NOTE

JASTA Say No: The Practical and Constitutional Deficiencies of the Justice Against Sponsors of Terrorism Act

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ABSTRACT

Congress passed the Justice Against Sponsors of Terrorism Act ("JASTA") to create a new jurisdictional exception to foreign sovereign immunity where a plaintiff is able to prove that a foreign sovereign sponsored terrorism. Unfortunately for potential plaintiffs, this framework has both constitutional and practical flaws that make it nearly impossible to ever collect on a successful judgment. JASTA failed to create a parallel attachment exception, which practically prevents plaintiffs from collecting. Further, the new immunity exception allows courts, rather than the Executive, to determine whether the United States views the foreign sovereign as a sponsor of terrorism.

This Note argues that JASTA violates the Executive's recognition power by designating the judiciary as the arbiter of whether the United States views another nation as a sponsor of terrorism. Further, aside from the separation of powers problem, the legislation is unworkable in practice: in its current state, the Act provides no feasible way for an injured plaintiff to collect on a valid judgment. To cure these deficiencies, this Note proposes that Congress repeal JASTA and replace it with a formal procedure that allows potential plaintiffs to petition the U.S. Department of State to designate a foreign power as a State

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Sponsor of Terrorism for the event in question. This alleviates the separation of powers issue, and a potential plaintiff that successfully petitions the executive branch would be able to bring her suit under the pre-JASTA terrorism exception, § 1605A. If a plaintiff succeeds on a § 1605A action, she would be able to attach nearly any property, other than an embassy, that the country owns in the United States in order to fulfill a judgment.

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Introduction

On November 5, 1990, Rabbi Meir Kahane gave a lecture at a Marriott in Manhattan.[1] When he was finished, a member of Al-Gam'aa Islamiyah, a terrorist organization, shot Rabbi Kahane in the neck and proceeded to shoot two other people, including Carlos Acosta.[2] The victims and surviving families sued Iran, relying on public State Department documents and expert testimony from State Department and Defense Intelligence Agency employees stating that Iran provided "facilities, transportation, weapons, training, and financial support" to the terrorist group.[3] The *Acosta* plaintiffs obtained a default judgment for over $300 million in damages after Iran chose not to appear in the litigation.[4]

1 *See* Acosta v. Islamic Republic of Iran, 574 F. Supp. 2d 15, 20 (D.D.C. 2008).
2 *See id.* at 18–20.
3 *See id.* at 22–23.
4 *See id.* at 31–32.

In 1995, Ahmed Sharifi, under the direction of Ayatollah Khamenei, began recruiting members for Saudi Hezbollah out of the Iranian embassy in Damascus, Syria.[5] He secured passports and other paperwork for the individuals, so that they could attack a United Nations peacekeeping mission in Saudi Arabia.[6] A little before 10:00 PM on June 25, 1996, a gasoline tanker parked next to the Khobar Towers complex in Dhahran, Saudi Arabia.[7] The driver got out and jumped into a waiting car that sped away.[8] Fewer than fifteen minutes later, the tanker exploded, decimating a residential building used to house military personnel.[9] Nineteen U.S. Air Force members were killed—and hundreds of others were injured.[10] Ten years later, in 2006, seventeen of the service members' survivors, known as the *Heiser* plaintiffs, obtained the first of two default judgments against Iran for the bombing, totaling over half a billion dollars.[11]

In 2017, more than twenty years after the *Heiser* plaintiffs lost their husbands, sons, and fathers to an act of terrorism—and roughly ten years after obtaining the judgments in question—both the *Acosta* and *Heiser* plaintiffs are still fighting to collect the damages that they were awarded.[12] Under the Foreign Sovereign Immunities Act ("FSIA"),[13] foreign nations are presumed immune from any requirement to appear before U.S. courts and from having their property used to satisfy any judgment against them.[14] For a plaintiff to bring suit, she must show that her case falls into one of the nine enumerated jurisdictional exceptions, one of which allows suits to be brought against nations the executive branch has designated as State Sponsors of Terrorism.[15] The *Heiser* and *Acosta* plaintiffs used the State Spon-

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5 *See* Estate of Heiser v. Islamic Republic of Iran (*Heiser I*), 466 F. Supp. 2d 229, 252 (D.D.C. 2006).

