have evidentiary support and are based on a reasonable belief, generally barring suits that

prospects for recovery in FSIA cases are extremely remote and unequally granted when assets can be attached.<sup>164</sup> JASTA ignores this reality and grows the pool of litigants trying to track down attachable assets by making it easier to bring suit under the FSIA.<sup>165</sup> As JASTA does not recognize any of these hurdles, the legislation will not achieve its stated purpose of benefitting victims of terrorism.<sup>166</sup> Further, it will exacerbate long-recognized policy problems of allowing litigants to seek reparations from foreign states at all.<sup>167</sup>

*B. JASTA Dangerously Disrupts the Principle of Sovereign Immunity and The Separation of Power Doctrine by Limiting the Executive's Control Over Foreign Policy.*

JASTA problematically disrupts the separation of powers.<sup>168</sup> Fighting terrorism and the exercise of diplomatic relations are traditionally within the purview of the executive branch, although Congress plays a supportive role.<sup>169</sup> However, rather than wait for the executive and Congress to determine which states merit listing as state sponsors of terrorism, JASTA allows private litigants to leapfrog the political branches by alleging a foreign state is responsible for a terrorist act.<sup>170</sup> This opens the door for litigants, whose interests do not necessarily match those of our nation as a whole, to bring foreign states into court.<sup>171</sup> Once a suit is initiated, the

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lack basis).

164. See Kim, *supra* note 155, at 524 (noting the FSIA mostly frustrates victims and adding further exceptions to immunities only exacerbates the problem).

165. See JASTA Pub. L. No. 114-222 § 2(b) (seeking to give civil litigants “the broadest possible basis” to seek relief against foreign states).

166. See Stephan Statement, *supra* note 78, at 67 (noting JASTA does not deal with the broader immunities pertaining to the attachment of assets).

167. See *id.* at 67-68 (arguing litigation under the FSIA is not sustainable).

168. See *In re Islamic Republic of Iran Terrorism Litig.*, 659 F. Supp. 2d 31, 37 (D.D.C. 2009) (holding civil actions against foreign states confront “fundamental understandings” of foreign state sovereignty and conflict with the exercise of presidential power in the realm of foreign affairs).

169. See U.S. CONST. art. II, § 2. (making the President “Commander in Chief” and delegating the President power to “make Treaties,” to “appoint Ambassadors, and to “receive Ambassadors and other public ministers”).

170. See Veto Message, *supra* note 25 (critiquing how JASTA permit litigation against countries that have neither been designated by the executive branch as state sponsors of terrorism nor taken direct actions in the United States).

171. Compare FSIA § 1605A(a)(1) (2008) (barring immunity for claims against states designated as FTOs by the State Department for specified acts of terrorism), with JASTA § 3(a) (2016) (allowing for claims “regardless of where the tortious act of the foreign state occurred” and regardless of their FTO status).

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executive loses control over the process and leaves these careful determinations in the hands of private citizens and district courts.<sup>172</sup> Removing these determinations from the executive does not advance the cause of identifying state sponsors of terrorism, and it further interferes with the executive's foreign policy efforts.<sup>173</sup>

The executive has an interest in keeping foreign states out of courts for a number of reasons.<sup>174</sup> Despite the fact that judges must hear evidence before entering judgment, the implied unfairness of these proceedings is questionable, particularly as foreign defendants rarely appear to defend themselves.<sup>175</sup> Although the jurisprudence of the courts has thus far limited modes of liability in keeping with the FSIA's presumption of immunity, courts run the risk of undermining their impartiality to satisfy the public's demand for justice to victims of terrorism.<sup>176</sup>

Keeping foreign states out of court is also in the interest of the executive because liquidating the assets of foreign states disrupts diplomatic relations and lessens political leverage.<sup>177</sup> Preventing such disruption and instability has been a concern of the executive branch, particularly with "rogue states."<sup>178</sup> As President Clinton explained when he utilized his presidential waiver to bar attachment of Iranian assets, the executive's control over foreign assets is a necessary component of a flexible and responsive foreign policy.<sup>179</sup> Further, when a foreign state is unable to pay billions it owes due

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172. See Stephan Statement, *supra* note 78, at 63 (testifying JASTA strips the executive branch of the authority given to it by Congress to identify threats to the U.S.).

