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"Mob-Legislating": JASTA's Addition to the Terrorism Exception to Foreign Sovereign Immunity

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NOTE

"MOB-LEGISLATING": JASTA'S ADDITION TO THE TERRORISM EXCEPTION TO FOREIGN SOVEREIGN IMMUNITY

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INTRODUCTION

On September 28, 2016, a politically divided United States Senate overrode President Barack Obama's veto for the first and only time in a particularly decisive vote: 97–1.[1] The joint effort was the culmination of a ten-year effort to pass the Justice Against Sponsors of Terrorism Act (JASTA).[2] JASTA created a new terrorism exception to the Foreign Sovereign Immunities Act by allowing United States citizens to bring suit against foreign states that have aided and abetted acts of terrorism.[3] Despite President Obama's strong condemnation of the legislation in his veto address,[4] Republican Senator John Cornyn praised JASTA as a "strong bill with a narrow focus" that fixed a loophole in the United States' approach to foreign sovereign immunity.[5] From across the aisle, Democratic Senator Chuck Schumer also expressed his optimism about the bill by emphasizing that the Legislature's focus in passing JASTA

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1 Mohammed Cherkaoui, *The U.S. JASTA: An Asset or a Liability for America Abroad?*, AL JAZEERA (Dec. 28, 2016, 13:38 Mecca), http://studies.aljazeera.net/en/reports/2016/12/jasta-asset-liability-america-161228101858709.html [http://perma.cc/SX65-R3J9]. Senate Minority Whip Harry Reid was the sole dissenter, while Senator Bernie Sanders and Senator Tim Kaine missed the vote to campaign with Hillary Clinton. *Id.* The House vote to override President Obama's veto was almost as decisive: 348–77. Juliet Eilperin & Karoun Demirjian, *Congress Thwarts Obama on Bill Allowing 9/11 Lawsuits Against Saudi Arabia*, WASH. POST (Sept. 28, 2016), https://www.washingtonpost.com/politics/congress-thwarts-obama-on-bill-allowing-911-lawsuits-against-saudi-arabia/2016/09/28/a93e31ba-859b-11e6-ac72-a29979381495_story.html?utm_term=.aeb669500efe [http://perma.cc/5NAD-X7BB].

2 Cherkaoui, *supra* note 1.

3 Ingrid Wuerth, *Justice Against Sponsors of Terrorism Act: Initial Analysis*, LAWFARE: FOREIGN SOVEREIGN IMMUNITIES ACT (Sept. 29, 2016, 2:19 PM), https://www.lawfareblog.com/justice-against-sponsors-terrorism-act-initial-analysis [http://perma.cc/6NWD-QA6F] (suggesting that JASTA may simply codify a power courts had sometimes previously exercised under federal common law).

4 Presidential Message to the Senate Returning Without Approval the Justice Against Sponsors of Terrorism Act, 2016 DAILY COMP. PRES. DOC. 628 (Sept. 23, 2016). President Obama's spokesperson Josh Earnest further criticized the bill by calling it "the single most embarrassing thing that the United States Senate has done, possibly, since 1983." Jordan Fabian, *White House Lashes out at 'Embarrassing' Senate Veto Override*, HILL (Sept. 28, 2016, 1:45 PM), http://thehill.com/homenews/administration/298290-white-house-lashes-out-at-embarrassing-senate-veto [https://perma.cc/VPB5-3NJP].

5 Cherkaoui, *supra* note 1.

was families and justice rather than diplomatic considerations.[6]

Reactions across the globe were neither as positive nor as hopeful. The Dutch Parliament condemned the new legislation as a "'gross unwarranted breach of Dutch sovereignty,' which could result in 'astronomical damages.'"[7] French Member of Parliament Pierre Lellouche cautioned that JASTA would "cause a legal revolution in international law with major political consequences."[8] Unsurprisingly, the Saudi Arabian government, which was the main target of the updated legislation, also responded negatively. The Saudi Arabian government threatened to sell all of their holdings in U.S. government assets, which was estimated at the time to be $750 billion.[9]

This Note explores the issues with the Foreign Sovereign Immunities Act that JASTA attempts to address, the likelihood of JASTA's success, and whether or not JASTA is a desirable solution. Though the relatively recent nature of this addition renders the long-term impact difficult to assess, an examination of foreign sovereign immunity doctrine's origins, evolution, and purpose provides sufficient information to make predictions about potential problems with JASTA. Part I briefly tracks the history of foreign sovereign immunity in the United States and the transition from an absolutist approach to a restricted approach. Part I also discusses the codification of the restricted approach to foreign sovereign immunity and its potential shortcomings. Part II discusses the original terrorism exception to the Foreign Sovereign Immunities Act of 1976, its origins, early uses, shortcomings, and amendments. Then, Part III explores the political background that gave rise to JASTA and raises concerns about the implications of such sweeping legislation.

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6 *Id.*

7 *Id.* (quoting Elura Nanos, *Bill Allowing Terror Victims to Sue Saudi Arabia Creates Serious Potentional Problems*, LAW & CRIME (Sep. 21, 2016, 10:59 AM), https://lawandcrime.com/important/bill-allowing-terror-victims-to-sue-saudi-arabia-creates-serious-potential-problems/ [https://perma.cc/DRY4-A6VV]).

8 *Id.* (quoting Nanos, *supra* note 7).

9 Mark Mazzetti, *Saudi Arabia Warns of Economic Fallout if Congress Passes 9/11 Bill*, N.Y. TIMES (Apr. 15, 2016), https://www.nytimes.com/2016/04/16/world/middleeast/saudi-arabia-warns-ofeconomic-fallout-if-congress-passes-9-11-bill.html [http://perma.cc/7H6P-6E6W]. Some estimates of Saudi assets range as low as $117 billion. Daniel Pipes, *Cruel Hoax: The Justice Against Sponsors of Terrorism Act*, NAT'L REV. (June 2, 2016, 6:33 PM), http://www.nationalreview.com/corner/436003/justice-against-sponsors-terrorism-act-cruel-hoax [http://perma.cc/7NYD-GAA8].

I
FOREIGN SOVEREIGN IMMUNITY'S ORIGINS AND EVOLUTION

A. Absolutism

The concept of foreign sovereign immunity has a long history both across the world and in the United States.[10] Starting with the Peace of Westphalia in 1648, international law considered nation-states to be the world's principal actors and presumed these states to be equal and uninvolved with each other's internal affairs.[11] These presumptions gave rise to an absolutist formulation of foreign sovereign immunity that required states to refrain from exercising any legal authority over one another.[12] This absolute version of foreign sovereign immunity dominated cross-border litigation for centuries.[13]

In the United States, *The Schooner Exchange v. McFaddon* opinion articulated four principles of foreign sovereign immunity and was later interpreted as extending absolute immunity to foreign sovereigns.[14] First, Chief Justice Marshall explained that a sovereign state's jurisdiction "derives from the perfect equality and independence" of each state and that this jurisdiction is exclusive, absolute, and subject only to its own limitations.[15] Second, the Chief Justice recognized that "common interest" prevents sovereigns from exerting extraterritorial jurisdiction.[16] This recognition would reinforce the basis for arguing that comity and reciprocity required absolute foreign sovereign immunity.[17] Third, the *The Schooner Exchange* opinion established that exceptions to immunity must be consen-

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10 *See* Richard T. Micco, *Putting the Terrorist-Sponsoring State in the Dock: Recent Changes in the Foreign Sovereign Immunities Act and the Individual's Recourse Against Foreign Powers*, 14 TEMP. INT'L & COMP. L.J. 109, 119 n.80 (2000) (first quoting PLATO, LAWS, BOOK III 683e (Thomas L. Pangle ed., Univ. of Chicago Press); then quoting THE FEDERALIST NO. 81 (Alexander Hamilton)).

11 *See* Derek Croxton, *The Peace of Westphalia of 1648 and the Origins of Sovereignty*, 21 INT'L HIST. REV. 569, 569–70 (1999) (acknowledging that many scholars believe the Peace of Westphalia established the principle of sovereignty).

12 *See* Micco, *supra* note 10, at 119–20.

13 *See* Robert B. von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 COLUM. J. TRANSNAT'L L. 33, 34 (1978) ("[A] theory of foreign sovereign immunity, which was rejected by the Immunities Act, is the 'absolute doctrine' that extends the immunity of a foreign state to all suits against it.").

14 The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116 (1812); *see* Tachiona v. Mugabe, 169 F. Supp. 2d 259, 268–70 (S.D.N.Y. 2001); *see also* Micco, *supra* note 10, at 121 ("State immunity operates as a restraint on the exercise of jurisdiction of one sovereign's legal system over another state.").

15 *Tachiona*, 169 F. Supp. 2d at 268 (citing *The Schooner Exchange*, 11 U.S. (7 Cranch) at 136).

16 *Id.* (quoting *The Schooner Exchange*, 11 U.S. (7 Cranch) at 137).

17 *See Id.*

sual, either impliedly or expressly, and listed common law examples of implied consent.[18] And lastly, Chief Justice Marshall discussed immunity for foreign sovereigns and their rulers, ultimately suggesting that immunity is "unitary and coextensive."[19]

Using these principles, American courts recognized "three objects of foreign sovereign immunity: diplomatic, head of state, and state."[20] In 1926, the Supreme Court expanded the holding from *The Schooner Exchange* (which only applied to states' private property) to all state entities regardless of public or private ownership in *Berizzi Brothers Co. v. Steamship Pesaro*.[21] This holding represented the apex of absolutist interpretations of foreign sovereign immunity.

The rise of state-owned commercial enterprises and monopolies forced both the judiciary and the Executive Branch to reevaluate the wisdom of absolute foreign immunity.[22] Instead of presumptively granting foreign sovereigns immunity from civil litigation, courts began relying on certifications of immunity from the State Department, effectively acknowledging the political nature of the determination.[23] Slowly, American courts internalized an obligation to "accept and follow the executive determination" of immunity for foreign sovereigns.[24]

This shift toward a more restrictive approach to state sovereign immunity was also clearly documented in the "Tate Letter" from Jack B. Tate, the Acting Legal Advisor at the State Department.[25] On May 19, 1952, Tate wrote to Attorney General Philip B. Pearlman to explain the State Department's decision to transition from an absolutist approach to a restrictive

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18 *Id.* at 269.

19 *Id.*; *see also id.* at 305 (stating that "the head-of-state doctrine as a residual branch of common law sovereign immunity addresses the personal immunity of the ruler").

20 Micco, *supra* note 10, at 120.

21 *See* Berizzi Bros. Co. v. S.S. Pesaro, 271 U.S. 562, 574 (1926) ("The decision in *The Exchange* therefore cannot be taken as excluding merchant ships held and used by a government from the principles there announced. On the contrary, if such ships come within those principles, they must be held to have the same immunity as war ships . . . ."); *see also* Todd Connors, *The Foreign Sovereign Immunities Act: Using Separation of Powers Analysis to Guide Judicial Decision-Making*, 26 LAW & POL'Y INT'L BUS. 203, 209 (1994) ("[T]he [Berizzi] court extended the privilege of sovereign immunity to all foreign state entities, without distinction between their public and private acts.").