6 *See id.*

7 *See id.*

8 *See id.*

9 *See id.*

10 *See id.*

11 *See* Estate of Heiser v. Islamic Republic of Iran (*Heiser II*), 659 F. Supp. 2d 20, 31 (D.D.C. 2009) (awarding $36,658,063 in compensatory damages and $300,000,000 in punitive damages); *Heiser I*, 466 F. Supp. 2d at 356 (awarding $254,431,903 in compensatory damages).

12 *See, e.g.*, Bennett v. Islamic Republic of Iran, 825 F.3d 949 (9th Cir. 2016), *aff'g* 927 F. Supp. 2d 833 (N.D. Cal. 2013), *and amending and superseding* 817 F.3d 1131 (9th Cir. 2016), *aff'g* 927 F. Supp. 2d 833 (N.D. Cal. 2013), *and withdrawing and superseding* 799 F.3d 1281 (9th Cir. 2015), *aff'g* 927 F. Supp. 2d 833 (N.D. Cal. 2013).

13 Foreign Sovereign Immunities Act (FSIA) of 1976, 28 U.S.C. §§ 1330, 1332, 1391(f), 1441(d), 1602–1611 (2012).

14 *See id.*

15 *Id.* § 1605.

sor of Terrorism exception to obtain a judgment, but Iran will not pay the judgments voluntarily.[16] Further, Iran has very few assets in the United States—and those that are in the United States tend to be frozen or blocked funds owed to various entities owned by Iran.[17]

Prior to 2008, under the FSIA, plaintiffs like those in *Heiser* and *Acosta* could only satisfy these judgments by going after property Iran used in commercial activity.[18] Further, the law at that time, in practice, prevented veil-piercing—so property owned by entities wholly owned by Iran, like Bank Melli, Iran's largest bank, was safe from attachment.[19] In 2008, Congress amended the FSIA, making it much easier for individuals holding terrorism judgments against designated State Sponsors of Terrorism,[20] including Iran, to attach *any* assets owned—even indirectly owned—by the foreign sovereign in the United States when executing the judgment.[21] The amendment created 28 U.S.C. § 1610(g), an attachment immunity exception for suits brought under a new terrorism jurisdiction exception, § 1605A.[22] This created the opportunity leading to the *Acosta* and *Heiser* plaintiffs' 2016 success before the Ninth Circuit.[23] That court held that the 2008 attachment exception, § 1610(g), allows for execution and attachment of an Iranian bank's property—funds VISA, *inter alia*, had been holding in the United States—to the judgments held by the *Acosta* and *Heiser* plaintiffs.[24] This occurred despite the fact that the Iranian bank was never a defendant or part of any proceeding regarding the terrorist acts.[25]

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16 *See, e.g.*, *Bennett*, 825 F.3d at 949.

17 *See In re* Islamic Republic of Iran Terrorism Litig., 659 F. Supp. 2d 31, 58 (D.D.C. 2009) ("In the case of Iran, however, the simple fact remains that very few blocked assets exist. In fact, according to OFAC's latest report, there are only 16.8 million dollars in blocked assets relating to Iran. This amount is inconsequential—a mere drop in the bucket—when compared to the staggering 9.6 billion dollars in outstanding judgments entered against Iran in terrorism cases as of August 2008 . . . ." (citation omitted)).

18 *See infra* Section I.B.

19 *See Bennett*, 825 F.3d at 957; *infra* Section I.B.

20 *See infra* Section I.B.

21 28 U.S.C. § 1610(g) (2012); *see also In re Islamic Republic of Iran Terrorism Litig.*, 659 F. Supp. 2d at 57 (discussing alteration of FSIA).

