“The Justice Against Sponsors of Terrorism Act”

Hearing Before the House Judiciary Committee,
Subcommittee on the Constitution and Civil Justice

July 14, 2016

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Thank you Mr. Chairman and Ranking Member Cohen for this opportunity to address S. 2040, the Justice Against Sponsors of Terrorism Act – or "JASTA." I am a partner in the law firm Sidley Austin LLP with a practice focusing on constitutional law, administrative law, and national security matters. I served as Senior Associate Counsel and Special Assistant to President George W. Bush, as the Legal Adviser on the staff of the National Security Council, and, much earlier, as a law clerk to Justice Sandra Day O'Connor. Although I represent certain of the victims of the attacks of September 11, 2001in asserting their claims against particular foreign states and other facilitators of terrorism, claims that JASTA would assist, my comments are directed generally toward the broader benefits and operation of this important legislation.

JASTA modernizes and addresses gaps in the Foreign Sovereign Immunities Act's treatment of claims in U.S. courts directed against terrorism striking the United States and facilitated by officials and agents of foreign states. As we have painfully learned in this century, terrorist attacks are often the tragic conclusion of a course of conduct that originates abroad and ends in the United States. We also have learned that officials and agents of various foreign states have a broad range of dealings with terrorist organizations with international capabilities and deeply held hostility to the United States and Americans. With or without the support of the highest officials of various states in the Middle East, South and Central Asia, and portions of Southeast Asia and Northern Africa, lesser officials and agents of these foreign states have, at

times, facilitated the development or directly assisted the terrorist activities of some of the world's most dangerous terrorist organizations. This phenomenon is not entirely new: since the 1970s, courts have entertained claims directed against efforts by foreign governments as different as Chile and the Republic of China to harm persons in the United States, often dissidents or expatriates seeking refuge here. Even so, the multitude of state-affiliated persons and entities supporting terrorist organizations, and the scale of the damage those organizations seek to cause here, are far different and require a far more robust response.

Even as these threats associated with foreign states have grown, our nation's capabilities to address them through civil litigation have decreased or proved inadequate. The principal federal statute intended to deter and provide redress for acts of terrorism, the Anti-Terrorism Act, generally cannot be invoked against foreign states and their officials. Terrorism-related claims against foreign sovereigns are facilitated by two provisions of the Foreign Sovereign Immunities Act (FSIA): Section 1605A, which permits suits against foreign states designated by the State Department as state sponsors of terrorism, and Section 1605(a)(5), the non-commercial tort exception to immunity.[1] Section 1605A requires an all-or-nothing determination whether a foreign state is amenable to suit, and a designation carries with it a range of commerce and other restrictions that extend far beyond expanding a state's amenability to suit. For this reason and the broader diplomatic implications of the designation, the State Department has been reluctant to impose the designation on foreign states whose officials have facilitated or do facilitate terrorism but that also cooperate with the United States at times. As a result, only Sudan, Syria, and Iran are currently designated as state sponsors of terrorism, and current policy calls into question whether even those designations will persist. Cuba and North Korea, for example, have

[1] 28 U.S.C. §§ 1605(a)(5) & 1605A.

been dropped from the list of designees. As for Section 1605(a)(5), certain courts have narrowed the scope of that provision, for example by excluding from its reach acts undertaken abroad that would otherwise meet the statutory requirements of causing "damage in the United States" or by limiting the acts attributable to the foreign state.

Enhancing the ability of U.S. courts to address claims against the sponsors of terrorism directed toward the United States, including those affiliated with foreign states, advances three central interests: ensuring justice for the victims of terrorism, deterring and redressing specific attacks within the nation's boundaries, and, more broadly, enhancing our nation's counter-terrorism efforts. Civil litigation is a relatively small but still important component of our counter-terrorism capabilities. As U.S. courts have repeatedly emphasized, the threat of civil penalties and associated public scrutiny can serve as an important deterrent for state organizations and affiliated persons, often of significant wealth or public stature, who might otherwise finance or enable terrorist activities. This deterrent effect may be especially important for prompting foreign sovereigns to ensure that officials at all levels of government, including regulators and quasi-governmental organizations, confront rather than assist terrorist organizations. Foreign sovereigns and their associated organizations have an important responsibility and unique capability to provide redress, accountability, and justice for the victims of terrorism. And, judicial processes – or a comparable state-to-state negotiated settlement – have important potential foreign policy benefits for the foreign state defendant and the United States. Those processes enable the foreign state to set history right with respect to the acts of prior officials, to demonstrate its current and prospective commitment to confronting terrorism, and to enhance its relationship with the U.S. government and financial community.