173. See *id.* (stating this shift of power gravely compromises U.S. security interests).

174. See generally Part B (interpreting JASTA's impact on the separation of powers as a detriment of national security).

175. *But see* Rein v. Socialist People's Libyan Arab Jamahiriya, 162 F.3d 748, 754 (2d Cir. 1998); Daliberti v. Republic of Iraq, 97 F. Supp. 2d 38, 43 (D.D.C. 2000) (entering judgments against Libya and Iraq in rare exception to the usual default judgment).

176. See Kim, *supra* note 155, at 526 (arguing that the nature of terrorism suits runs the risk of politicizing Judges against "pariah states").

177. See Walters v. Indus. & Commerce Bank of China, Ltd., 651 F.3d 280, 289 (2d Cir. 2011) (highlighting the view that great seizure of a state's property may undermine relations).

178. See Kim, *supra* note 155 at 526 (writing the Clinton Administration "strenuously" objected to TRIA's aim of letting plaintiff's attach foreign assets to satisfy judgments).

179. See *id.* at 527 (noting Congress recognized the importance of leveraging frozen assets when it created the International Emergency Economic Powers Act, 50 U.S.C. § 1701-06 (2003) and Trading with the Enemy Act, 50 U.S.C. App. §§ 1-6, 7-39, 41-44 (2003), and noting that Carter's ability to freeze \$12 billion of Iranian assets during the

to terrorism suits, this prevents relations from thawing, whether or not this is in the interest of the state.<sup>180</sup> JASTA undermines and exacerbates these concerns by making it easier for litigants to bring foreign states to court seeking individual “justice.”<sup>181</sup>

The passage of JASTA illustrates a Congressional shift away from the executive branch’s long-recognized powers in the sphere of foreign affairs.<sup>182</sup> When compared to the interplay between the two branches in *Republic of Iraq v. Beaty*, arising from the Bush Administration’s pushback against the NDAA, JASTA reveals a significant step into the domain of the executive.<sup>183</sup> In *Beaty*, the Court was asked to resolve conflict between congressional intent to create victim-friendly legislation and executive obligations to a foreign state.<sup>184</sup> Congress’s initial attempt to amend the FSIA’s terrorism exception directly conflicted with President Bush’s foreign policy goals in Iraq.<sup>185</sup> The proposed amendment would have applied to current and past designated state sponsors of terrorism, potentially opening Iraq to suit, although it had been delisted.<sup>186</sup> When Congress failed to include a presidential waiver provision, which would allow President Bush to waive the bill’s applicability to Iraq, he vetoed the bill.<sup>187</sup> Ultimately, the bill was redrafted to include a provision satisfying

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Iranian hostage crises hinged on his ability to leverage these assets).

180. See *id.* at 526-27 (arguing that this is the central policy concern of the executive because it reduced the likelihood of using diplomatic channels in the future to resolve disputes).

181. See JASTA Pub. L. No. 114-222 § 2(a)(1), (7) (positing that the Act reflects the U.S.’s “vital interest” in providing individuals “full access” to the court system, in contrast to the executive’s concerns articulated in the Presidential Veto).

182. See Stephan Statement, *supra* note 78, at 63 (testifying that JASTA strips the executive branch of its proper authority to address terrorism, which is mostly effected by external relations).

183. See Memorandum, *supra* note 117 (vetoing the NDAA on the basis that it disrupts relations between states and principles of sovereign immunity). See generally *Republic of Iraq v. Beaty*, 556 U.S. 848, 851 (2009).

184. See generally *Republic of Iraq*, 556 U.S. at 851 (providing President Bush to exercise his authority to the fullest extent to declare Iraq “inapplicable” to the FSIA § 620A so that it could be rebuilt).

185. See Memorandum, *supra* note 117 (stating to subject Iraq to litigation in U.S. courts or hold it liable for terrorist acts would undermine improving relations and stabilization of the region).