22 28 U.S.C. § 1610(g) (2012); *id.* § 1605A.

23 *See Bennett*, 825 F.3d at 949. The portion of this holding regarding the breadth of the 2008 attachment immunity exception conflicts with the Seventh Circuit's holding in *Rubin v. Islamic Republic of Iran*, 830 F.3d 470 (7th Cir. 2016), and the Supreme Court has asked for the Acting Solicitor General's views on the *Bennett* certiorari petition. *See* Bank Melli v. Bennett, 137 S. Ct. 707 (2017) (No. 16-334).

24 *See Bennett*, 825 F.3d at 954.

25 *See id.* at 965–66; *see also infra* Section I.B.

Although twenty years feels like an absurd amount of time for a remedy to begin to materialize, the Iran-sponsored terrorism victim plaintiffs have had a much easier time getting their claims heard than the victims of the September 11th attacks have had in their attempts to hold Saudi Arabia liable for the actions of al-Qaeda.[26] While the Iran-sponsored terrorism victims have obtained judgments awarding monetary damages for Iran's role in those attacks, the September 11th plaintiffs have struggled to even get that far, with courts unwilling to hear arguments that Saudi Arabia may be liable for the September 11th attacks.[27] Unlike Iran, Saudi Arabia has not been designated a State Sponsor of Terrorism.[28]

Congress sought to give the families of September 11th victims an opportunity to seek monetary damages against Saudi Arabia by creating a new pathway to circumvent the FSIA.[29] Thus, in 2016, Congress passed the Justice Against Sponsors of Terrorism Act ("JASTA"),[30] which grants the judiciary the power to determine whether a foreign sovereign materially sponsored terrorism, a decision that had formerly rested exclusively with the executive branch.[31] JASTA fails to include, however, a parallel exception to immunity from attachment.[32] This recreates the situation the Iran-sponsored terrorism victims faced prior to the 2008 amendment to the FSIA.[33] Without the 2008 amendment, veil-piercing was nearly impossible, and the *Acosta* and *Heiser* plaintiffs could not have attached the assets of the Iran-owned bank to

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26 *See generally* Sean Hennessy, Note, *In Re The Foreign Sovereign Immunities Act: How the 9/11 Litigation Shows the Shortcomings of FSIA as a Tool in the War on Global Terrorism*, 42 GEO. J. INT'L L. 855 (2011) (detailing the many attempts of September 11th plaintiffs through 2011). This Note takes no position regarding Saudi Arabia's potential liability for the September 11th attacks.

27 *See id.*

28 BUREAU OF COUNTERTERRORISM & COUNTERING VIOLENT EXTREMISM, U.S. DEP'T OF STATE, COUNTRY REPORTS ON TERRORISM 2015, at 299–302 (2016), https://www.state.gov/documents/organization/258249.pdf.

29 *See* Lelchook v. Islamic Republic of Iran, 224 F. Supp. 3d 108, 113 n.1 (D. Mass. 2016) (discussing the legislative history and motivation behind JASTA).

30 Justice Against Sponsors of Terrorism Act (JASTA), Pub. L. No. 114-222, 130 Stat. 852 (2016) (to be codified at 28 U.S.C. § 1605B).

31 28 U.S.C. § 1605A(h)(6) (2012) (granting designation power to the Secretary of State).

32 *See* JASTA, 130 Stat. 852, 852–55.