JASTA responds to the problems posed by modern state-sponsored terrorism and achieves the broader objectives -- of justice, defense, and enhanced counter-terrorism -- associated with facilitating civil litigation directed toward terrorist acts. It does this through three principal mechanisms:

- JASTA would add a new provision of the Foreign Sovereign Immunities Act, Section 1605B.[2] That provision confirms that claims may proceed against sovereigns that facilitate a terrorist attack on U.S. soil, even if that facilitation occurred through acts undertaken abroad. It also confirms that state sovereigns will be held liable for the acts of their agents and for a broad range of tortious conduct that facilitates terrorism.
- The Act would extend the scope of the Anti-Terrorism Act ("ATA").[3] As amended, the ATA would authorize claims against foreign officials for facilitating acts of international terrorism, to the extent that the claim also falls within the scope of the new Section 1605B. The Act also clarifies that liability arises under the ATA for various forms of assistance, including aiding and abetting and conspiracy, that facilitate a foreign terrorist organization's actions harming U.S. persons. The ATA defines the scope of relevant tortious conduct in the terrorism context.
- JASTA also seeks to facilitate the state-to-state resolution of terrorism-related claims and to coordinate judicial claims with the Executive Branch's foreign policy initiatives.[4] It does so by providing that actions maintained under the new Section 1605B may be stayed upon a certification by the Secretary of State that the United States is engaged in good

[2] S. 2040, 114th Cong., 2d Sess., § 3.

[3] *Id*. § 4.

[4] *Id*. § 5.

faith negotiations to have the foreign state defendant provide redress to the affected victims of terrorism.

JASTA carefully tailors the scope of newly enabled claims to address the legal and practical challenges to our nation's counter-terrorism efforts outlined above. Section 1605B enables only claims that seek redress for injury caused by an act of international terrorism, defined by reference to an existing and well understood statutory provision – and supplemented by a further limitation that excludes acts of war.[5] That injury is further limited to "physical injury to person or property or death."[6] Perhaps most significantly, the injury forming the basis of the claim must occur in the United States.[7] And, it must be caused by certain types of tortious acts undertaken by officials or agents associated with a foreign state or otherwise attributable to the state. Allegations of omissions or mere negligence by the foreign state officials cannot provide the basis for recovery.[8] And good faith, state-to-state negotiations between the United States and the defendant state to remedy the harm underlying the claims may suspend court proceedings.

With respect to terrorism-related claims, the new Section 1605B in large measure simply restores and moderately adjusts the scope for claims authorized by the text of the non-commercial tort exception to sovereign immunity, subsection 1605(a)(5).[9] That subsection provides an exception to immunity for claims seeking damages "against a foreign state for

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[5] *Id*. § 3 (Section1605B(a)).

[6] *Id*. (Section 1605B(b)).

[7] *Id*.

[8] *Id*. (Section 1605B(d)).

[9] 28 U.S.C. § 1605(a)(5).

personal injury or death, or damage to or loss of property," limited to injury "occurring in the United States" and "caused by the tortious act" of a "foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment."[10] Section 1605(a)(5)'s terms are more expansive than that of Section 1605B to the extent that the existing provision permits claims based on omissions and negligence and is not limited to injury caused by acts of international terrorism. Section 1605(a)(5) is somewhat more limited than Section 1605B in its exclusion of certain claims related to the discretionary functions of state officials and commercial activities and distinct torts that have little relation to terrorism. Section 1605B confirms that the acts of a state's agent can give rise to liability and, perhaps most importantly, confirms that claims can be based on acts of the foreign state committed abroad, as long as they contribute to injury in the United States. Likewise, the amendment to the ATA rejects narrowing judicial constructions that disallow recovery based on claims of secondary liability – for example, aiding and abetting through the provision of material support for terrorism, or conspiring with others who commit the terrorist act.[11]

Similarly, Section 1605B can be viewed as redressing the implementation weaknesses that have bedeviled Section 1605A – at least for injury occurring from an act of terrorism in the United States. Section 1605A similarly focuses on claims seeking damages for injury caused by acts of terrorism undertaken with a foreign state's support. Unlike Section 1605B, which extends only to injury occurring in the United States (without regard to the nationality of the injured claimant), Section 1605A lifted immunity for claims based on terrorism-related injury occurring anywhere in the world – but only for injury to U.S. persons. More importantly,

[10] *Id.*

[11] S. 2040, *supra*, § 4.

