

JASTA: Expanded Liability Under US Anti-Terrorism Act

The US Congress expanded civil liability for international businesses and foreign states by overwhelmingly enacting the Justice Against Sponsors of Terrorism Act (JASTA) on September 28, 2016. JASTA changes existing law by narrowing sovereign immunity and expanding civil liability for terrorist attacks. In enacting JASTA, the US Congress overrode President Obama's veto of legislation for the first time during his presidency.

Sovereign Immunity Narrowed

JASTA creates a new exception to the Foreign Sovereign Immunities Act's (FSIA) protection of foreign states and state-owned enterprises. Previously, under FSIA, a foreign state could be sued for non-commercial torts only if all of the foreign state's tortious conduct took place in the United States (the "entire tort" rule).¹ In other words, all of the acts constituting a tort had to occur in the United States—not just the injury—to fit within the FSIA's non-commercial tort exception.² JASTA now strips immunity from all foreign states and instrumentalities if the "act of international terrorism [occurs] in the United States ... regardless [of] where the tortious act or acts of the foreign state occurred."³

As a result, foreign states and instrumentalities can now be sued in US courts under the federal Anti-Terrorism Act (ATA) for international terrorist acts on US soil even where the foreign state's or instrumentality's conduct occurs outside of the US. The law is thus another extension of US law to regulate conduct that occurs abroad.

Some congressional leaders explained that JASTA is "about pursuing justice" for the "families of the victims of 9/11."⁴ The law is widely seen as a vehicle to allow suits against the Kingdom of Saudi Arabia related to the September 11, 2001 attacks.⁵ Saudi Arabia had previously been dismissed from 9/11 lawsuits on sovereign immunity grounds. JASTA's language, however, is not limited to Saudi Arabia or 9/11, and thus it is sure to affect a broad range of ATA cases.

Secondary Liability Created

JASTA also creates two new categories of liability in connection with international terrorism: aiding and abetting liability and civil conspiracy liability. Prior to JASTA, courts repeatedly held that the ATA did not permit such secondary forms of liability.⁶

¹ 28 U.S.C. § 1605(a)(5) (2015).

² *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 441 (1989).

³ JASTA § 3(a), to be codified at 28 U.S.C. § 1605B(b).

⁴ Seung Min Kim, *Congress hands Obama first veto override*, POLITICO (Sept. 28, 2016).

⁵ *Id.*

⁶ *E.g.*, *In re: Terrorist Attacks on Sept. 11, 2001*, 714 F.3d 118, 123 (2d Cir. 2013); *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 689-90 (7th Cir. 2008).

JASTA specifically authorizes civil suits against anyone who "aids and abets, by knowingly providing substantial assistance, or who conspires with the person who committed such an act of international terrorism."⁷

This new secondary liability, however, only applies to "international terrorism" that was "committed, planned, or authorized by" a designated "foreign terrorist organization" (designated FTO). A designated FTO is a "foreign organization" that the US Secretary of State has designated as an FTO because it "engages in terrorist activity . . . or retains the capability and intent to engage in terrorist activity or terrorism" and "the terrorist activity or terrorism of the organization threatens the security of United States nationals or the national security of the United States."⁸ As a result, JASTA's expansion of secondary liability is limited to cases involving designated FTOs. Many (if not most) cases brought under the ATA, however, involve designated FTOs.

In the text of JASTA, Congress expressly "finds" that "Halberstam v. Welch, 705 F.2d 472 (D.C. Cir. 1983) ... provides the proper legal framework for how such [secondary] liability should function."⁹ The issue of whether and to what extent Congress's recognition of Halberstam controls remains to be litigated.

In *Halberstam*, the court noted liability for aiding and abetting included the following elements: "(1) the party whom the defendant aids must perform a wrongful act that causes an injury; (2) the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance; [and] (3) the defendant must knowingly and substantially assist the principal violation."¹⁰

Halberstam also explained that the elements of a civil conspiracy included "(1) an agreement between two or more persons; (2) to participate in an unlawful act, or a lawful act in an unlawful manner; (3) an injury caused by an unlawful overt act performed by one of the parties to the agreement; (4) which overt act was done pursuant to and in furtherance of the common scheme."¹¹

Whether JASTA's recognition of secondary liability will actually expand liability under the ATA is uncertain, since a number of courts have imposed primary liability on defendants for providing material support to terrorists, including providing financial or other services to terrorist organizations.

Retroactivity

JASTA purports to "apply to any civil action (1) pending on, or commenced on or after, the date of enactment of" JASTA and "(2) arising out of an injury to a person, property, or business on or after September 11, 2001."¹² Consequently, JASTA threatens retroactive application to all suits currently pending involving injuries dating back to 9/11. Whether courts will give retroactive effect to JASTA will be litigated in the next several months and years.

* * *

JASTA has widely been reported as a substantial expansion of ATA liability and significant restriction on sovereign immunity. More defendants will be subject to ATA litigation in light of JASTA. Foreign states and instrumentalities will no longer be immune from suit for US attacks involving international terrorism, even where the foreign state acts substantially and exclusively outside of the US. In addition, plaintiffs are likely to seek to hold a host of companies liable on aiding, abetting, and conspiracy claims. Accordingly, state-owned enterprises, financial institutions, social media companies, and defense contractors will face expanded litigation risk in the US as a result of the goods and services they distribute. Companies would be well-served to re-evaluate their customer screening procedures in light of the expanded risks associated with ATA litigation.

⁷ JASTA § 4(a) to be codified at 18 U.S.C. § 2333(d)(2).

⁸ 8 U.S.C. § 1189(a)(1). A list of designated FTOs can be found at <http://www.state.gov/j/ct/rls/other/des/123085.htm>.

⁹ JASTA § 2(a)(5).

¹⁰ 705 F.2d at 477.

¹¹ *Id.*

¹² JASTA § 7.

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