22 *See* Micco, *supra* note 10, at 123.

23 *See* Connors, *supra* note 21, at 210.

24 Republic of Mexico v. Hoffman, 324 U.S. 30, 36 (1945).

25 Jack B. Tate, *Changed Policy Concerning the Granting of Sovereign Immunity to Foreign Governments*, 26 DEP'T ST. BULL. 984 (1952) [hereinafter *The Tate Letter*]; *see* Micco, *supra* note 10, at 123.

approach to foreign sovereign immunity. The Tate Letter cited the United States' submission to suit for merchant vessels and "the widespread and increasing practice on the part of governments of engaging in commercial activities."[26] Though the Tate Letter set out the Executive's reasons for the shift, this new approach failed to provide specific guidelines and criteria for courts to follow when deciding to exercise jurisdiction.[27] Furthermore, the State Department was not required to comment on each foreign sovereign immunity case that entered the courts, occasionally leaving courts without a standard for assessment.[28] Consequently, this restrictive but uncodified approach that dominated courts' approach to foreign sovereign immunity between 1952 and 1976, allowed foreign sovereigns to inappropriately influence the State Department[29] and obligated the courts to abide by the Executive's decisions even when they were inconsistent with doctrine or precedent.[30]

B. Restricted Immunity and the Foreign Sovereign Immunities Act of 1976

Recognizing the problems posed by the Tate Letter's approach, the United States Congress proposed and passed the Foreign Sovereign Immunities Act of 1976 (FSIA), effectively codifying the United States' adherence to a restrictive approach to foreign sovereign immunity.[31] As he signed the Act, President Gerald Ford expressed his hopes that the FSIA would "make it easier for our citizens and foreign governments to turn to the courts to resolve ordinary legal disputes" and hailed the FSIA as "carr[ying] forward a modern and enlightened trend in international law."[32] Though President Ford did not explicitly state it as one of the FSIA's purposes, the Act was also aimed at both freeing the State Department from making case-by-case determinations in foreign sovereign immunity claims and at

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26 Chem. Nat. Res., Inc. v. Republic of Venezuela, 215 A.2d 864, 884 (Pa. 1966) (quoting *The Tate Letter*).

27 *See* von Mehren, *supra* note 13, at 41.

28 *See* Connors, *supra* note 21, at 211.

29 *See* Micco, *supra* note 10, at 124–25.

30 *See id.* at 125; Connors, *supra* note 21, at 211–12.

31 Jeewon Kim, *Making State Sponsors of Terrorism Pay: A Separation of Powers Discourse Under the Foreign Sovereign Immunities Act*, 22 BERKELEY J. INT'L L. 513, 514 (2014).

32 von Mehren, *supra* note 13, at 33 (quoting Presidential Statement on Signing the Foreign Sovereign Immunities Act of 1976, 3 PUB. PAPERS 937 (Oct. 22, 1976)).

removing undue political influences from the certification process.[33]

Four key features characterize the Foreign Sovereign Immunities Act of 1976. First, the Act codified the restricted immunity approach to foreign sovereignty.[34] Second, the FSIA entrenched the idea of equality between the foreign and domestic sovereign.[35] Third, the codification of restricted immunity shifted the burden of determining sovereign immunity from the State Department to the Judiciary,[36] replacing the Judicial duty with deference to the Executive.[37] Finally, the FSIA restricted jurisdiction over foreign sovereigns to in personam jurisdiction by eliminating in rem and quasi in rem jurisdiction.[38] Notably, the Act also explicitly carved out exceptions to foreign sovereign immunity such as consent and commercial activities.[39] In 1988, arbitrated settlements were added as an exception and, as will be discussed later, state sponsors of terrorism were added as an exception in the 1990s.[40]

Though the FSIA did clarify the Judiciary's role in foreign sovereign immunity determinations, the Act was by no means a panacea for the difficulties posed by litigating against foreign sovereigns and may have created issues of its own. Perhaps the most immediately problematic issue was the lack of guidance in the FSIA about what constitutes "commercial activity."[41] Section 1603(d) of the Act requires that courts use "the nature of the course of conduct or particular transaction or act,

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33 *See* Micco, *supra* note 10, at 125.

34 *See* von Mehren, *supra* note 13, at 45; *see also* Connors, *supra* note 21, at 213.

35 *See* von Mehren, *supra* note 13, at 45. The FSIA allows foreign sovereigns to forego a trial by jury in the same way U.S. sovereigns may also be excepted. Foreign sovereigns are given the same number of days to answer and reply as domestic sovereigns. The Act also limits default judgments to the same circumstances in which default judgments would be entered against a domestic sovereign. Lastly, and perhaps most importantly for claimants using terrorism exception jurisdiction, the FSIA largely prevents attachment of property prior to judgment in the same way it does for domestic sovereigns. *See id.* at 45–46.

36 *See* Kim, *supra* note 31, at 514.

37 *See* von Mehren, *supra* note 13, at 45.

38 *Id.* As von Mehren notes, it is rare for a statute to prioritize in personam jurisdiction over in rem or quasi in rem jurisdiction, but, in the case of foreign sovereign immunity, it makes sense. Von Mehren offers two justifications for this limitation: (1) U.S. courts should not be obligated to try cases simply because a foreign sovereign owns property located in the U.S. and (2) attachment of property before judgment would pose "an irritant in American foreign relations." *Id.* at 46–47.

39 Micco, *supra* note 10, at 126.

40 *Id.* at 126, 128–29.

41 *See* Connors, *supra* note 21, at 205.

rather than by reference to its purpose," for determining whether an activity is commercial.[42] This definition and the FSIA's legislative history are meant to give wide discretion to the courts in defining commercial activity.[43] However, this has proven particularly difficult because the FSIA mandated a departure from precedent.[44] Similarly, § 1605(a)(2) denies immunity to cases "based upon" commercial activities and cases "based upon" an act "in connection with a commercial activity."[45] These poorly defined standards have created disagreements between the lower courts and led to discrepancies in applications of the FSIA.[46]

Even following the codification of restricted foreign sovereign immunity, the issue of whether the Judiciary or the Executive was constitutionally mandated to review these decisions remained at large. Some commentators have concluded that if the issue ever reached the Supreme Court, it would be unlikely that the Court would hold that the Judiciary is constitutionally mandated to defer to the Executive in immunity cases.[47] Other commentators have suggested the polar opposite.[48] To further confuse the issue of constitutional mandates, in *Verlinden B.V. v. Central Bank of Nigeria*, the Supreme Court held that "foreign sovereign immunity is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution."[49] This uncertainty about the role of the Judiciary, the Executive, and the requirements imposed by the Constitution have eviscerated predictability under the FSIA, and have shrouded in mystery courts' decisions regarding immunity. However, it is also worth noting that all states recognize

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42 28 U.S.C. § 1603(d) (2012).

43 *See* von Mehren, *supra* note 13, at 53.

44 *See id.* Prior to the Foreign Sovereign Immunities Act, courts used the standard discussed in *Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354 (2d Cir. 1964), to determine whether an activity was commercial. This standard set out five instances in which the court would rule in favor of sovereign immunity: "(1) internal administrative acts, . . . (2) legislative acts, . . . (3) acts concerning the armed forces[,] (4) acts concerning diplomatic activity[, and] (5) public loans." *Id.* at 360. The Foreign Sovereign Immunity Act's requirement that courts examine the nature and not the purpose of a sovereign's activity departed from this standard by eliminating the "public vs. political" distinction in *Victory Transport* and furthermore removed purpose from the traditional assessment, leaving only "nature" as a guiding influence.

45 28 U.S.C. § 1605(a)(2) (2012).

46 GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 279 (5th ed. 2011).

47 *See* Connors, *supra* note 21, at 208–09.

48 *See* Martin S. Flaherty, *Restoring Separation of Powers in Foreign Affairs*, 2 J. INT'L COMP. L. 22–23 (2016).

49 Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 486 (1983).

some form of foreign sovereign immunity.[50] The United States' decision to enact the FSIA was based in part on a belief that it was adhering to international law, suggesting that comity, though not constitutionally mandated, is an important consideration in these cases.[51]

As will be discussed below in relation to cases arising under the terrorism exception to the FSIA, enforcement of judgments against foreign sovereigns has proven particularly difficult.[52] The primary means of enforcement of judgments against foreign sovereigns is the attachment of "the property [that] is or was used for the commercial activity upon which the claim is based."[53] However, this mechanism relies on foreign sovereigns having property within the United States that claimants may attach and that these foreign sovereigns accept the validity of the proceedings against them.[54] Because it is rarely the case that a foreign sovereign meets both criteria for enforcement, the FSIA is largely toothless in terms of enforcement.[55]

Additionally, the presumption of immunity for foreign sovereigns has also created controversy over the pleading standards required to bring a case against a foreign sovereign and what standard courts should use to determine whether a taking was "in violation of international law."[56] A heightened pleading standard for FSIA claims and a strenuous test for finding a violation of international law may make claims under FSIA even more difficult to sustain.

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50 *See* Jasper Finke, *Sovereign Immunity: Rule, Comity or Something Else?*, 21 EUR. J. INT'L. L. 853, 871, 874 (2010).

51 *See id.*

52 *See* Micco, *supra* note 10, at 135. The FSIA's lack of enforcement mechanism pushed Micco to declare judgments won under the FSIA as a mere "paper award for the trouble of bringing, presenting and proving a case." *Id.*

53 28 U.S.C. § 1610(a)(2) (2012).

54 Micco, *supra* note 10, at 135.

55 Jack Goldsmith, *President Obama Should Veto JASTA*, LAWFARE (Sept. 14, 2016, 8:45 AM), https://www.lawfareblog.com/president-obama-should-veto-jasta [https://perma.cc/6MZK-NEKD].

56 Bolivarian Republic of Venez. v. Helmerich & Payne Int'l Drilling Co., 137 S. Ct. 1312, 1323 (2017) (holding that claimants must show more than a non-frivolous argument that property was taken in violation of international law to bring a claim within the scope of the FSIA). This case also requires that courts resolve factual disputes about a defense of foreign sovereign immunity "as near to the outset of the case as is reasonably possible." *Id.* at 1317.