186. See *Republic of Iraq*, 556 U.S. at 863 (noting that to prevent the President from using his waiver authority would imperil billions of dollars of Iraqi assets).

187. See *id.* at 854 (citing Bush’s Memorandum to the House of Representatives Returning Without Approval the NDAA, unless the law recognized all provisions “with respect to Iraq”).

President Bush's demands.<sup>188</sup>

Although the Supreme Court conceded that it could not say with certainty whether President Bush was correct in his view that exposing Iraq to damages would jeopardize the reconstruction of the state, it noted courts should be “wary of overriding apparent statutory text supported by executive interpretation in favor of speculation about a law’s true purpose” that falls within the “complicated” and “delicate” realm of foreign affairs.<sup>189</sup> This determination emphasizes the judiciary and congressional acquiescence to granting the President the power to suspend the operation of a valid law in the sphere of foreign affairs.<sup>190</sup> The Court found “the granting of Presidential waiver authority . . . particularly apt with respect to congressional elimination of foreign sovereign immunity, since the granting or denial of that immunity was historically the case-by-case prerogative of the Executive Branch.”<sup>191</sup> Although this left some victims unable to proceed with suit against Iraq, larger policy interests articulated by the executive to stabilize Iraq were favored.<sup>192</sup>

The Court’s holding in *Beatty* emphasizes the practical and functional rationales for affording the executive branch greater leeway in the maintenance of diplomatic relations for the benefit of national security.<sup>193</sup> Scholars have argued that, in the realm of foreign affairs, the executive possesses extraconstitutional powers against the backdrop of national security considerations.<sup>194</sup> The executive is directly afforded power through Article II section 2 of the Constitution to “make Treaties,” “appoint Ambassadors,” and to “receive Ambassadors and other public

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188. See Memorandum, *supra* note 117 (conditioning his acceptance of the NDAA on inclusion of the waiver).

189. See *Republic of Iraq*, 556 U.S. at 860 (noting that the executive’s powers to implement sovereign immunities is based on political realities and relationships).

190. See *id.* at 856 (noting that while “to a layperson” the notion of the President’s suspension of valid law “may seem strange,” the practice is “well-established, at least in the sphere of foreign affairs”).

191. See *id.* at 857 (citing to *Ex parte Peru*, 318 U.S. 578, 586-590 (1943)).

192. See *id.* at 863 (holding it would be “perplexing” to convert Iraq’s billion-dollar reconstruction project “into a compensation scheme” for a limited group of victims).

193. See *id.* at 858 (noting that the Court canvassed precedents from as early as the “inception of the national government” in support of the executive’s powers to suspend operation of law in the sphere of foreign affairs).

194. See *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 318-19 (1935) (asserting in Justice Sutherland’s dicta that the “powers of external sovereignty did not depend upon the affirmative grants of the Constitution,” but rather are “vested in the federal government as necessary concomitants of nationality” and locating those powers in the president).

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ministers.”<sup>195</sup> These reflect the President’s domestic powers to create international obligations for the United States in his capacity as the nation’s “constitutional representative” in foreign affairs.<sup>196</sup>

The Court has also highlighted the executive’s superior position with respect to fact gathering as a compelling reason for granting the President sole authority in the arena of international relations.<sup>197</sup> Therefore, in addition to constitutional arguments, there are pragmatic factors that tip the balance of foreign-relations control in the executive’s favor.<sup>198</sup> A combination of these observations supports the argument that, because the Constitution does not articulate which political branch is directly responsible for shaping and executing U.S. foreign policy, the executive branch should be allowed to exercise *de facto* primary control in the arena of foreign affairs.<sup>199</sup> This comports with historical precedent: when determining whether a foreign state could assert the defense of sovereign immunity in a U.S. court, the historic judicial practice had been to defer to the executive’s recommendations.<sup>200</sup>

The Supreme Court has long held that the President has plenary and exclusive authority over the conduct of foreign affairs.<sup>201</sup> This does not mean that the executive is the “sole organ” in the realm of external relations; but rather, that the branch holds significant responsibility for the “conduct of foreign relations” and is shown necessary deference over matters concerning national security.<sup>202</sup> Indeed, the President’s “sole

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195. See U.S. CONST. art. II § 3 (providing as well the power to “take care the “Laws be faithfully executed”).