Section 1605A operates only against persons affiliated with sovereigns that the U.S. government has deemed to be state sponsors of terrorism. As described above, this dependence on Executive Branch action has proved quite unsatisfactory and has resulted in a very limited scope for terrorism-related claims against sovereigns. JASTA's separate provision permitting courts to stay claims asserted by victims of terrorism where the Executive is negotiating state-to-state settlements establishes a separate and more comprehensive mechanism for coordinating the assessments of Congress and the Executive.

Three principal objections have been directed toward JASTA: that Congress has done too much, by addressing matters more appropriately left to the Executive Branch; that Congress has done too little, because it has left resolution of claims to the judicial process; and that JASTA will prompt foreign states to facilitate legal claims directed against the United States. Especially when set against the benefits secured by JASTA, noted above, these objections have little merit.

a. First, the objection that Congress is invading the province of the President is quite misdirected. Congress has an entirely legitimate and, indeed, primary role in defining the scope of a foreign state's immunity in U.S. courts. Contrary to the occasionally expressed view that the Executive is the nation's "sole organ" in foreign affairs (which, more properly, means at most the sole organ in communicating with foreign nations), Congress and the President in fact share responsibility for formulating and directing the nation's foreign relations. Congress's powers arise from the Constitution's commitment to Congress or to the Senate of powers over foreign commerce, spending, "defin[ing] and punish[ing] … Offenses against the Law of

Nations," consenting to treaties and appointments of diplomats, and controlling various domestic matters that bear on our foreign relations.[12]

More specifically, as the Supreme Court has described, "[b]y reason of its authority over foreign commerce and foreign relations, Congress has the undisputed power to decide, as a matter of federal law, whether and under what circumstances foreign nations should be amenable to suit in the United States."[13] Supreme Court cases extending back to 1812 have established that no foreign state is entitled to any exclusion from the jurisdiction of our federal courts, because "the jurisdiction of a nation within its own territory 'is susceptible of no limitation not imposed upon itself.'"[14] Congress has taken the lead in defining the scope of sovereign immunity since the passage of the Foreign Sovereign Immunities Act of 1976. In "[e]nacting the FSIA in 1976, Congress transferred from the Executive to the courts the principal responsibility for determining a foreign state's amenability to suit," and "it remains Congress' prerogative to alter a foreign state's immunity and to render the alteration dispositive of judicial proceedings in progress."[15] The just-quoted decision illustrates the scope of Congress's power: there, the Supreme Court upheld a revision to the FSIA's provisions that was directed against a single sovereign (Iran) and which affected a single, consolidated judicial proceeding.

JASTA reflects Congress's leading role in defining foreign sovereign immunity but still seeks to advance the national interest by coordinating Congressional, judicial, and Executive

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[12] U.S. Const., Art. I, § 8; *see Bank Markazi v. Peterson*, 136 S.Ct. 1310, 1328 (2016); *Zivotofsky v. Kerry*, 135 S.Ct. 2076, 2087 (2015).

[13] *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493 (1983).

[14] *Id*. at 482 (quoting *The Schooner Exchange v. M'Faddon*, 7 Cranch 116, 136 (1812) (Marshall, C.J.)); *see also Republic of Austria v. Altmann*, 541 U.S. 677, 688 (2004).

[15] *Bank Markazi v. Peterson*, 136 S.Ct. at 1329 (2016); *id*. (citing *Republic of Iraq v. Beaty*, 556 U.S. 848, 856-57, 865 (2009)).

Branch efforts to address claims against foreign states. For claims in U.S. courts addressing terrorism-related injuries to U.S. persons occurring abroad, JASTA does not disturb the President's exclusive role under Section 1605A to determine which foreign states may be subject to suit. Claims may proceed against only those foreign states that the President, through the Secretary of State, has designated as state sponsors of terrorism. However, for claims against foreign states associated with acts of terror causing harm within the United States, JASTA draws upon a different Presidential power to ensure that the branches of government are coordinated. The President has the power at least to suspend claims against foreign states in U.S. courts to effectuate state-to-state agreements that would provide comparable, alternative redress to the affected claimants.[16] JASTA recognizes and enhances this power by providing that claims against foreign states related to domestic terrorism may be suspended if the Secretary of State certifies that the Executive Branch is engaged in good faith negotiations with the foreign state defendant to secure alternative redress for the claimants.