II
CARVING OUT AN EXCEPTION FOR TERRORISM

A. Origins and Motivating Factors

For over twenty years, the FSIA was "the sole vehicle for redressing international human rights violations."[57] Despite being the only mechanism for addressing these matters, suing a foreign sovereign under the FSIA was by no means easy.[58] Plaintiffs would have to either hope a foreign sovereign consented to suit or, alternatively, prove that the alleged human rights violation, such as an act of terrorism, had been both in the foreign sovereign's interest and committed on U.S. soil by an agent of the foreign government.[59] The narrow number of cases that could meet the criteria of location and actor were still unlikely to succeed because courts consistently held that terrorist activities were not commercial.[60] The 1979 capture of the United States Embassy in Tehran by Hezbollah gave rise to *Cicippio v. Islamic Republic of Iran*, in which former hostages sought damages from the Iranian government for their abduction.[61] This case was originally dismissed for lack of jurisdiction over Iran.[62] Similarly, *Smith v. Socialist People's Libyan Arab Jamahiriya*, a suit based on the Lockerbie bombing in December 1988, was also initially dismissed due to foreign sovereign immunity.[63] Additionally, § 1604's presumption of immunity,[64] combined with the Executive's attempts to restrict suits against foreign sovereigns, made the FSIA an unsatisfactory mechanism to address human rights violations.[65]

Frustration with the narrow opportunity to sue foreign sovereigns was exacerbated by several events in the late 1980s and early 1990s and ultimately led to an amendment that added a "terrorism exception" to foreign sovereign immunity.[66] The 1993 New York World Trade Center bombing,[67] the 1995

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57 Kim, *supra* note 31, at 515.

58 Micco, *supra* note 10, at 111.

59 *Id.*

60 *Id.* at 111–12.

61 *See* Cicippio v. Islamic Republic of Iran, 30 F.3d. 164 (D.C. Cir. 1994).

62 *See id.* at 168–69.

63 *See* Smith v. Socialist People's Libyan Arab Jamahiriya, 886 F. Supp. 306, 315 (E.D.N.Y. 1995).

64 28 U.S.C. § 1604 (2012).

65 *See* Kim, *supra* note 31, at 519–20.

66 *See* Micco, *supra* note 10, at 109.

67 *See* Jesse Greenspan, *Remembering the 1993 World Trade Center Bombing*, HIST., (Feb. 26, 2013), http://www.history.com/news/remembering-the-1993-world-trade-center-bombing [https://perma.cc/R8VL-5YQ7].

Tokyo subway attack,[68] and the 1995 bombing of a federal office in Oklahoma City[69] preyed on fears of Middle Eastern terrorism affecting the United States domestically and intensified the perceived need to create a means of bringing suits against foreign sovereigns.[70] Perhaps the most direct line from an act of terrorism to a change in jurisdiction over foreign sovereigns can be drawn between the 1995 death of Alisa Flatow and the Antiterrorism and Effective Death Penalty Act (AEDPA) and Flatow Amendment of 1996.[71] Section 221 of the AEDPA created a "terrorism exception" to foreign sovereign immunity that enabled suits against certain foreign sovereigns.[72] The AEDPA allowed courts to strip states that had been designated a state sponsor of terrorism by the State Department of foreign sovereign immunity.[73] The Flatow Amendment to the Civil Liability for Acts of State Sponsored Terrorism, which followed just five months after the AEDPA, allowed plaintiffs to seek punitive damages in addition to compensatory damages in cases of state-sponsored terrorism.[74] With these two pieces of legislation, the Flatow family successfully sued Iran for their daughter's death and won a judgment of $20 million in compensatory damages and $225 million in punitive damages.[75]

B. Early Days of Litigation under the Terrorism Exception

Litigation under these provisions began immediately. By 2004, U.S. courts had awarded plaintiffs over $4.4 billion in

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68 *See* Nicholas D. Kristof, *Poison Gas Fills Tokyo Subway; Six Die and Hundreds Are Hurt*, N.Y. TIMES (Mar. 20, 1995), https://www.nytimes.com/1995/03/20/world/poison-gas-fills-tokyo-subway-six-die-and-hundreds-are-hurt.html [https://perma.cc/5P8D-DTJG].

69 *See* Penelope Poulou, *Oklahoma City Bombing Documentary Examines Growth of American Extremism*, VOA NEWS (Mar. 7, 2017, 11:32 AM), http://www.voanews.com/a/oklahoma-city-bombing-homegrown-extremism-terrorism/3753687.html [https://perma.cc/G7ZA-6QMC].

70 *See* Micco, *supra* note 10, at 110 n.5.

71 *See id.* at 109, 112; *see also* Joseph Keller, *The Flatow Amendment and State-Sponsored Terrorism*, 28 SEATTLE U.L. REV. 1029, 1031 (2005). Alisa Flatow was a twenty-year-old Jewish American student at Brandeis University studying abroad in Israel. On April 9, 1995, Alisa was aboard a bus with sixty Israeli soldiers on its way to a seacoast village when a bomb exploded, taking the lives of seven soldiers and Alisa. It was later discovered that the Shaqaqi faction of the Palestinian Islamic Jihad, an organization sponsored by the Iranian government, was responsible for this attack. *Id.*

72 *See* Micco, *supra* note 10, at 112, 130.

73 *See* Naomi Roht-Arriaza, *The Foreign Sovereign Immunities Act and Human Rights Violations: One Step Forward, Two Steps Back*, 16 BERKELEY J. INT'L L. 71, 78 (1998).

74 Keller, *supra* note 71, at 1031.

75 *See* Flatow v. Islamic Republic of Iran, 999 F. Supp. 1, 34 (D.D.C. 1998).

damages against state sponsors of terror.[76] Cases like *Alejandre v. Republic of Cuba* and *Cicippio II* illustrated U.S. plaintiffs' newfound ability to win judgments with tremendous compensatory and punitive damages.[77] In many of these cases, the foreign sovereigns facing suit chose not to make an appearance in U.S. courts, and the courts consequently entered large default judgments in their absence.[78] *Rein v. Socialist People's Libyan Arab Jamahiriya*, another case concerning the Lockerbie bombing, clarified the terrorism exception's standard for personal jurisdiction.[79] The Second Circuit explained in *Rein* that suits brought under the FSIA's terrorist exception do not require minimum contacts to establish personal jurisdiction, but instead need only successful service of process.[80]

These cases also began to expose the gaps in coverage for victims of terrorism and state sponsors of human rights violations. They betrayed an inequality of citizenship inherent in the terrorism exception. Despite having suffered the same harms, non-U.S. citizens were barred from recovering against foreign sovereigns notwithstanding their connections to the United States through property ownership and permanent residency.[81] Because the 1996 amendments to the FSIA restricted both the eligible claimants and defendants in the terrorism exception, the provision's efficacy in addressing terrorism and compensating victims is necessarily limited.[82] Through these

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76 Kelly A. Atherton, *Compensating Victims under the "Terrorism-Exception" of the Foreign Sovereign Immunities Act: A State-Sponsored Victim's Compensation Fund*, 12 WILLAMETTE J. INT'L L. & DISP. RESOL. 158, 158–59 (2004).

77 *See* Micco, *supra* note 10, at 112. In *Cicippio II*, the District Court for the District of Columbia granted $65 million in compensatory damages. *See* Cicippio v. Islamic Republic of Iran, 18 F. Supp. 2d 62, 70 (D.D.C. 1998). And though the court did not grant punitive damages, the claimants in *Cicippio II* were eventually able to collect $73.2 million under § 2002 of the Victims of Trafficking and Violence Protection Act (VTVPA). *See* DAVID M. ACKERMAN, CONG. RESEARCH SERV., RL31258, SUITS AGAINST TERRORIST STATES 22 (2002). In *Alejandre*, the Southern District of Florida granted nearly $50 million in compensatory damages and $137.7 million in punitive damages. *See* Alejandre v. Republic of Cuba, 996 F. Supp. 1239, 1253 (1997). Under § 2002, the claimants were able to collect $96.7 million from liquidated Cuban assets. *Cf.* Kim, *supra* note 31, at 520 (noting that the VTVPA led the U.S. government to liquidate approximately half of Cuba's $193.5 million in frozen assets to compensate the claimants).

78 *See* Daveed Gartenstein-Ross, Note, *Resolving Outstanding Judgments Under the Terrorism Exception to the Foreign Sovereign Immunities Act*, 77 N.Y.U. L. REV. 496, 505–06 (2002).

79 *See* Rein v. Socialist People's Libyan Arab Jamahiriya, 162 F.3d 748, 753 (2d Cir. 1998).

80 *See id.* at 759.

81 *See* Micco, *supra* note 10, at 116.

82 As discussed above, the terrorism exception limits the defendants subject to liability to those designated by the U.S. State Department as state sponsors of

early cases, courts articulated the contours of the terrorism exception by holding that the Flatow Amendment created neither *respondeat superior* for foreign states,[83] nor an independent cause of action for claimants.[84]

Perhaps more troubling than the articulation of the terrorism exception's boundaries was the issue of enforcement and executive action to thwart the collection of judgments. The Clinton administration refused to release foreign sovereigns' assets to facilitate the collection of damages and claimed that these assets were protected by international agreements and were a vital part of United States foreign relations.[85] The inability to attach property rendered the judgments nothing more than nominal awards, frustrated the purpose of the terrorism exception, and prompted the changes discussed below.

C. Beginning of Change

Shortly after creating a terrorism exception to foreign sovereign immunity, Congress began amending it to address the issues raised by early litigation. In response to the Clinton administration's refusal to release assets, Congress amended § 1610 of the FSIA to allow attachment "at the request of any party in whose favor a judgment has been issued with respect to a claim for which the foreign state is not immune" through

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terrorism. For a current list of these nations designated as such, see *State Sponsors of Terrorism*, U.S. DEP'T OF STATE, https://www.state.gov/j/ct/list/c14151.htm [http://perma.cc/NTR3-Q6PG]. This list has been subject to little change with only eight countries ever being on the list: Iran (added in 1984 by President Ronald Reagan), Sudan (added in 1993 by President Bill Clinton), Syria (added in 1979 by President Jimmy Carter), North Korea (added in 1988 by President Ronald Reagan, removed from the list in 2008 by President George W. Bush, and reinstated in 2017 by President Donald Trump), Cuba (added in 1982 by President Ronald Reagan and removed in 2015 by President Barack Obama), Iraq (added in 1979 by President Jimmy Carter and removed in 2004 by President George W. Bush), Libya (added in 1979 by President Jimmy Carter and removed in 2006 by President George W. Bush), and South Yemen (added in 1979 by President Jimmy Carter and removed in 1990 after merging with the Yemen Arab Republic to form Yemen). *See Country Reports on Terrorism*, U.S. DEP'T OF STATE, https://www.state.gov/j/ct/rls/crt/ [https://perma.cc/VQN4-KDAD]; *Overview of State-Sponsored Terrorism*, U.S. DEP'T OF STATE (Apr. 29, 2004), https://www.state.gov/j/ct/rls/crt/2003/31644.htm [https://perma.cc/4UR9-TNZN].

83 *See* Hurst v. Socialist People's Libyan Arab Jamahiriya, 474 F. Supp. 2d 19, 26 (D.D.C. 2007) (stating "[i]f Congress had intended to create respondeat superior liability for foreign states under the Flatow Amendment, it would have said so").

84 *See* Keller, *supra* note 74, at 1031–32.