33 *See* Bank Markazi v. Peterson, 136 S. Ct. 1310, 1318 (2016) ("When the terrorism exception was adopted, only foreign-state property located in the United States and 'used for a commercial activity' was available for the satisfaction of judgments. Further limiting judgment-enforcement prospects, the FSIA shields from execution property 'of a foreign central bank or monetary authority held for its own account.'" (citation omitted) (quoting 28 U.S.C. § 1611(b)(1) (2012))).

satisfy their judgments against Iran.[34] Similarly, there is very little, if any, property that the September 11th plaintiffs could locate that a judge could properly classify as attachable.[35] Under JASTA, a Saudi Arabian–owned oil company's assets, for example, could not be used to satisfy a judgment against Saudi Arabia.[36]

This Note argues that JASTA violates the Executive's recognition power by designating the judiciary as the arbiter of whether the United States views another nation as a sponsor of terrorism. Further, it argues the legislation is unworkable in practice: the Act provides no feasible way for an injured plaintiff to collect on a valid judgment, as the Act created only a jurisdictional immunity exception without an attendant parallel attachment exception. This Note proposes that Congress repeal JASTA and replace it with a formal procedure that allows potential plaintiffs to petition the State Department to designate a foreign power as a State Sponsor of Terrorism for a specific event. This alleviates the separation of powers issue, and a potential plaintiff who successfully petitions the executive branch would be able to bring her suit under the pre-JASTA terrorism exception, § 1605A. If the plaintiff succeeds on a § 1605A action, she could then attach nearly any property, other than an embassy, that the country owns in the United States to fulfill a judgment.[37]

Part I provides an overview of foreign sovereign immunity. Part II analyzes the separation of powers problems inherent in JASTA. Further, it addresses the inadequate solution of simply broadening the 2008 attachment exception, § 1610(g), to apply to JASTA-exception actions brought under § 1605B. It also discusses the practical problems with JASTA—both for the plaintiffs bringing lawsuits and the President in conducting foreign policy. Part III suggests a more effective approach: Congress should direct the State Department to create a formal hearing process on the issue of terrorism sponsorship. Using this determination, successful plaintiffs could proceed under the pre-JASTA § 1605A terrorism exception and parallel attachment exceptions, eliminating the need for JASTA and the serious separation of powers problems it has created.

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34 See *infra* Section I.B for a discussion of attaching agency assets.

35 *See infra* Section I.B.

36 *See infra* Section I.B.

37 *See* 28 U.S.C. § 1610(g) (2012); *see also infra* Section II.C.

I. Background: Foreign Sovereign Immunity in the United States

Under JASTA, successful plaintiffs will face the same "long, bitter, and often futile quest for justice" that the Iran-sponsored terrorism victim plaintiffs faced prior to 2008.[38] This is because the latest amendments to the FSIA contained in JASTA: (1) create a jurisdictional immunity exception without a parallel attachment exception, preventing plaintiffs from collecting on a judgment should the foreign nation not choose to voluntarily pay the damage award;[39] and (2) wrench the determination of terrorism sponsor designations from the Executive and hand this sensitive foreign policy determination to the ill-equipped judiciary.[40]

To place JASTA in the proper context, the following Section summarizes the history of foreign sovereign immunity in the United States. First, it introduces the origins of sovereign immunity and then provides an overview of the Foreign Sovereign Immunities Act of 1976, as well as subsequent amendments and significant Supreme Court interpretations. Next, it provides a brief overview of an existing circuit split regarding the breadth of the 2008 FSIA terrorism judgment attachment provision, § 1610(g). Finally, it discusses JASTA, its legislative history, and the implications of the previously discussed circuit split on cases brought under the new JASTA amendment.

A. History of Sovereign Immunity

For the majority of U.S. history, foreign nations were granted complete sovereign immunity from litigation in American courts.[41] This stemmed from concepts of sovereignty that dominated at the time of the Peace of Westphalia, which is often viewed as the dawn of modern international law—European nations stopped warring and began to interact diplomatically with each other.[42] Many governments claimed that their sovereignty was ordained by God and the ruling

38 *In re* Islamic Republic of Iran Terrorism Litig., 659 F. Supp. 2d 31, 46 (D.D.C. 2009).

39 *See* JASTA, Pub. L. No. 114-222, § 3, 130 Stat. 852, 853 (2016) (creating a jurisdictional immunity exception under § 1605B); *see also* 28 U.S.C. § 1610(g) (2012) (noting the existence of an attachment exception which applies only to property of nations with judgments against them obtained under § 1605A).

