

Congress passes JASTA, which expands liability under the Anti-Terrorism Act

On September 9, 2016, the US House of Representatives unanimously passed The Justice Against Sponsors of Terrorism Act (JASTA), which would narrow sovereign immunity and expand civil liability under the federal Anti-Terrorism Act (ATA). In May, the Senate similarly unanimously approved JASTA. As a result, the Act is on its way to President Obama for approval, though he has threatened to veto the bill. If President Obama vetoes the bill, it will return to Congress for a possible override of the President's veto, which could occur later this year.

Numerous financial institutions and countries have faced civil suits in the US under the ATA. The ATA provides that "[a]ny national of the United States injured ... by reason of an act of international terrorism ... may sue therefor in any appropriate district court of the United States and shall recover threefold the damages."¹ If enacted, JASTA threatens to expand liability under the ATA, exposing additional businesses and foreign nations to civil litigation. JASTA contains two provisions of particular significance: (1) narrowing sovereign immunity for foreign nations sued under the ATA and (2) creating secondary liability for aiding, abetting, or conspiring with a designated foreign terrorist organization.

Narrowing sovereign immunity

Under the Foreign Sovereign Immunities Act (FSIA), a foreign state is generally "immune from the jurisdiction of the courts of the United States" unless an exception is met.² FSIA authorizes jurisdiction when the claim arises from tortious conduct that occurred in the United States (the "non-commercial tort exception"). The Supreme Court has described the exception as "cover[ing] only torts occurring within the territorial jurisdiction of the United States."³ Injury or damage occurring within the US is not enough. Instead, the entire tort must occur in the United States (the "entire tort" rule).⁴ Thus, if injury occurs in the United States, but part or all of the foreign state's actions occurred abroad, the non-commercial tort exception to sovereign immunity would not apply.

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¹ 18 U.S.C. § 2333(a).

² 28 U.S.C. § 1604.

³ *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 441 (1989).

⁴ *Doe I v. State of Israel*, 400 F. Supp. 2d 86, 108 (D.D.C. 2005); *see also O'Bryan v. Holy See*, 556 F.3d 361, 382 (6th Cir. 2009) (the entire tort must occur in the United States); *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 379 (7th Cir. 1985) (tortious act or omission, as well as injury, must occur in the United States).

JASTA seeks to overturn the entire tort rule. Instead, it provides that "A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which money damages are sought against a foreign state for physical injury to person or property or death occurring in the United States and caused by ... (1) an act of international terrorism in the United States; and (2) a tortious act or acts of the foreign state ... *regardless where the tortious act or acts of the foreign state occurred* (emphasis added). As a result, JASTA would expose nations to new lawsuits suit under the ATA by narrowing the scope of sovereign immunity for actions that take place in whole or in part outside of the US.

Imposing secondary liability

Courts repeatedly have held that the ATA does not permit secondary liability for aiding, abetting, or conspiring with terrorists. JASTA seeks to reverse course in part, and impose secondary liability on "any person who aids and abets, by knowingly providing substantial assistance, or who conspires with" an "organization that had been designated as a foreign terrorist organization under section 219 of the Immigration and Nationality Act" at the time the "act of international terrorism was committed, planned, or authorized."

The effect of permitting such secondary liability under the ATA is not entirely clear given that courts have repeatedly imposed *primary* liability under the ATA for providing material support (including the provision of financial services) to terrorists. The issues of whether and how JASTA would expand upon such primary liability are issues that would likely be litigated for many years.

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If JASTA becomes law, it would expand the range of defendants facing suit under that ATA. JASTA would expand the range of liability for foreign sovereigns and businesses who wittingly (or often unwittingly) have interacted with people who later commit terrorist acts. This threat of liability hangs over financial institutions and other businesses who have complied with all other applicable laws and regulations, including customer identification procedures and checking customers against government watch lists. Part of the express motivation for passing JASTA is to allow 9/11 victims to sue Saudi Arabia,⁵ but the bill reaches far beyond that motivation.

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⁵ "I'm pleased the House has taken this huge step forward towards justice for the families of the victims of 9/11. There are always diplomatic considerations that get in the way of justice, but if a court proves the Saudis were complicit in 9/11, they should be held accountable." Sen. Chuck Schumer (D-NY) (Sept. 9, 2016).