85 *See* Kim, *supra* note 31, at 519–20.

the Treasury Department Appropriations Act of 1999.[86] However, this Act also contained a section discussing waiver that allowed the President to "waive the requirements of this section in the interest of national security."[87] President Clinton took immediate advantage of this provision by signing the Act into law and then immediately invoking the waiver for all foreign assets, effectively turning the waiver clause into a line item veto.[88]

Forced to reorganize yet again, Congress next passed the Victims of Trafficking and Violence Protection Act (VTVPA) in 2000.[89] Section 2002 of this Act enables plaintiffs who have won suits against Iran or Cuba to recover compensatory, but not punitive, damages in exchange for an agreement not to attach certain property.[90] This provision implicitly denies relief to claimants who sued Iraq and Libya and denies claimants suing Iran and Cuba a means of recovering what is likely to be the larger portion of their damages.[91] Ultimately, the half measure proposed by the VTVPA enabled claimants in one case against Cuba and ten cases against Iran to move forward with collection on their judgments.[92] Treasury Secretary Paul O'Neill liquidated frozen Cuban assets in February 2001,[93] allowing the claimants in *Alejandre* to collect $96.7 million in damages.[94]

However, in spite of this legislation and its stated purpose, the Clinton and Bush administrations still refused to liquidate Iran's assets, asserting that this would "seriously compromise important national security and foreign policy interests" and

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86 Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, § 117(B)(2)(A), 112 Stat. 2681 (1998) (codified as amended at 28 U.S.C. § 1610(f)(2)(A) (2012)).

87 *Id.* § 117(d).

88 *See* Presidential Statement on Signing the Victims of Trafficking and Violence Protection Act of 2000, 3 PUB. PAPERS 2352 (Oct. 28, 2000).

89 Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000) (codified as 22 U.S.C. § 7101 (2012)).

90 *See* Kim, *supra* note 31, at 520.

91 *Cf. id.* at 521 (discussing how some plaintiffs who had been awarded judgments did not receive payment).

92 *Id.* at 520.

93 *See* Mark C. Medish, *In the Name of the Patriot Act: That's Ours*, WASH. POST (Oct. 19, 2003), https://www.washingtonpost.com/archive/opinions/2003/10/19/in-the-name-of-the-patriot-act-thats-ours/a03f9531-4493-4b50-9bff-e96beade6352/?utm_term=.f39ad07357df [http://perma.cc/Y8EU-NBCX].

94 *See* Andrew Lyubarsky, *Clearing the Road to Havana: Settling Legally Questionable Terrorism Judgments to Ensure Normalization of Relations Between the United States and Cuba*, 91 N.Y.U. L. REV. 459, 468 (2016).

unfairly discriminate between claimants.[95] Instead, the U.S. Treasury paid over $350 million to partially satisfy the judgments in nine of ten cases against Iran.[96] Because this permitted the alleged state sponsors of terrorism to escape the financial ramifications of an adverse judgment against them, this use of taxpayers' money to satisfy judgments jeopardizes any deterrent effect that the terrorism exception offers and raises issues of fairness. Furthermore, designating the Executive as responsible for enforcing the judiciary's judgments creates serious separation of powers concerns, which will be discussed below.

For today's plaintiffs, attachment of foreign sovereign assets remains difficult.[97] The Foreign Sovereign Immunities Act extends foreign sovereign immunity to immunity from attachment,[98] meaning that plaintiffs seeking to attach property as a means of enforcement must demonstrate that the property sought to be attached falls into an exception listed by the Act.[99] Because prejudgment attachment of foreign sovereign assets is largely unheard of,[100] plaintiffs suing a foreign sovereign must usually seek post-judgment attachment of a foreign sovereign's assets.[101] However, post-judgment attachment may only proceed once a plaintiff has won a favorable judgment, which in itself constitutes a serious obstacle. Sections 1610(a) and (b) discuss attachment of both a foreign sovereign's properties and properties owned by a foreign sovereign's agencies and instrumentalities.[102] Though the provisions for attaching property owned by an agency or instrumentality of a foreign sovereign

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95 Sean K. Mangan, Note, *Compensation for "Certain" Victims of Terrorism Under Section 2002 of the Victims of Trafficking and Violence Protection Act of 2000: Individual Payments at an Institutional Cost*, 42 VA. J. INT'L L. 1037, 1052 (2002).

96 *See* Kim, *supra* note 31, at 520–21.

97 *See* Kenneth Reisenfeld, Mark Cymrot & Joshua Robbins, *Suits Against Foreign Sovereigns: Mixed Bag for Energy Cos.*, LAW360 (Jan. 17, 2017, 4:54 PM), https://www.law360.com/articles/881735 [http://perma.cc/564H-LMW7].

98 *See* Foreign Sovereign Immunities Act of 1976 § 1610(a), 28 U.S.C. § 1602 (1976).

99 *See id.* § 1610(a)–(g).

100 *Cf. id.* § 1610(d) (describing requirements for pre-judgment attachments). Section 1610(d)(2) allows for attachment where a state has explicitly waived its immunity or "purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction." For a discussion of prejudgment attachment under the FSIA, see Craig J. Hanson, *The Foreign Sovereign Immunities Act: The Use of Pre-Judgment Attachment to Ensure Satisfaction of Anticipated Judgments*, 2 NW. J. INT'L L. & BUS. 517 (1980).

101 *See* Foreign Sovereign Immunities Act § 1610.

102 *See id.* § 1610(a)–(b).

are broader,[103] plaintiffs still face a limited number of exceptions that they may use to enforce judgments against a foreign sovereign. However, § 1610(g) of the FSIA specifically allows for attachment in cases arising under the original terrorism exception and many more exceptions to sovereign immunity from attachment.[104] Regardless of the type of property sought to be attached, the FSIA also requires that "a reasonable period of time has elapsed following the entry of judgment" before attachment is ordered.[105]

Given these significant obstacles, Congress has continued to attempt changes to the FSIA's enforcement provisions. In another attempt to bolster enforcement of awards against foreign sovereigns under the terrorism exception and cure the FSIA's defects, Congress passed the Terrorism Risk Insurance Act of 2002 (TRIA).[106] This Act attempts to avoid the "line item veto" through waiver that rendered the Treasury Department Appropriations Act ineffective, by requiring that the President make asset-by-asset determinations about the national security interest at stake.[107] TRIA also diminishes the Executive's power to protect foreign sovereigns by protecting only certain assets as defined by the Vienna Convention.[108] Together these changes provided for certain judgments against Iran to be enforced and collected. Congress has extended TRIA through 2020, and though it does work to provide remedies to some FSIA claimants, these solutions make arbitrary distinctions between similarly situated claimants and further causes tension between the three branches of government.[109] It is also worth noting that, despite Congressional efforts, as of May 2016, Iran still owed $53 billion in unpaid U.S. court judgments with no concrete means of enforcement on the horizon.[110]

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103 Unlike § 1610(a), § 1610(b), which applies to agencies and instrumentalities, does not require that the property sought to be attached be used in a commercial activity that is the basis of the claim. *See id.* § 1610(b)(2).

104 *See id.* § 1610(g).

105 *Id.* § 1610(c). The Supreme Court has yet to rule on what constitutes a "reasonable period of time."

106 Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, 116 Stat. 2322 (2002) (codified as amended at 28 U.S.C. § 1610).

107 *See* Kim, *supra* note 31, at 522.

108 *See id.*

109 *See id.*

110 Orde Kittrie, *Iran Still Owes $53 Billion in Unpaid U.S. Court Judgments to American Victims of Iranian Terrorism*, FOUND. FOR DEF. OF DEMOCRACIES (May 9, 2016), http://www.defenddemocracy.org/media-hit/orde-kittrie-after-supreme-court-decision-iran-still-owes-53-billion-in-unpaid-us-cour/ [https://perma.cc/HDW6-HM2Z].

III
PASSING JASTA

A. Changes to Foreign Sovereign Immunity under JASTA

JASTA's stated objectives seem to address the loopholes created by the original terrorism exception to foreign sovereign immunity and its amendments. The version of JASTA that ultimately became law in 2016, included a congressional finding that "terrorism is a serious and deadly problem that threatens the vital interests of the United States" and that Congress must "recognize the substantive causes of action for aiding and abetting conspiracy liability under Chapter 113B of title 18 [of the] United States Code."[111] However, more than simply recognizing these causes of action, JASTA exempts

> [p]ersons, entities or countries that knowingly or recklessly contribute material support or resources, directly or indirectly, to persons or organizations that pose a significant risk of committing acts of terrorism that threaten the security of nationals of the United States or the national security, foreign policy, or economy of the United States, necessarily direct their conduct at the United States, and should reasonably anticipate being brought to court in the United States to answer for such activities

from foreign sovereign immunity protection.[112] JASTA touts this expansion of the terrorism exception as providing claimants with "the broadest possible basis, consistent with the Constitution of the United States, to seek relief against persons, entities, and foreign countries . . . that engage in terrorist activities against the United States."[113]

JASTA achieves this goal by creating a new exception to the jurisdictional immunity of a foreign state. The previous terrorism exception found in 28 U.S.C. § 1605A required that a state be designated a state sponsor of terror in order to be stripped of foreign sovereign immunity.[114] The new exception to jurisdictional immunity created by JASTA, 28 U.S.C. § 1605B, includes no such limitation.[115] In addition to removing the requirement of designation as a state sponsor of terrorism, § 4(a) of JASTA also expanded the opportunities to seek relief for international terrorism by extending 18 U.S.C. § 2333 to

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111 Justice Against Sponsors of Terrorism Act of 2016, Pub. L. No. 114-222, §§ 2(a)(1), 2(a)(4), 130 Stat. 852 [hereinafter *JASTA*].
112 *JASTA* § 2(a)(6).
113 *JASTA* § 2(b).
114 28 U.S.C. § 1605A(a)(2)(A)(i)(I)–(II).
115 28 U.S.C. § 1605B.

include "any person who aids and abets, by knowingly providing substantial assistance, or who conspires with the person who committed such an act of international terrorism."[116] Together, § 1605B and the amended version of § 2333 create a new cause of action available to claimants seeking relief for international terrorism.[117]

Though JASTA creates an expansive cause of action to sue foreign states allegedly involved in terrorism, there are some mechanisms within the bill that curb this wide applicability. Section 3(a) of JASTA explicitly excludes omissions, tortious acts, and merely negligent acts as potential bases for § 1605B exceptions to foreign sovereign immunity.[118] Section 3(b) of JASTA preserves 28 U.S.C. §1605(g)(1)(A)'s provision allowing courts to stay "any request, demand, or order for discovery on the United States that the Attorney General certifies would significantly interfere with a criminal investigation or prosecution, or a national security operation."[119] Section 3(c) limits defendants in aiding and abetting suits to only officials acting outside their official capacity, representing a significant limitation on the threat JASTA poses to foreign sovereign immunity.[120] JASTA also includes an intervention provision that may severely restrict the number of cases that could continue using these newly formed causes of action. Section 5(b) of JASTA gives courts the discretion to grant a stay in a case against a foreign sovereign, at the request of the Attorney General, if the Secretary of State certifies that the United States is currently engaged in good faith negotiations with the defendant state.[121] Following the initial stay of 180 days, the court is obligated to extend the stay if the Secretary of State recertifies good faith negotiations with the foreign state.[122] JASTA does not place an upper limit on the number of stays a court is obligated to grant following certification and is silent on any standard of review for recertification.