196. See *Curtiss-Wright*, 299 U.S. at 319 (suggesting this characterization of the president is a functional extension of the duties afforded to the office through the Constitution).

197. See *id.* at 320 (holding the President, not Congress, has the better opportunity of knowing the conditions that prevail in foreign countries).

198. See *id.* (noting the nature of foreign policy often requires immediate responses that could not reasonably be expected from a congressional body for all diplomatic interactions).

199. See *id.* (suggesting that the maintenance of our external relations is dependent on providing the executive with a degree of discretion because sensitive information of state cannot always reasonably be shared with Congress).

200. See *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1126 (9th Cir. 2010) (articulating that determinations of immunity were traditionally made by the executive).

201. See *e.g.* *Zschernig v. Miller*, 389 U.S. 429, 436 (1948); see also *Curtiss-Wright*, 299 U.S. at 317 (reminding that “though the states were several people in respect of foreign affairs were one”).

202. See *Curtiss-Wright*, 299 U.S. at 320 (recognizing this power as not arising from an act of Congress).

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organ” powers were put into check in *Youngstown Sheet & Tube Company v. Sawyer*, particularly because the President’s attempt to seize domestic steel mills without Congressional approval had an internal effect.<sup>203</sup>

*United States v. Curtiss-Wright Export Corporation* emphasizes the distinction between the application of executive powers between internal and external affairs.<sup>204</sup> In *Curtiss-Wright*, the Court suggests that the corners of limiting executive powers externally were not as explicit when assigning foreign policy powers because external powers do not infringe on the rights of states.<sup>205</sup> Even if the Constitution enumerated the executive’s foreign affairs’ powers, the executive would still have inherited powers beyond the Congress or Judiciary through the Executive’s ability to shape foreign policy as the states’ constitutional representative.<sup>206</sup> The Court found it “apparent” that when embarrassment in the maintenance of our international relations is to be avoided and success for our nations’ aims achieved, congressional legislation within the international sphere should accord the President “a degree of discretion and freedom from statutory restriction” that would not be appropriate within the domestic realm.<sup>207</sup>

In contrast, JASTA interferes with the executive’s ability to afford certain states immunity where policy dictates for national security reasons.<sup>208</sup> Whether JASTA is able to curtail sovereign immunity or not, its bid to diminish immunity is clear.<sup>209</sup> It attempts to move U.S. policy further away from a presumption of immunity, as it amends the FSIA and purports to amend the ATA.<sup>210</sup> Comity and mutual respect for sovereignty

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203. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 684-85 (1952). *But see id.* at 668 (Vinson, C.J., dissenting) (dissenting on the basis that the external exigencies of the Korean War justified the President’s actions for national security reasons).

204. See *Curtiss-Wright*, 299 U.S. at 315-16 (holding that the idea of the executive being constrained by her enumerated rights is only true in the context of *internal* affairs).

205. See *id.* at 316 (noting states never had foreign relation powers thus the foreign affairs power of the executive emanates from another source).

206. See *id.* at 316, 318 (writing that as a result of the colonies separation from Great Britain, the power over external relations passed to the United States as a single organ).

207. See *id.* at 320 (highlighting particularly how JASTA fractures the executive’s ability to control U.S. policy towards foreign states because any plaintiff can bring a suit against any nation).

208. See Memorandum, *supra* note 117 (arguing that to constrict the executive from exercising a waiver of immunity would imperil stabilization of Iraq and undermine national security efforts aimed at the region).

209. See JASTA Pub. L. No. 114-222 § 2(b) (providing the “broadest” possible basis for litigants to seek relief against foreign states).