40 *Compare* 28 U.S.C. § 1605A (2012) (granting limited jurisdiction only where the executive branch has designated a nation as a State Sponsor of Terrorism), *with* JASTA § 3, 130 Stat. 852, 853 (creating broad jurisdiction for the judiciary to determine the "[r]esponsibility of foreign states for international terrorism against the United States").

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

42 *See* Lori Fisler Damrosch & Sean D. Murphy, International Law: Cases and Materials xviii (6th ed. 2014).

power could thus not be subject to the laws of any other nation.[43] Immunity was largely understood to mean that one sovereign state could not exercise power over another, during times of peace, for any reason.[44]

In the United States, this grant of international immunity was not based in the Constitution or any statute, but was recognized as a matter of comity and standard diplomatic practice.[45] Following the First World War, many nation states (but not the United States) sought to hold foreign nations accountable for deficiencies in their commercial actions involving ships by adopting a restrictive theory of immunity.[46] This restrictive theory of immunity created exceptions to the full immunity that predated World War I.[47] One common exception to absolute sovereign immunity recognized under a restrictive theory is for commercial dealings.[48] For example, if an embassy hired a local caterer and refused to pay, in a system of full sovereign immunity, the country owning the embassy would not be subject to the laws of the host nation and would not be held liable.[49] Under a restrictive theory of immunity with exceptions for commercial activity, however, the embassy-owning nation would be liable for its breach of contract with the caterer.

In 1952, the U.S. State Department publicly recognized a shift in customary international law and adopted the restrictive approach to immunity.[50] The policy was announced in the Tate Letter,[51] which explained the shift toward granting immunity for traditional sovereign acts but denying immunity where the sovereign was acting in commerce.[52] The State Department enforced this restrictive theory by allowing nations that faced potential litigation in the United States apply to the State Department, which would then assert immunity on

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43 *See id.* at xvii–xviii. A similar argument today comes from democracies that have chosen their own laws—thus they cannot be subject to the laws of another nation. *See id.*

44 *See id.*

45 *See* James E. Berger & Charlene Sun, *Sovereign Immunity: A Venerable Concept in Transition?*, INT'L LITIG. Q., Winter/Spring 2011, at 1.

46 *See* Robert M. Jarvis, *The Tate Letter: Some Words Regarding Its Authorship*, 55 AM. J. LEGAL HIST. 465, 470 (2015).

47 *See, e.g.*, Berger & Sun, *supra* note 45, at 1.

48 *See id.*

49 Though the caterer could bring suit in a full immunity system, the court would grant a motion to dismiss.

50 *See* Jack B. Tate, *Changed Policy Concerning the Granting of Sovereign Immunity to Foreign Governments*, 26 DEP'T ST. BULL. 984, 984–85 (1952).

51 *Id.*

52 *See* John M. Niehuss, *International Law—Sovereign Immunity—The First Decade of the Tate Letter Policy*, 60 MICH. L. REV. 1142, 1142 (1962).

behalf of the visiting nation where appropriate.[53] In practice, if a foreign nation was sued, or received a subpoena, its embassy would send a diplomatic note to the State Department.[54] The State Department would then inform the nation of its decision regarding immunity, and, if immunity was granted, the State Department would then submit a filing to the court indicating that the country was immune and requesting that the court dismiss the suit.[55] Occasionally, the State Department would ask the Attorney General to order a U.S. Attorney to present the immunity position of the foreign nation before the court.[56] Rather than apply the policy uniformly, however, the State Department opted to pick and choose which countries would receive immunity for all of their acts, which countries would receive immunity for acts other than commercial activity, and which countries would receive immunity for almost none of their actions.[57] While there may have been some foreign policy benefits to this approach, it created a system where U.S. citizens and companies could not predict which foreign governments that operated commercial entities in the United States could be held liable for their misdeeds.[58]

B. The Foreign Sovereign Immunities Act

In 1976, Congress codified the restrictive theory of immunity by passing the FSIA, shifting the decisionmaking about when—and to which nations—immunity would be granted from the State Department to the courts.[59] The FSIA states that foreign sovereigns are immune from suit unless certain exceptions are met.[60] And, under the FSIA, in addition to this jurisdictional immunity, foreign sovereigns

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53 *See id.* at 1142–45.