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116 *JASTA* § 4(a). This section also contains a limiting factor that the terrorist organization that the defendant has allegedly aided or abetted be considered a Foreign Terrorist Organization under § 219 of the Immigration and Nationalist Act, 8 U.S.C. § 1189 (2012).

117 *See* Wuerth, *supra* note 3.

118 *JASTA* § 3(a).

119 28 U.S.C. § 1605(g)(1)(A).

120 *JASTA* § 3(c).

121 *JASTA* § 5(b).

122 *Id.*

B. Concerns with JASTA's Approach to Foreign Sovereign Immunity

JASTA renewed discussions surrounding foreign sovereign immunity and the roles of the judiciary and the Executive in adjudicating and enforcing such claims. Though some of these critiques and concerns are not unique to the terrorism exception and apply more generally to foreign sovereignty as a whole, the amendments introduced by JASTA highlighted and magnified these concerns.

1. *Comity and Reciprocity*

When the terrorist exception to the Foreign Sovereign Immunity Act was first codified, the Department of Justice expressed concern that other countries, specifically the Middle Eastern states that bore the brunt of this legislation's consequences, would interpret the AEDPA as extraterritorial pressure to conform to Western legal ideologies.[123] This unwelcome pressure, the Department of Justice posited, could lead other foreign sovereigns to enact mirror-image legislation that would render the United States liable for its acts abroad in the name of stopping terrorism.[124] To make matters worse, the Department of Justice argued, foreign legislatures drafting and passing these reciprocal acts would not be obligated to limit the acts in the same way that the FSIA's terrorism exception is limited.[125] It is also worth noting that, with the exception of Canada, the terrorism exception is a uniquely American mechanism for providing relief to victims of terrorism.[126]

Furthermore, this unilateral implementation of American norms and definitions of terrorism and appropriate remedies under the terrorism exception not only seems to violate the norm of international reciprocity, but the norm of comity as well. The Department of Justice described the terrorism exception as it was first legislated, as an act of American "political and cultural hegemony" that is fundamentally at odds with the concept that other nations are inherent equals with exclusive and absolute jurisdiction over their internal affairs.[127]

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123 *See* Micco, *supra* note 10, at 116.

124 *See id.*

125 *See id.* at 116–17.

126 *See* Lincoln Caylor, *Foreign States Now Liable in Canada for Terrorism and Improper Commercial Conduct*, ICC FRAUDNET, https://icc-ccs.org/talkfraud/foreign-states-now-liable-in-canada-for-terrorism-and-improper-commercial-conduct-lincoln [https://perma.cc/AKW5-8TSN] (last visited May 7, 2017).

127 Micco, *supra* note 10, at 117.

One aspect of American litigation that is particularly troublesome in the context of international comity and reciprocity is the potential for large punitive damages. This discomfort with punitive damages is especially acute in terrorism litigation. As previously mentioned, the Flatow Amendment allowed claimants using the terrorism exception to foreign sovereign immunity to seek both punitive and compensatory damages.[128] The Flatow family's case against Iran and other subsequent litigation illustrated that American courts were unlikely to shy away from awarding sizable damages to victims of international terrorism, despite the lack of acceptance of punitive damages abroad.[129] Punitive damages in general have gained significant attention and critique from European legal scholars, and these criticisms are likely to be even more pronounced in cases like *Flatow* because of the size of the awards and the controversial nature of the cause of action. By awarding such large punitive damages, the United States and its significant global military presence may risk equally large, reciprocal decisions against it from foreign courts.

Though reciprocity and comity were at the forefront of the original terrorism exception, JASTA's passage amplified these concerns. As President Obama highlighted in his veto address, the true danger of JASTA lies in its potential to "upset long-standing international principles regarding sovereign immunity, putting in place rules that, if applied globally, could have serious implications for U.S. national interests."[130] Because the United States has a uniquely large global presence, it heavily relies on foreign sovereign immunity to limit the number of lawsuits against the U.S. government.[131] Keeping this reliance

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128 *See id.* at 109.

129 Expert testimony in *Flatow* counseled that "a factor of three times its annual expenditure for terrorist activities would be the minimum amount which would affect the conduct of the Islamic Republic of Iran, and that a factor of up to ten times its annual expenditure for terrorism must be considered to constitute a serious deterrent to future terrorist activities aimed at United States nationals." *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 34 (D.D.C. 1998). The D.C. District Court also examined several broad factors before awarding $225 million in punitive damages. These factors included: "(1) the nature of the act itself, and the extent to which any civilized society would find that act repugnant; (2) the circumstances of its planning; (3) Defendants' economic status with regard to the ability of Defendants to pay; and (4) the basis upon which a Court might determine the amount of an award reasonably sufficient to deter like conduct in the future, both by the Defendants and others." *Id.* at 33.

130 Presidential Message to the Senate Returning without Approval the Justice Against Sponsors of Terrorism Act, 2016 DAILY COMP. PRES. DOC. 628 (Sept. 23, 2016).

131 *See* Cherkaoui, *supra* note 1.

in mind, some analysts argue that creating a standard that would allow for more cases against foreign sovereigns is a "huge mistake"[132] that "opens up a Pandora's box" in terms of future lawsuits.[133] Adel al-Jubeir, Saudi Arabia's foreign minister, warned that "[t]he United States is, by eroding [the sovereign immunity] principle, opening the door for other countries to take similar steps and then before you know it international order becomes governed by the law of the jungle."[134]

Even if other countries simply copied and codified the language from JASTA and did not take any liberties to further expand this exception to foreign sovereign immunity, government entities, persons, entities, organizations and affiliated groups, individuals, and the United States as a country would be vulnerable to suit.[135] This immediate reciprocity is not farfetched. Following the *Alvarez-Machain* case,[136] Iran responded by drafting a bill that enabled Iran to "to arrest anywhere Americans who take action against Iranian citizens or property anywhere in the world and bring them to Iran for trial."[137]

In a more recent example, a group called the "Arab Project" in Iraq requested that the Iraqi parliament file a lawsuit against the United States over the U.S.'s involvement in Iraq in 2003, illustrating the desire to not only litigate against the United States, but also to hold the nation responsible for its military engagements.[138]

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132 *Id.* (quoting John Kruzel, *Legal Experts Say Allowing 9/11 Families to Sue Saudi Arabia Has Consequences*, ABC NEWS (Sep. 28, 2016, 7:43 PM), http://abcnews.go.com/Politics/legal-experts-law-allowing-911-families-sue-saudia/story?id=42432568 [https://perma.cc/C4VS-6SDP]).

133 Michel Chossudovsky, *Justice Against Sponsors of Terrorism Act (JASTA): U.S. Citizens Can Now Sue Foreign Governments*, GLOBAL RES. (Oct. 13, 2016), http://www.globalresearch.ca/justice-against-sponsors-of-terrorism-act-jasta-u-s-citizens-can-now-sue-foreign-governments/5550781 [https://perma.cc/M8EL-BWDJ].

134 *Saudi Arabia Lobbies to Amend JASTA Law Which Allows 9/11 Victims to Sue the Gulf State*, RT (Dec. 19, 2016 7:25) (alteration in original), https://www.rt.com/usa/370708-saudi-jasta-terrorism-change/ [https://perma.cc/52W3-Z73C].

135 *See id.*

136 *See* Alvarez-Machain v. United States, 96 F.3d 1246 (9th Cir. 1996), *amended and superseded by*, 107 F.3d 696 (9th Cir. 1996).

137 Micco, *supra* note 10, at 144 (quoting Mark S. Zaid, *Military Might Versus Sovereign Right: The Kidnapping of Dr. Humberto Alvarez-Machain and the Resulting Fallout*, 19 HOUS. J. INT'L L. 829, 850 (1997)).

138 *See* Joshua Claybourn, *Suing the Saudis Would Be a Mistake*, AM. SPECTATOR (Nov. 4, 2016, 3:11 AM), https://spectator.org/suing-the-saudis-would-be-a-mistake/ [https://perma.cc/7VMJ-VSU3].

Recent events in Turkey present a potential future issue arising out of reciprocity in foreign sovereign immunity. Turkey's President Recep Tayyip Erdogan believes the United States harbored a rebellious cleric that helped precipitate Turkey's recent attempted coup.[139] Under principles of reciprocity, President Erdogan and the Turkish legislature would be justified in introducing legislation similar to JASTA that would hold the United States liable for the damages caused by the attempted coup.[140] Similar to the potential Turkish suit against the United States, if foreign countries followed the norm of reciprocity, JASTA becomes particularly dangerous because it "opens up government agencies to court-ordered discovery."[141]

On the other hand, proponents of this bill like Senator Cornyn defend JASTA by emphasizing that "JASTA is not a departure from our long-standing approach to sovereign immunity; it just fixes the loophole."[142] Despite these protests, it is clear that the Saudi Arabian government did not view JASTA as consistent with international law, but instead referred to the act as an "erosion of sovereign immunity" that would "have a negative impact on all nations, including the United States."[143] Former State Department Legal Adviser John B. Bellinger III stated that by departing from these norms of presumed foreign sovereignty, Congress was "playing with fire" and that "[w]hen we ourselves begin to chip away at sovereign immunity . . . it does encourage other countries to chip away at sovereign immunity."[144] "[B]ecause the U.S. government takes rules very seriously," amended legislation that allows for suits against the U.S. government would likely be strictly followed, creating a situation where JASTA would have a larger impact on the U.S. sovereign than the Saudi Arabian government.[145]

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139 *See id.*

140 *See id.*

141 Eilperin & Demirjian, *supra* note 1.

142 *See* Cherkaoui, *supra* note 1 (quoting John Cornyn & Terry Strada, Opinion, *No Remorse for Passing the Needed Jasta Act*, WALL STREET J. (Oct. 9, 2016, 1:40 PM), https://www.wsj.com/articles/no-remorse-for-passing-the-needed-jasta-act-1476034833 [https://perma.cc/QX67-NXE3]).

143 Mark Mazzetti, *Claims of Saudi Role in 9/11 Appear Headed for Manhattan Court*, N.Y. TIMES (Sept. 29, 2016), https://www.nytimes.com/2016/09/30/us/saudi-arabia-9-11-legal-battle.html [https://perma.cc/SB38-5TQN].