JASTA's additional coordination mechanism appropriately does not rely completely on Executive Branch determinations. For cases involving injury within the United States, the Act does not permit the Executive to shield a sovereign from suit altogether but instead enables the Executive to affect particular cases, but only if the Executive and the foreign state defendant are engaged in good faith negotiations to provide a remedy to the claimants. That strategy continues the process initiated by the FSIA of depoliticizing the immunity determination. Before the passage of the FSIA, under the processes administered and formalized by the State Department beginning in 1952, "foreign nations often placed diplomatic pressure on the State Department in seeking immunity. On occasion, political considerations led to suggestions of immunity in cases

[16] *See Dames & Moore v. Regan*, 453 U.S. 654 (1981); *see also Amer. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003).

where immunity would not [otherwise] have been available … .”[17] As a result, Congress passed the FSIA “to free the Government from the case-by-case diplomatic pressures, to clarify the governing standards, and to ‘assure litigants that … decisions are made purely on legal grounds and under procedures that insure due process.’”[18] Or, more bluntly, “Congress abated th[is] bedlam in 1976, replacing the old executive-driven, factor intensive, loosely common-law-based immunity regime with the Foreign Sovereign Immunities Act’s ‘comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state.’”[19] The addition of Section 1605A to the FSIA, relying on the Executive Branch’s discretionary determinations of which foreign states would be amenable to suit for certain terrorism-related claims, reflected a partial return to the pre-1976 model of deference to the State Department -- and brought along with it the political pressures and process defects that the FSIA had been designed to eliminate. JASTA reverses that departure for a subset of terrorism-related cases and returns to an approach more in keeping with the broader structure and operation of the FSIA.

Litigation undertaken by the victims of the September 11, 2001 attacks against the Kingdom of Saudi Arabia, various prominent Saudi financiers of terrorism, and others illustrate how the Executive Branch responds to this type of political pressure in particular cases. The Department of Justice had, during a previous Administration, assured the courts that, under its construction of the FSIA, suits against foreign states alleged to have facilitated the September

[17] *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. at 487.

[18] *Id.*, 461 U.S. at 488 (quoting H.R. Rep. No. 94-1487, p. 7 (1976)).

[19] *Repub. of Argentina v. NML Capital, Ltd.*, 134 S.Ct. 2250, 2255 (2014) (quoting *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. at 488).

11th attacks could proceed in U.S. courts.[20] Later, however, when required to address an actual case of this type, the Department acted quite differently. It disregarded its own earlier reasoning and instead strained to present prior cases and the FSIA itself as precluding claims against the Kingdom or as otherwise indicating that the U.S. Supreme Court should not undertake to review decisions adverse to the victims of the September 11th attacks.[21] It sought to block claims by the victims even when the Department publicly acknowledged that the courts below had dismissed the claims based on basic *misconstructions* of the FSIA (mistakes later recognized even by the lower court below).[22] Likewise, the Administration has not acted consistently with assurances that it had provided to representatives of the victims of the attacks regarding how the government would address and advance their claims. Similarly, the Administration's extensive negotiations with Iran have apparently not included any effort to ensure that Iran satisfy the billions of dollars in damages that victims of Iranian-sponsored terrorism, including the victims of the September 11th attacks, have had recognized in judgments entered by U.S. courts against Iran. Throughout, the Administration has advocated for foreign states, including states quite hostile to American

[20] Brief for *Amicus Curiae*, United States, in Support of Plaintiffs-Appellees, No. 03-7117, at p. 17, *Kilburn v. Libyan Arab Jamahiriya*, 376 F.3d 1123 (D.C. Cir. 2004) ("For example, in cases of terrorism on U.S. territory, such as the September 11 attacks, jurisdiction might properly be founded on both paragraphs (a)(5) and (a)(7).").

[21] *See* Brief of the United States as *Amicus Curiae, Federal Ins. Co. v. Kingdom of Saudi Arabia*, No. 08-640 (U.S. Supreme Court, June 1, 2009); Supplemental Brief of Petitioners in Response to the United States, *Federal Ins. Co. v. Kingdom of Saudi Arabia*, No. 08-640 (U.S. Supreme Court, June 8, 2009); *see also* Brief of the United States as *Amicus Curiae, In re Terrorist Attacks of September 11, 2001, O'Neill v. Al Rajhi Bank*, No. 13-318 (U.S. Supreme Court, May 27, 2014); Supplemental Brief of Petitioners in Response to the Brief of the United States, *In re Terrorist Attacks of September 11, 2001, O'Neill v. Al Rajhi Bank*, No. 13-318 (U.S. Supreme Court, June 9, 2014).

[22] *See* Brief of the United States as *Amicus Curiae, Federal Ins. Co. v. Kingdom of Saudi Arabia, supra*, at pp. 6-8, 13-15.

interests, and has advanced those states' interests at the expense of the victims of the most significant terrorist attack on U.S. soil.

b. A different objection is that Congress should do more than JASTA accomplishes, and instead should directly assess whether particular claims against a foreign state are meritorious and, if so, should then enable recovery from the sovereign's assets located in the United States.