54 *See, e.g.*, *In re* Grand Jury Investigation of the Shipping Indus., 186 F. Supp. 298, 318 (D.D.C. 1960) (discussing the process the Philippines experienced with the State Department when seeking immunity).

55 *See id.*; Niehuss, *supra* note 52, at 1144–45 (noting examples of the State Department approving and denying immunity requests).

56 *See* Niehuss, *supra* note 52, at 1144.

57 *See id.* at 1143 (noting that some cases "indicate[d] that [the State Department] is at least willing to apply the restrictive theory of sovereign immunity. However, other cases suggest that it is not [] firmly wedded to the restrictive theory").

58 *See id.* at 1144–45.

59 *See* 28 U.S.C. § 1605 (2012). To accomplish this, Congress relied on its Article I Section 8 power to "regulate commerce with foreign nations" and Article III power to set the jurisdiction of the lower courts. *See* FSIA, Pub. L. No. 94-583, § 1602, 90 Stat. 2891, 2892 (codified as amended at 28 U.S.C. § 1602 (2006)) (finding "[u]nder international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned").

60 *See* 28 U.S.C. §§ 1604–1607.

are entitled to immunity from attachment—creating a default rule that their assets may not be seized to satisfy a judgment.[61]

Section 1605 sets forth the general exceptions to the FSIA's broad jurisdictional immunity.[62] The initial exceptions, created in 1976, included waiver, actions based on commercial activity within the United States, and respondeat superior claims for non-commercial torts.[63]

Section 1609 then grants foreign nations immunity from arrest and execution of judgment, except as modified by international agreement and §§ 1610–1611.[64] The FSIA limited property that plaintiffs may use for execution of a judgment to property for which immunity has been waived,[65] property that is used in commercial activity,[66] or real property that is the subject of a case.[67] Thus, for most actions that did not involve real property, the only property available for attachment was the property a nation used in commercial activity.

In 1983, the Supreme Court further limited the property available for attachment under the FSIA by holding that the statute prevents treating state-owned entities as one-and-the-same as the state, similar to veil-piercing protections enjoyed by corporations and their subsidiaries.[68] In *First National City Bank v. Banco Para El Comercio Exterior de Cuba*,[69] the Supreme Court announced the *Bancec* rule, which significantly limits the commercial activity exceptions to jurisdiction and attachment.[70] The *Bancec* rule provides that "a judgment against a foreign state cannot be executed on property owned by its juridically

61 *Id.* § 1609. Additionally, any suit brought in state court against a foreign nation may be removed to federal court under 28 U.S.C. § 1441(d) (2012). Further, in *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983), the Supreme Court declared that even nonfederal claims brought against foreign states arise under federal law because the issue of immunity under the FSIA is a question of federal law. *Id.* at 492–94.

62 *See* 28 U.S.C. § 1605 (2012).

63 *Id.* The other initial exceptions were: where the rights to property within the United States are at issue due to succession or gift; certain arbitration enforcement actions; certain admiralty suits to enforce maritime liens; actions to foreclose a preferred mortgage; and actions arising out of a taking in violation of international law. *Id.*

64 *Id.* § 1609. Congress also protected property from attachment if it is used by an international organization, defense agency, or military authority. *See id.* § 1611.

65 *See id.* § 1610(a)(1).

66 Commercial activity includes activity upon which the claim is based and activity unrelated to the claim. *See id.* § 1610(a)(2), (b).

67 *See id.* § 1610(a)(3).