144 Eilperin & Demirjian, *supra* note 1 (alteration in original).

145 *Id.*

2. *Separation of Powers*

Perhaps one of the most pressing concerns surrounding the terrorism exception and foreign sovereign immunity generally (and JASTA specifically) is the disruption of the Constitution's separation of powers between the three branches of the federal government. Separation of powers and the proper balance between the branches is usually discussed in reference to three specific issues: (1) when there is a "constitutional commitment of an issue to the political branches for resolution;" (2) when there is no manageable judicial standard available to address the issue; and (3) when the need for a unified position from the federal government is imperative.[146] In the case of JASTA and the proper scope of foreign sovereign immunity, only the third issue is in serious jeopardy.

a. *Formalism: Article I and Article II Powers*

The formalist argument, that the Constitution textually removes foreign sovereign immunity from the Judiciary's power or Congress's ability to legislate, is relatively weak. The Constitution grants affirmative foreign affairs powers to both the Legislature and the Executive, but by no means provides an exhaustive list of capabilities or responsibilities.[147] This "invitation to struggle for the privilege of directing American foreign policy" has sparked intense debates about each branch's power.[148]

Article I of the Constitution allocates the powers to "regulate Commerce with foreign nations," "declare war," "raise and support Armies," "provide and maintain a Navy," and "make rules for the Government and Regulation of the land and naval forces" to Congress.[149] The Senate is also involved in ratifying treaties and consenting to diplomatic appointments.[150] Additionally, the Constitution grants Congress the power to make any laws that are "necessary and proper" to execute its other powers, which may arguably include legislation like JASTA.[151]

The Constitution in turn designates the President as the Commander-in-Chief of the army and navy, and allocates to

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146 Connors, *supra* note 21, at 222.

147 Jonathan Masters, *U.S. Foreign Policy Powers: Congress and the President*, COUNCIL ON FOREIGN REL. (Mar. 2, 2017), http://www.cfr.org/united-states/us-foreign-policy-powers-congress-president/p38889 [https://perma.cc/2PQA-7M9A].

148 *Id.* (quoting another source).

149 U.S. CONST. art. I § 8.

150 *See id.*

151 *Id.*

the Executive the power to appoint ambassadors and enter into treaties in Article II.[152] This exclusive power to appoint and receive ambassadors has been historically implied to include the authority to recognize foreign governments and conduct diplomatic correspondence with other countries generally.[153]

However, because neither Article I nor Article II explicitly delegates exclusive power over foreign policy or foreign sovereign immunity to either branch, a formalist argument that JASTA's allocation of power between the branches violates the Constitution is not compelling. Furthermore, the history of foreign sovereign immunity in the United States also weighs against a formalist rejection of JASTA. Starting with the codification of restricted foreign sovereign immunity in the Foreign Sovereign Immunity Act of 1976, legislative intervention in this realm of foreign policy has been relatively common and even viewed as a desirable form of cooperation between the branches.[154] The numerous subsequent amendments to the legislation and judicial decisions further suggest that this is an area of law in which Congress and the courts have been and will likely remain involved.

b. *Functionalism: The Judiciary's Role under JASTA*

Therefore, any opposition to JASTA from a separation of powers point of view would be better supported by a functionalist approach. Some critics of the terrorism exception and JASTA's expansion of jurisdiction argue that these laws "assign[] a task to U.S. federal courts for which they are ill-suited."[155] Jack Goldsmith, former General Counsel of the Department of Defense, described JASTA's allocation of control over foreign sovereign immunity to United States federal courts as "an awkward place to ascertain Saudi responsibility for 9/11," especially for the President who will have to address any potential diplomatic fall out.[156] This critique of the federal courts as "awkward" in the context of foreign sovereign immunity seems to be affirmed by the courts' own behavior. United States federal courts have developed a number of standards such as ripeness, mootness, standing, and technical definitions of "case or controversy" to avoid ruling on certain

152 U.S. CONST. art. II, § 2.
153 *See* Masters, *supra* note 147.
154 *See* Danica Curavic, *Compensating Victims of Terrorism or Frustrating Cultural Diplomacy? The Unintended Consequences of the Foreign Sovereign Immunities Act's Terrorism Provisions*, 43 CORNELL INT'L L.J. 381, 393 (2010).
155 *See* Cherkaoui, *supra* note 1 (citing Nanos, *supra* note 7).
156 *Id.* (citing Nanos, *supra* note 7).

cases.[157] Though there are benefits to careful consideration of jurisdiction, U.S. federal courts seem to employ these standards with particular frequency in cases involving foreign affairs.[158] This reluctance and discomfort on the courts' part seems to reflect the undesirability of JASTA's allocation of power between the branches of government.

The role of federal courts in deciding foreign sovereign immunity under JASTA piques fears that the United States will no longer be able to present a cohesive foreign policy program, but will instead be left with a "a patchwork of different courts reaching different conclusions about individual foreign governments."[159] This concern about the proper role of the judiciary did not go unnoticed, even by those who voted in favor of JASTA. Despite having voted in favor of JASTA, Senator Bob Corker admitted that the new bill effectively "export[ed] . . . foreign policy to trial lawyers."[160] Though this concern about the overinvolvement of the Judiciary in foreign sovereign immunity cases is implicated by the original terrorism exception, JASTA increases the frequency and likelihood of this troubling scenario arising.[161] Proponents of JASTA and an empowered judiciary may also argue that this new legislation merely codifies a common law grant of authorities courts have been making use of for years and therefore presents no new separation of powers concerns.[162] It may also be tempting to place significant power in the judiciary because "only courts and bureaucrats" (in contrast to the Legislature and the Executive) "have longer time horizons."[163] However, U.S. federal courts are staffed by generalists with specific jurisdiction, not experts

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157 Louis Henkin, *Foreign Affairs and the Constitution*, 66 FOREIGN AFF. 284, 285 (1987).

158 *Id.*

159 Claybourn, *supra* note 138. As Yishai Schwartz notes in his review of Nitsana Darshan-Leitner and Samuel Katz's recent book, "[e]ach lawsuit that seeks to move the war on terror into the civil courts deals an additional blow to the possibility of a coherent foreign policy." Yishai Schwartz, *Following the Money*, LAWFARE (Jan. 18, 2018, 2:00 PM), https://www.lawfareblog.com/following-money [https://perma.cc/D7A6-5VND].

160 *Enter the Lawyers*, ECONOMIST (Sept. 29, 2016), http://www.economist.com/news/united-states/21707931-presidents-veto-ringingly-overturned-congress-enter-lawyers [https://perma.cc/F4KH-H5TL].

161 *See* James E. Berger & Charlene C. Sun, *JASTA Amendments to FSIA Become Law*, JDSUPRA (Oct. 11, 2016), https://www.jdsupra.com/legalnews/jasta-amendments-to-fsia-become-law-81257/ [https://perma.cc/C9X8-PK7Y] (referring to the increase in the litigation as "[t]he most likely consequence of JASTA's adoption in the immediate term").

162 *See* Wuerth, *supra* note 3.

163 Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2345 (2006).

well-versed in international relations, terrorism, or national security.[164]

Similarly, proponents of a large judiciary role in foreign sovereign immunity may argue courts are "more constrained by legal factors and less likely to base their decisions on political factors" when they have adequate doctrinal guidance.[165] However, empirical studies supporting the independence and stability of the judicial system have not been able to definitively declare the judiciary's decision-making process apolitical.[166] Furthermore, JASTA's creation of a new cause of action, § 1605B, and the emotionally charged nature of claims brought by victims of the 9/11 attacks are likely to vitiate any doctrinal rigidity courts generally enjoy.[167] Likewise, in contrast to other areas of foreign sovereign immunity like the commercial activity exception, concepts like "aiding and abetting" and "material support" in relation to international terrorism are even more poorly defined and doctrinally undeveloped.

c. *Functionalism: Legislative Intervention in Foreign Sovereign Immunity through JASTA*

JASTA's expansion of foreign sovereign immunity also represents a significant use of congressional power to influence foreign affairs. Congress's historical involvement in foreign sovereign immunity doctrine suggests that this role, if not constitutionally contemplated, is at least widely accepted. However, despite the supporting precedents for congressional involvement in foreign sovereign immunity, the legislative process surrounding JASTA specifically illustrates why this addition to the terrorism exception is particularly dangerous and demonstrative of Congress's functional difficulties addressing these issues.

First, in stark contrast to the judiciary, Congress and its members have remarkably short time horizons. Congressional patterns of productivity suggest that a looming election has a

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164 *See id.*

165 Adam S. Chilton & Christopher A. Whytock, *Foreign Sovereign Immunity and Comparative Institutional Competence*, 163 U. PA. L. REV. 411, 459 (2015).

166 *Id.* This empirical study found that for decisions concerning the commercial activity exception to foreign sovereign immunity, judges were more legally constrained and political factors were particularly unimportant in these decisions. The authors credit the well-developed legal doctrine surrounding the commercial activity exception as an explanation for this constraint. The authors also found that courts were more likely to grant immunity to "wealthy, democratic allies" than other nations, and when the United States government was a plaintiff. *Id.* at 465; *see id.* at 420.

167 *See id.* at 477–78.

significant impact on which legislation becomes law.[168] Though congresspeople tend to introduce fewer bills during election years, the number of bills that pass Congress actually increases, suggesting a pressure to appear productive, competent, and active in the lead-up to an election.[169] The pressures of an election year may push Congress to pass legislation it is either afraid to deny or is not fully informed about. In the case of JASTA, Congress was "not at its bravest weeks before a general election"[170] and feared being "perceived as voting against 9/11 families right before an election."[171] Senator Corker, a member of the Senate Foreign Relations Committee who voted in favor of the veto override to pass JASTA, said shortly after JASTA became law that he "wish[es] we had all focused on this a little bit more, earlier," and expressed concern that lawmakers did not adequately scrutinize the details ahead of time.[172] Senator Lindsey Graham similarly expressed a conflicted mentality about JASTA, saying that though he is "for the 9/11 families having their day in court," he also clarified he was "for not exposing our people unnecessarily" and warned that lawmakers should "be careful what [they] wish for."[173] Similarly, Senate Majority Leader Mitch McConnell admitted that while everyone was aware of who stood to benefit from JASTA, "nobody had really focused on the potential downsides in terms of our international relationships."[174]

This immediate expression of remorse or regret from legislators prompted critics of Congress to label the veto override to

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168 *See* Christopher Ingraham, *Believe It or Not, Congress Gets More Done in Election Years*, WASH. POST: WONKBLOG (May 1, 2014), https://www.washingtonpost.com/news/wonk/wp/2014/05/01/believe-it-or-not-congress-gets-more-done-in-election-years/?utm_term=.9e06b5a694e2 [https://perma.cc/U3VY-BQM6].

169 *See id.* Overall, Congress has been passing fewer and fewer bills over time, but in every congressional term since 1947, Congress has passed more bills during the second year of the term than the first. *Id.*

170 *Supra* note 160.

171 Cherkaoui, *supra* note 1.

172 Eilperin & Demirjian, *supra* note 1.

173 *Id.* A good example of the rhetoric senators were faced with when voting for the veto override of JASTA can be found in the *New York Times*. Mindy Kleinberg, whose husband was a victim of 9/11, expressed her support for JASTA by saying that "[i]t's stunning to think that our government would back the Saudis over its own citizens." Sentiments like these that seem to pit the executive against victims of terrorism are exactly what many senators hoped to avoid by passing JASTA. Mazzetti, *supra* note 9.