How Congress might effectively and fairly undertake such assessments or provide for recovery is entirely unclear. Congress has, for example, extensively examined facts related to the persons and entities that contributed to the growth of al Qaeda and to the September 11th attacks,[23] but those conclusions were not designed to function as the equivalent of judicial determinations or to provide the basis for proceeding against any foreign sovereign's assets. Arranging for the freezing and disposition of U.S.-based assets would require processes associated with the sanctions regimes or wartime measures, and would be highly inflammatory and destabilizing. Nor are making such liability-related determinations and providing for related recovery, other than through the judicial process, usual functions of Congress or traditionally employed in having foreign sovereigns redress injuries caused in the United States. Any such effort would be perceived, with some justification, as more politicized and less consistent with due process principles than comparable determinations of liability and measures to compel payment carried out by courts of law using generally applicable legal principles and processes.

Instead, JASTA appropriately make use of the same judicial mechanisms, and the same allocation of powers between Congress and the judiciary, that the FSIA has employed for the

[23] *See, e.g., Joint Inquiry into Intelligence Community Activities Before and After the Terrorist Attacks of September 11, 2001*, Report of the U.S. Senate Select Comm. on Intelligence and U.S. House Permanent Select Comm. on Intelligence, S. Rept. No. 107-351, H. Rept. 107-792, 107th Cong., 2d Sess. (Dec. 2002).

past forty years. Congress defines when a foreign sovereign may be amenable to suit in federal court, but any liability on the part of a foreign state arises under generally applicable state and federal laws and is determined in contested proceedings before independent judges while affording all the procedural protections to the foreign sovereign that are afforded to other litigants in U.S. courts, domestic or foreign. Congress has no obligation to assume the judicial function, and all the benefits secured by the FSIA counsel against doing so. Again, that statute was designed "to free the Government from the case-by-case diplomatic pressures, to clarify the governing standards, and to 'assure litigants that … decisions are made purely on legal grounds and under procedures that insure due process,'"[24] and all those benefits would be lost if Congress were to resolve and provide specific remedies related to individual claims against foreign states.

c. Finally, some raise concerns that certain foreign states may respond to JASTA by authorizing reciprocal suits directed against legitimate actions of this nation abroad. Although the risk of overreaching foreign suits has long existed and will continue to need to be monitored and addressed, JASTA does not give rise to or increase that risk.

To the extent the concern is that other foreign states will replicate the jurisdiction afforded by JASTA, that result would pose no risk to legitimate U.S. activities. JASTA is narrowly focused on state-facilitated acts of international terrorism and explicitly excludes from its scope any exception to immunity for acts of war, omissions, and mere negligence. JASTA's reference to "international terrorism" relies directly on a narrow, well-defined definition that is long-embedded in U.S. law and addressed by decades of judicial decisions. The Act confirms that its exception to immunity does not extend to military, self-defense, and other initiatives that this nation properly uses to defend its interests.

[24] *See supra* n.18.

If the concern is instead that foreign states will use JASTA as an excuse to implement *broader* exceptions to immunity that could impede U.S. activities, then that concern has little to do with JASTA. The FSIA's non-commercial tort exception and especially its provisions related to state-sponsored terrorism, such as Section 1605A, already provide the ostensible basis for any foreign state seeking to facilitate litigation against the United States. And even if the FSIA did not already contain such provisions, it would be perverse to decline to defend our legitimate interests in resisting state-sponsored terrorism simply because we feared that our adversaries would mislabel our legitimate self-defense efforts as "international terrorism."

Those pressing this concern also mistake diplomatic issues for legal ones. Lawyers, especially international lawyers, often exaggerate the legal component of what are essentially issues of economic, political, and military power to be addressed in the context of bilateral and multilateral relations. Those considerations of power, and our diplomacy, are what will cause foreign nations to decline or seek to facilitate illegitimate legal claims against the United States, just as those factors affect whether foreign states might undertake any other actions that would be adverse to our interests. JASTA provides foreign states with no legitimate argument that would change this calculus. To the extent that the real concern is, instead, that particular foreign states would not relish being held to account for their facilitation of acts of international terrorism visited upon the United States, then those same, broader factors come into play and our diplomats have an opportunity to ensure that victims of terrorism secure justice even as foreign nations are encouraged to assist rather than evade our nation's counter-terrorism efforts.

Thank you for your attention, and I would be pleased to respond to any questions you may have.