210. See *id.* (purporting to scale back the protections afforded to foreign states but

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operates both ways.<sup>211</sup> JASTA erodes this protection and departs from longstanding standards of practice codified in the FSIA.<sup>212</sup> It also threatens to strip all foreign governments of immunity from judicial process based on private litigant's allegations, rather than executive determination.<sup>213</sup> Instead of speaking with one unified voice, this invites the possibility that different courts could reach varying conclusions about the culpability of individual foreign governments and their role in terrorist activities directed against the United States.<sup>214</sup> Thus, JASTA promotes discordant policy in the realm of foreign affairs and conflicts with the executive's ability to control its relations with foreign states.<sup>215</sup>

Additionally, by upsetting longstanding international principles of sovereign immunity, JASTA jeopardizes the executive's long-held powers over national security by putting foreign nationals, the military, and diplomatic officers of the state at risk.<sup>216</sup> JASTA erodes the principle of sovereign immunity, which makes the United States vulnerable to reciprocal actions from foreign states.<sup>217</sup> Moreover, the United States has the most to lose through reciprocal actions because it holds more property abroad than any other nation.<sup>218</sup>

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in practice falls short of many of its aims).

211. See *Schooner Exch. v. McFaddon*, 11 U.S. 116, 137 (1812) (characterizing the notion of sovereign immunity as consonant with the accepted obligations of the civilized world).

212. Compare JASTA Pub. L. No. 114-222 § 2(b) (enlarging the means to bring suit against a sovereign foreign state), with *Schooner Exch.*, 11 U.S. at 137 (holding that the principle of sovereign immunity is integral to successful relations between states).

213. See Veto Message, *supra* note 25 (arguing that JASTA upsets longstanding international principles regarding sovereign immunity that can globally change how states mutually recognize sovereignty and have serious implications for U.S. national interests).

214. Compare *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 317 (1935) (articulating that the states speak through the voice of the executive to avoid embarrassment), with JASTA, § 2(b) (providing litigants a way to circumvent the vetting process of the executive).

215. See Veto Message, *supra* note 25 (noting that evaluations of state sponsors of terrorism are only made by careful security, policy, and intelligence considerations are made because of the external repercussions of these decisions).

216. See *id.* (stating that JASTA encourages foreign governments to reciprocally allow their domestic courts to exercise jurisdiction over the United States where the U.S. previously enjoyed immunity through customary international law).

217. See *id.* (noting reciprocal actions could implicate the safety of military abroad for allegedly causing injuries overseas through U.S. support for third-parties, such as Saudi Arabia in Yemen or the Kurds in Syria).

218. See *id.* (reminding Congress that any successful judgments would be fulfilled

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Unlike the current terrorism exception in U.S. law, JASTA does not limit litigation to cases where our government has determined that retaliation for terrorist support is justified.<sup>219</sup> JASTA undercuts the United States' ability to argue that the terrorism exception is a legitimate countermeasure permitted by international law.<sup>220</sup> Instead, it allows private parties to force a foreign sovereign into court, disrupting the executive's recognized control over foreign policy and national security issues.<sup>221</sup>

#### IV. POLICY RECOMMENDATION

JASTA should be repealed because it represents the worst of all worlds; it exacerbates issues of terrorism by isolating the United States from its allies in the fight against terror, and reduces comity between states overall. Moreover, it harkens back to the reactionary policies post 9/11 that triggered a period of "American exceptionalism" that significantly affected international law.<sup>222</sup> In particular, President Bush's "war on terror" promoted a flexible take on *jus cogens* norms and justified exceptions to the rule of law as necessary to combat terrorism.<sup>223</sup> Pundits may debate the effectiveness of this approach but there is no doubt that it had significant costs on the international reputation of the United States.<sup>224</sup> JASTA similarly pursues policies that are in contravention to international norms, and undermines the United States' credibility as a law abiding country.<sup>225</sup>

The legality of the Bush and Obama Administration's policies in response to terrorism were questioned by both our allies as well as our adversaries.<sup>226</sup> JASTA reiterates these concerns and suggests that the

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by seizing U.S. assets abroad).

219. See *id.* (stating these are delicate political evaluations).

220. See *id.* (undermining existing national security policy and implicating questions of legality under international law).

221. See Veto Message, *supra* note 25 (emphasizing the Obama Administration's necessary veto of JASTA).

222. See Christopher J. Borgen, *Hearts and Minds and Laws: Legal Compliance and Diplomatic Persuasion*, 50 S. TEX. L. REV. 769, 769 (2008-2009) (attributing the term to William Kristol, a neoconservative who advocated rejected rigid legalism when addressing conflict areas in the world).