174 Cherkaoui, *supra* note 1; Adam Brown, *Senators McCain and Graham Propose Amendment to JASTA*, MOROCCO WORLD NEWS (Dec. 1, 2016), https://www.moroccoworldnews.com/2016/12/202745/senators-mccain-graham-propose-amendment-jasta/ [https://perma.cc/UK5K-GDXP].

pass JASTA "a mistake," "pathetic," "embarrassing," and "mob legislating."[175] These critiques are indicative of Congress's short-term thinking, but also of its lack of expertise on the issue. Following the passage of JASTA, President Obama spoke at a town hall hosted by the media outlet CNN, attacking JASTA as a congressional failure to do "what's hard" and arguing that the true danger of JASTA was its removal of national security and foreign policy experts from the discussion of foreign sovereign immunity.[176] President Obama conceded that he "understood why" JASTA passed—"All of us still carry the scars and trauma of 9/11," he explained—but he expressed disappointment in Congress for not taking the harder route, suggesting JASTA was more of a lay approach to foreign sovereign immunity than a fully-informed, expert approach.[177] Though proponents of legislative involvement in foreign sovereign immunity may argue that this lay approach is precisely what makes Congress the right actor to make changes to foreign sovereign immunity,[178] others have expressed concern that Congress is "playing with fire here, even if for a laudable purpose."[179]

Furthermore, the Legislature's lack of confidence in its own ability and expertise in foreign affairs is also manifested by the Legislature's constant willingness to give power back to the Executive Branch or ratify executive decisions after action has been taken.[180] Similar to the Treasury Appropriations Act, JASTA also contains a provision that invites the Executive Branch to intervene, if necessary, through the State Department and Attorney General,[181] which could serve as a means of removing congressional power to modify foreign sovereign immunity.

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175 Cherkaoui, *supra* note 1 (first quoting Editorial, *Mob Legislating by Congress*, WASH. POST (Oct. 1, 2016), https://www.washingtonpost.com/opinions/mob-legislating-by-congress/2016/10/01/ac557a06-8754-11e6-ac72-a29979381495_story.html?utm_term=.c4297c83d902 [https://perma.cc/63SX-PWVX]; then quoting Kruzel, *supra* note 132); Eilperin & Demirjian, *supra* note 1.

176 Cherkaoui, *supra* note 1 (quoting Seung Min Kim, *Congress Disses Obama One Last Time*, POLITICO (Sept. 28, 2016), https://www.politico.com/story/2016/09/obama-congress-veto-override-228869 [https://perma.cc/KY2T-H744]).

177 Eilperin & Demirjian, *supra* note 1.

178 Chuck Schumer, one of the sponsors of JASTA, accused the Executive Branch of being "far more interested in diplomatic considerations," in contrast to the legislators who are "more interested in the families and in justice," and declared the administration "just dead wrong on this issue." Cherkaoui, *supra* note 1 (quoting Kim, *supra* note 176).

179 Eilperin & Demirjian, *supra* note 1.

180 *See* Henkin, *supra* note 157, at 292.

181 *JASTA* § 5(b).

Third, significant congressional interventions in foreign sovereign immunity may not be a desirable separation of powers between the three branches of government because of the bureaucratic limitations Congress faces. Though divided government is "baked into our constitutional structure," it also shares a direct relationship with gridlock and legislative inaction.[182] By the time Congress passed JASTA in 2016, some form of this legislation had been in the making for over a decade, illustrating Congress's slow pace and difficulty in responding swiftly to even the most sympathetic appeals from constituents.

However, now that JASTA has become law, Congress's ability to amend the legislation's flaws and loopholes may become particularly salient. The day JASTA became law, Representatives Darrell Issa and Juan Vargas introduced the Safeguarding America's Armed Forces and Effectiveness Act (SAAFE) as an amendment to JASTA that would limit JASTA's application to only those claims arising out of the 9/11 attacks.[183] However, the bill has made no subsequent progress. Similarly, on November 30, 2016, Senators John McCain and Lindsey Graham also proposed amendments to JASTA that would narrow its reach.[184] This proposed amendment focused on adding an intent element to JASTA's exception, and Senator Graham was careful to emphasize that he did not "want any nation state, including ours, to be sued for a discretionary act unless that discretionary act encompasses knowingly engaging in the financing or sponsorship of terrorism whether directly or indirectly."[185]

Though the 115th Congress started its term with more productivity than in recent years,[186] distractions such as multiple healthcare votes,[187] protracted nomination proceed-

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182 Josh Chafetz, *The Phenomenology of Gridlock*, 88 NOTRE DAME L. REV. 2065, 2076–77 (2013).

183 Safeguarding America's Armed Forces and Effectiveness Act, H.R. 6223, 114th Cong. (2016).

184 *See* Brown, *supra* note 174.

185 *Id.*

186 Philip Bump, *Trump's First Congress Is Off to a Faster-Than-Normal Slow Start*, WASH. POST (Mar. 21, 2017), https://www.washingtonpost.com/news/politics/wp/2017/03/21/trumps-first-congress-is-off-to-a-faster-than-normal-slow-start/?utm_term=.ff1206c07178 [https://perma.cc/S8XD-6KPK].

187 Leigh Anne Caldwell, *Obamacare Repeal Fails: Three GOP Senators Rebel in 49-51 Vote*, NBC NEWS (Jul. 28, 2017), https://www.nbcnews.com/politics/congress/senate-gop-effort-repeal-obamacare-fails-n787311 [https://perma.cc/QJX8-TQMM].

ings,[188] and congressional investigations[189] may keep JASTA in the background for some time. As of January 2018, the 115th Congress had enacted just ninety-seven laws, which was the fourth fewest for the first calendar year of a congressional session in thirty years, leaving little hope that Congress will be able to amend JASTA in the near future.[190]

d. *The Diminished Executive Role under JASTA*

As President Obama lamented, JASTA reduces the Executive's ability to make decisions regarding foreign sovereign immunity.[191] Though the gradual reduction in the Executive's control over foreign sovereign immunity arguably started with the codification of restricted foreign sovereign immunity in the Foreign Sovereign Immunities Act of 1976, JASTA presents separation of powers concerns much larger than that codification. As he vetoed JASTA, President Obama declared that JASTA "would neither protect Americans from terrorist attacks nor improve the effectiveness of our response to such attacks" because it marginalized the role of the Executive Branch's experts.[192] JASTA, according to President Obama, inhibits the federal government's ability to coordinate a "response that considers the wide range of important and effective tools available."[193]

JASTA trades the variety of tools available to the Executive for a mechanical and poorly articulated judicial instrument, thereby removing power from the branch best suited to address foreign affairs concerns like international terrorism. Some analysts may fear an Executive with ever-growing power,[194] but allowing further infringement on foreign sovereign immu-

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188 Tamara Keith, *Despite Recent Additions, Trump Cabinet Still Emptier Than Predecessors'*, NPR NEWS (Feb. 9, 2017, 11:46 AM ET), http://www.npr.org/2017/02/09/513926267/despite-recent-additions-trump-cabinet-still-emptier-than-predecessors [https://perma.cc/K6GP-C4K4].

189 Nicholas Fandos, *Despite Mueller's Push, House Republicans Declare No Evidence of Collusion*, N.Y. TIMES (Mar. 12, 2018), https://www.nytimes.com/2018/03/12/us/politics/house-intelligence-trump-russia.html [https://perma.cc/CV4G-CXCN].

190 Drew DeSilver, *Despite GOP Control of Congress and White House, Lawmaking Lagged in 2017*, PEW RES. CTR. (Jan. 11, 2018), http://www.pewresearch.org/fact-tank/2018/01/11/despite-gop-control-of-congress-and-white-house-lawmaking-lagged-in-2017/ [https://perma.cc/J3BW-6HZK].

191 *See* Presidential Message to the Senate Returning Without Approval the Justice Against Sponsors of Terrorism Act, 2016 DAILY COMP. PRES. DOC. 628 (Sept. 23, 2016).

192 *Id.*

193 *Id.*

194 *See* Katyal, *supra* note 163, at 2316.

nity is not the proper mechanism for reigning in the Executive. The Executive is arguably best functionally suited to address foreign sovereign immunity for alleged state sponsors of terrorism because of the flexibility the branch enjoys. Unlike the judiciary and the Legislature, which can only act through judicial opinions, statutes, and formal acts, the President has the power and infrastructure to act quickly, informally, discreetly, and secretly, all of which create a more nuanced, effective, and cautious response to issues like terrorism and foreign sovereign immunity.[195] Because "only the President has the ability to effect comprehensive, coherent change in administrative policymaking," legislation that removes power from the Executive Branch should be viewed with a skeptical eye for its functional impacts.[196] In contrast, JASTA's scheme of foreign sovereign immunity allows private plaintiffs to "enlist the courts in pursuit of a personalized foreign policy."[197]

Criticism of the original terrorism exception included concerns that attachment provisions "seriously weaken" the President's ability to control national security and that such legislation would hinder the Executive's ability to normalize relations with state sponsors of terrorism.[198] JASTA exacerbates these separation-of-powers problems by forcing the Executive to soothe and normalize relationships that had been progressing smoothly under the assumption of foreign sovereign immunity. Despite having previously enjoyed amicable and mutually beneficial relationships with Saudi Arabia and Turkey, the U.S. federal government must now attempt to allay fears of constant litigation in the judicial branch. Furthermore, JASTA will also have a negative effect on other processes within the Executive Branch. By connecting the State Department's list of Foreign Terror Organizations (FTOs) to an exception for foreign sovereign immunity, JASTA complicates the Executive Branch's decision to designate an organization an FTO. This shifts the Executive's decision-making power from determining which states are designated as a sponsor of terror to determining which organizations should be listed as FTOs. Though this shift may appear subtle, the changes proposed by JASTA re-

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195 *See* Henkin, *supra* note 157, at 291.

196 Katyal, *supra* note 164, at 2318 (quoting Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2341 (2001)).

197 Schwartz, *supra* note 159.

198 Kim, *supra* note 31, at 526 (quoting *Victims' Access to Terrorist Assets: Hearing on Amendments to the Foreign Sovereign Immunities Act Before the Senate Comm. on the Judiciary*, 106th Cong. (1999) (prepared statement of Stuart E. Eizenstat, Deputy Secretary, Department of the Treasury)).

present a serious burden on the Executive because they require that the State Department consider the implications for foreign sovereign immunity when compiling its list of FTOs, and will likely ultimately have a chilling effect on the number of organizations designated as FTOs in an attempt to preserve foreign sovereign immunities.[199]

The President's access to a highly sophisticated and accurate intelligence mechanism allows the Executive Branch to make the hard decisions President Obama feared that Congress shied away from when Congress passed JASTA. Though the judiciary has fact-finding mechanisms and the ability to compel discovery, cooperation, and testimony, and Congress can oversee some aspects of the political process through fragmented committees, the Executive enjoys unique and unified "real-time access to the full range of inputs necessary for integrating intelligence collection practices into a national strategy."[200] The Executive's ability to conduct both monetary and strategic cost-benefit analysis points in favor of affording the Executive and its designations of which countries qualify as state sponsors of terrorism substantial deference, rather than legislating around this designation as JASTA does.[201]

3. *Political Motivations and Questions*

Related to the issue of removing power from the Executive through legislation is the concern that bills and acts like JASTA are transparently politically motivated. The State Department's decision to designate a state as a sponsor of terror is already an inherently political decision that undoubtedly has important foreign relations consequences. To unmoor foreign

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199 This chilling effect has important political ramifications. Designating an organization as a Foreign Terror Organization (FTO) under § 219 of the Immigration and Nationality Act requires that the group's actions "threatens the security of United States nationals or the national security [(national defense, foreign relations, or economic interests)] of the United States." 8 U.S.C. § 1189(a)(1) (2012). This designation is significant because it criminalizes providing material support to an FTO, allows for the deportation of any FTO representatives or members, and requires U.S. financial institutions with funds associated with an FTO to retain possession of the assets and file a report with the U.S. treasury. Furthermore, designating a group as an FTO has important normative and international consequences because it stigmatizes the group; deters donations and financial support; raises public awareness and knowledge about the FTO; and signals to other governments that the United States is concerned about the FTO and its potential negative impact on national security. *See Foreign Terror Organizations*, U.S. DEP'T OF STATE, https://www.state.gov/j/ct/rls/other/des/123085.htm [https://perma.cc/S3E6-2642] (last visited May 7, 2017).

200 Samuel J. Rascoff, *Presidential Intelligence*, 129 HARV. L. REV. 633, 679 (2016).

201 *See id.* at 677.

sovereign immunity from this designation only serves to further politicize the process of suing a foreign sovereign based on alleged acts of terrorism. At no point has Saudi Arabia been listed on the State Department's list of state sponsors of terror,[202] likely reflecting a judgment of the Executive that such a designation would not benefit the United States' foreign relations.[203] Furthermore, the 9/11 Commission, charged with "prepar[ing] a full and complete account of the circumstances surrounding the September 11 attacks,"[204] found no evidence that the attacks on the World Trade Center and Pentagon were sponsored, funded, or supported by the Saudi Arabian government.[205] Allowing an estimated 9,000 claimants to file suits against the Saudi Arabian government under the terrorism exception, based on facts like the attackers' nationality, can only serve to inject domestic politics into bilateral international relationships.[206]

Furthermore, the events leading up to and following the veto override to pass JASTA reveal the consequences of putting foreign sovereign immunity to a vote by a legislative body. The Saudi Arabian government paid millions of dollars to lobby against JASTA, perhaps explaining its later threats to remove its significant assets from American holdings.[207] Following the veto override, the Senate also voted on a measure to restrict arms sales to Saudi Arabia in an attempt to compel the Saudi Arabian government to stop its abuses in Yemen. Though the measure was tabled by a 71–27 vote, these events coalesced

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202 *See supra* note 82.

203 For an analysis of the Obama Doctrine, see Samuel Oakford & Peter Salisbury, *Yemen: The Graveyard of the Obama Doctrine,* ATLANTIC (Sept. 23, 2016), https://www.theatlantic.com/international/archive/2016/09/yemen-saudi-arabia-obama-riyadh/501365/ [https://perma.cc/9XN2-8MWG] ("Earlier this year, *The Atlantic*'s Jeffrey Goldberg published 'The Obama Doctrine,' in which the president described a Middle East populated by unreliable 'free-rider' allies constantly drawing the United States into their petty rivalries, fueled by avarice, tribalism, and sectarianism. Key among those free riders were the Sunni Arab states of the Gulf, Goldberg wrote. The Saudis, along with the Iranians, Obama said, 'need to find an effective way to share the neighborhood.' Yet despite the Obama White House's misgivings about Saudi Arabia, it backed its campaign in Yemen, enabling perhaps the chief free-rider's war."). *See also* Farid Farid, *Obama's Administration Sold More Weapons Than Any Other Since World War II,* VICE: MOTHERBOARD (Jan. 3, 2017, 1:31 PM), https://motherboard.vice.com/en_us/article/obamas-administration-sold-more-weapons-than-any-other-since-world-war-ii [https://perma.cc/HN99-ESRH] (describing the Obama administration's arm sales).

204 FAIZULLAH JAN, THE MUSLIM EXTREMIST DISCOURSE: CONSTRUCTING US VERSUS THEM 53 (2015).

205 *See* Mazzetti, *supra* note 143.

206 *See id.*

207 *See id.*

into an anti-Saudi Arabian sentiment emanating from the Legislature, despite the Executive Branch's relatively peaceful relationship with the country.[208] These circumstances may also give rise to some constitutional concerns by potentially contravening the prohibition against state bills of attainder and *ex post facto* laws.[209] It does, however, appear that Congress has the constitutional power to create such legislation when it does so with a very narrow focus.[210] Whether it is politically wise or efficient for Congress to use the full extent of its power remains uncertain.

In the same vein, though the legislative history of JASTA shows that the purpose of the Act is to provide victims of the 9/11 attacks with a means to sue the Saudi Arabian Government, there is no such limiting language present in the Act.[211] Though Congress and the American people may favor allowing suits against the Saudi Arabian government to move forward, in the case of other countries and sovereigns, consensus may not be so clear. Additionally, instead of categorically forbidding suits against American allies like France, Israel, and Turkey,[212] JASTA allows private litigants and courts to act as "private secretar[ies] of state" and file any suit they choose without regard to its effect on foreign relations.[213]

4. *Enforcement*

The Justice Against Sponsors of Terrorism Act allows for many more suits against foreign sovereigns by expanding both the classes of eligible claimants and defendants. However, JASTA does not provide a proportionate expansion of enforcement mechanisms of judgments against foreign sovereigns. As

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208 *See* Eilperin & Demirjian, *supra* note 1.

209 *See* David F. Forte, *The Heritage Guide to the Constitution: State Bill of Attainder and State Ex Post Facto*, HERITAGE FOUND. http://www.heritage.org/constitution/#!/articles/1/essays/71/state-bill-of-attainder-and-state-ex-post-facto [https://perma.cc/L3EU-BLJ3] (last visited July 23, 2017).

210 In *Bank Markazi v. Peterson*, the Supreme Court held that Congress did not violate the constitutional separation of powers by passing the Iran Threat Reduction and Syria Human Rights Act of 2012, which was outcome determinative and addressed a single, specific case of post-judgment attachment for a case won under the § 1605A terrorism exception. *See* Bank Markazi v. Peterson, 136 S. Ct. 1310 (2016). Despite protests from Iran's central bank that the legislation violated the separation of powers, the Supreme Court held that "Congress acted comfortably within the political branches' authority over foreign sovereign immunity and foreign-state assets." *Id.* at 1329.

211 *See* Chossudovsky, *supra* note 133.

212 *See id.*

213 Kim, *supra* note 31, at 525 (alteration in original) (quoting Roger Parloff, *Deep Freezing Terror's Assets*, AM. LAW., June 2002).

discussed above, enforcement is a significant obstacle in all claims under the FSIA, but enforcement and collection become a much larger issue in cases of terrorism, and all but impossible under JASTA's new cause of action.

The difficulties of enforcing judgments brought under § 1605A prompted a series of legislative reforms detailed above. Section 1610 of the U.S. Code, which discusses exceptions to the immunity from attachment or execution, contains a number of express references to the older terrorism exception to the FSIA. Sections 1610(a)(7), 1610(b), 1610(f), and 1610(g) all explicitly address enforcement of judgments won using § 1605A.[214] However, JASTA made no amendments to § 1610, therefore leaving it unclear to observers, courts, claimants, and defendants if these extra mechanisms were meant to apply to § 1605B's new cause of action. Without the added means of enforcement that cases brought under § 1605A enjoy, it is doubtful that JASTA cases will be enforced at a higher or even comparable rate as previous cases for international terrorism.[215]

Furthermore, because JASTA does not significantly alter the enforcement and attachment framework to satisfy judgments against foreign sovereigns but does increase the number of foreign states vulnerable to suit, the simpler solution for defendants may be to never bring or keep assets within U.S. jurisdiction. Upon passage of JASTA, the Saudi Arabian government immediately threatened to remove its assets from the United States as a means of avoiding collection for future litigation.[216] Though some analysts alleged that Saudi officials exaggerated its holdings in U.S. debt and would ultimately have difficulty following through with these threats, this remains a viable option as a means of avoiding enforcement in the future if JASTA is not amended.[217]

CONCLUSION AND OTHER POSSIBLE SOLUTIONS

In January 2018, Saudi Arabia requested that a U.S. judge in the Southern District of New York dismiss the lawsuit pend-

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214 *See* 28 U.S.C. §§ 1610(a)(7), (b), (f), (g) (2012). For an argument that courts should read § 1610(g) as creating a free-standing exception for terrorism-related cases, see Alyssa N. Speichert, *The Persepolis Complex: A Case for Making the Collections Process Easier Under Section 1610(g) of the Foreign Sovereign Immunities Act for Victims of Foreign State-Sponsored Terrorism*, 2017 MICH. ST. L. REV. 547, 579–85 (2017).

215 *See* Wuerth, *supra* note 3.

216 *See supra* note 9 and accompanying text.

217 *See id.*

ing against the country for allegedly helping al-Qaeda carry out the September 11 attacks.[218] These allegations may be sufficient to move the case forward under JASTA, but, in asking for dismissal, Saudi Arabia's lawyer emphasized that the FBI, CIA, and 9/11 Commission independently failed to find involvement by Saudi Arabia in the attacks and that "conclusions, speculation, [and] hearsay are not enough" to sustain a cause of action.[219] The expansions to the FSIA's terrorism exception in JASTA implicate serious concerns about comity and reciprocity, the separation of powers, and political questions. While this decision is pending, it is clear that JASTA calls into question the role of foreign sovereign immunity and how it will be managed in times of international turbulence and violence committed by non-state actors. It remains to be seen whether the United States will face a backlash of reciprocal litigation, but early indications show that the passage of JASTA did not go unnoticed in the international community.

The shortcomings of JASTA and the FSIA's terrorism exception need not be accepted as inevitable or incurable. Though such a large addition to the exceptions to foreign sovereign immunity may present the simplest solution for addressing human rights violations, these legislative acts are by no means the only solution. Creating a mechanism that would give the Legislature more oversight over the Executive's decisions regarding the necessity of foreign sovereign immunity would likely appeal to each branch's institutional competency. Allowing the Executive to act first on issues of foreign affairs is desirable because of its access to information and flexibility. However, this power does not need to go unchecked. The Legislature's ability to conduct investigations, make recommendations, and draft bills that enable enforcement and to express the needs of constituents should also not be overlooked. If the U.S. Congress wants to provide victims of terrorism with greater recourse in American courts, changing the enforcement mechanisms available in terrorism-exception cases would present a much simpler and safer solution than allowing for countries like Saudi Arabia to be sued in the United States.

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218 Bob Van Voris, *Saudi Arabia Claims No Evidence It Aided 9/11 Plot*, BLOOMBERG (Jan. 18, 2018, 12:06 PM EST), https://www.bloomberg.com/news/articles/2018-01-18/saudi-arabia-tells-judge-there-s-no-evidence-it-aided-9-11-plot [https://perma.cc/WAD5-3ZCV].

219 *Id.*