223. See Nagle, *supra* note 24 (reporting on Dutch and Iraqi outcries against JASTA because it breaches international norms of sovereignty).

224. See Martin Kettle et al., *What impact did 9/11 have on America?*, GUARDIAN (Sept. 6, 2011), <http://bit.ly/2fNFsbd> (reflecting on policies following 9/11 that were viewed as unjustifiable by the international community).

225. See *id.* (arguing that the Bush Administration's policy eroded fundamental protections in the American and international legal landscape).

226. See Stephan Statement, *supra* note 78, at 65 (noting that actions viewed as illegal by other states also subject the US to reciprocal actions under JASTA).

United States is indifferent to longstanding principles of international law.<sup>227</sup> The United States' indifference to international law, real or imagined, has several counteractive effects on security. First, it undercuts our legitimacy in the "fight in terror" and sows mistrust.<sup>228</sup> Second, JASTA's disregard for international law encourages other states to do the same, thereby shrinking comity between states worldwide.<sup>229</sup> Third, although terrorism has required the United States and other states to reevaluate longstanding conceptions of what war and combat means, one lesson has remained constant: the insidious nature of terrorism means that collaboration between states is essential to combat global terrorist networks.<sup>230</sup>

Collaboration between states is dependent on international law – "the language and grammar of international relations."<sup>231</sup> Thus, while policies of American exceptionalism have downplayed the importance of international norms in matters of national security and war, these constraints matter most internationally.<sup>232</sup> Repealing JASTA will indicate that the United States does not see itself as a global dictator, but rather, as a global player.<sup>233</sup>

If the United States is going to engage collaboratively with other states it must use reasonable policies that fit within a wider context of shared understandings about the rule of law and international norms.<sup>234</sup> Typically this is referred to as "soft power," or the ability to influence other states

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227. See *Schooner Exch. v. McFaddon*, 11 U.S. 116, 137 (1812) (holding that to haul a sovereign nation to a domestic court is an affront to its sovereignty and undermines relations between states).

228. See Stephan Statement, *supra* note 78, at 70 (arguing that to let private litigants accuse sovereign states of terrorism as a matter of first instance discredits counterterrorism policies).

229. See *id.* (arguing that JASTA erodes customary practice of international law in regards to sovereign immunity).

230. See Borgen, *supra* note 222, at 774 (suggesting that to combat terrorism states must "out-cooperate").

231. See *id.* at 770 (noting that law structures the relations among states by using a common frame of reference).

232. See *id.* at 770-71 (arguing international law is the common vernacular between states, thus when it is ignored it leads to diplomatic isolation).

233. See Sheikh Jamal Al-Dhari, *With Saudi-9/11 Bill, Iraqis Will Force US to Answer For 2003 Invasion*, THE HILL (Oct. 25, 2016), <http://tinyurl.com/jx2xd9g> (noting that JASTA has led to the creation of Justice Against American Actions (JAAA), a group of international lawyers organizing against American unilateralism).

234. See generally JOSEPH S. NYE, JR., *SOFT POWER: THE MEANS TO SUCCESS IN WORLD POLITICS* (2004) (noting that dominant states cannot simply impose their will on others, but must persuade through soft power means of persuasion).

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through non-military means.<sup>235</sup> A key aspect of soft power is a state's reputation and compliance with rule of law and international norms.<sup>236</sup> In other words, soft power is enhanced by adhering to international law.<sup>237</sup>

Given the transnational nature of terrorism, the United States cannot expect to prevent terrorist attacks without the collaboration of other states.<sup>238</sup> Policies such as JASTA that undermine customary law and custom do not go unnoticed, nor do they encourage collaboration.<sup>239</sup> As writer and foreign affairs journalist Fareed Zakaria discussed shortly before the United States began the Iraq War: "America is virtually alone. Never will it have waged a war in such isolation. Never have so many of its allies been so firmly opposed to its policies. In fact, the debate is not about Saddam anymore. It is about America and its role in the new world . . . ."<sup>240</sup> JASTA is policy that isolates the United States in the eyes of the world and promotes a return of military might versus military right.<sup>241</sup> This kind of legislation is untenable for combating terrorism and should be repealed.

#### V. CONCLUSION

JASTA will not achieve its stated aim of holding foreign states accountable for materially supporting terrorism because it creates potent and unjustifiable risks.<sup>242</sup> First, it allows private litigants to bring sovereign states into U.S. courts against the long-established principles of sovereign

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235. See *id.* at 18-21 (advocating soft power diplomacy as an alternative to military force to influence foreign states).

236. See Borgen, *supra* note 222, at 775 (arguing soft power creates pull that attracts other states to collaborate and eases cooperation).

237. See *id.* (citing Harold Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1480 (2003) which argues that when the US obeys international norms it enhances its moral authority).

238. See generally Crocker Snow, Jr., *The Privatization of U.S. Public Diplomacy*, 32 FLETCHER F. WORLD AFF. 189, 192 (2008) (noting the "with us or against us" policies for combatting terrorism were not successful).

239. See Al-Dhari, *supra* note 233 (suggesting that Congress was not aware how JASTA would affect its credibility).

240. See Borgen *supra* note 222, at 776 (quoting Fareed Zakaria, *The Arrogant Empire*, NEWSWEEK, at 18, 20-23 (Mar. 24, 2003)).

241. See Snow, *supra* note 238, at 192 (arguing that taking unilateralist positions on key matters of war and peace are widely viewed as hypocritical to U.S. ideals).

242. See Stephan Statement, *supra* note 78, at 67 (noting JASTA only deals with amenability to suit rather than immunities for attachment of assets that could satisfy a successful judgment); see also Vladeck, *JASTA*, *supra* note 77 (positing that JASTA is the worst of all worlds by presenting victims of terrorism with legislation that is legally weak, while eroding the principle of sovereign immunity and relations with Saudi Arabia).

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immunity.<sup>243</sup> This allows private citizens to circumvent the political branches if they believe they were harmed by a foreign state, stripping the executive of its power to effectively govern foreign relations and protect American interests.<sup>244</sup> Secondly, JASTA opens the door for reciprocal litigation against the United States, endangering American citizens and property held abroad.<sup>245</sup>

In addition, JASTA's drafting denudes much of what it purports to do.<sup>246</sup> It fails to overturn prior judicial decisions relating to 9/11 litigation, providing no new remedy for these victims as it claims.<sup>247</sup> Further, it provides for an executive stay of action that can stall litigation.<sup>248</sup> Finally, it fails to address the attachment of assets to successful judgments, the greatest hurdle for litigants seeking reparations from a foreign state.<sup>249</sup> Rather than help victims of terrorism as it purports, JASTA erodes protections for citizens as a whole, and interferes with the executive's policies of combating terrorism by violating international law and damaging relations between states.

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243. See generally *Schooner Exch. v. McFaddon*, 11 U.S. 116, 146 (1812) (establishing the principle of sovereign immunity in U.S. jurisprudence).

244. See *id.* (concluding that the has the authority to thwart domestic litigation when the needs of foreign policy are pressing).

245. See Stephan Statement, *supra* note 78, at 64 (testifying that only the international practice of recognizing sovereign immunity protects the United States from financial risk through suit and distracting harassment); Veto Message, *supra* note 25 (remarking enactment of JASTA encourages foreign governments to allow their domestic courts to exercise jurisdiction over U.S. officials and military for allegedly causing injuries overseas).

246. See Vladeck, *JASTA*, *supra* note 77 (comparing JASTA as it was proposed and its force as enacted).

247. See JASTA Pub. L. No. 114-222 § 2 (claiming but not providing for plaintiffs to seek relief against persons, entities, and foreign states "wherever they may be found").

248. See *id.* at § 5 (opening the door for the executive to use its claims settlement power or stay litigation indefinitely).

249. See Stephan Statement, *supra* note 78, at 68 (concluding that civil actions against foreign states frustrate victims because they are rarely paid while simultaneously causing conflict with foreign states).