68 *See* First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611, 626–29 (1983), *superseded by* National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1083, 122 Stat. 3, 338–43 (2008) (codified at 28 U.S.C. § 1610(g) (2012)).

69 462 U.S. 611 (1983).

70 *See id.* at 622; Rubin v. Islamic Republic of Iran, 830 F.3d 470, 473–74 (7th Cir. 2016)

separate instrumentality."[71] A "juridically separate instrumentality" is an entity operated separately from the state, even though it may be fully owned by the state.[72] A steel company wholly owned by China, for example, is likely juridically separate from China itself. Thus, if a plaintiff had secured a judgment against China—for, say, a tort—the steel company's assets would be unavailable for execution and attachment under *Bancec* even if it could have fit under the plain language of the FSIA exceptions. Two extremely rare exceptions to the *Bancec* rule exist in instances where the plaintiff is able to show that the separate juridical instrumentality is the alter-ego of the foreign state or where "the rule of separateness would work an injustice."[73]

In 1996, Congress added what is now § 1605A, a terrorism jurisdiction exception, as a part of the Antiterrorism and Effective Death Penalty Act.[74] Section 1605A creates a jurisdictional immunity exemption for terrorist actions by nations that have been designated by the State Department as State Sponsors of Terrorism.[75] The current list of State Sponsors of Terrorism includes only Iran, Sudan, Syria, and North Korea.[76] Under the initial iteration of the State Sponsor of Terrorism jurisdictional exception, the *Bancec* rule applied.[77] Thus, a successful plaintiff could not attach the property of a state-owned company, even if owned by a State Sponsor of Terrorism, that was used in commercial activity unless the plaintiff could prove that the separate entity was an alter ego of the state or that the rule against that seizure would be unjust.[78] Between 1996 and 2008, the "property used in commercial activity" exception was the only attachment immunity exception available for actions under § 1605A.[79]

Congress remedied this gap in the FSIA by passing the National Defense Authorization Act for Fiscal Year 2008,[80] which created

(noting limits created by the *Bancec* rule), *cert. granted in part*, 137 S. Ct. 2326 (2017) (No. 16-534).

71 *Rubin*, 830 F.3d at 473 (citing *First Nat'l City Bank*, 462 U.S. at 626–29).

72 *See id.* at 481–82 (citing *First Nat'l City Bank*, 462 U.S. at 626–27).

73 *Id.* at 474.

74 Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221, 110 Stat. 1214, 1241 (codified at 28 U.S.C. § 1605 (2012)); *see also* Hennessy, *supra* note 26, at 861.

75 28 U.S.C. § 1605A; *see* Hennessy, *supra* note 26, at 861.

76 Bureau of Counterterrorism & Countering Violent Extremism, *supra* note 28, at 4; *State Sponsors of Terrorism*, U.S. Dep't St., https://www.state.gov/j/ct/list/c14151.htm (last visited Nov. 20, 2017).

77 *See Rubin*, 830 F.3d at 473–74 (citing *First Nat'l City Bank*, 462 U.S. at 626–29).

78 *See id.*

79 *See* 28 U.S.C. § 1610 (2012).

80 National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 3; *see* Hennessy, *supra* note 26, at 861.

§ 1610(g), an attachment exception.[81] Section 1610(g) partially abrogates the *Bancec* rule because "holders of terrorism-related judgments" obtained under § 1605A may attach property "without regard to the presumption of separateness—that is, without the requirement of establishing alter-ego status or showing an injustice."[82] This change made significantly more foreign nation-owned property available to enforce judgments obtained under the § 1605A terrorism exception, but left the *Bancec* rule in place for all other FSIA judgments.[83]

C. Current FSIA Interpretation Questions

Effectively abrogating *Bancec* for terrorism judgments, it turns out, was not as simple as the language in § 1610(g) might suggest. A circuit split has developed over whether § 1610(g) simply amends the current commercial activity attachment immunity,[84] as the Seventh Circuit recently held in *Rubin v. Islamic Republic of Iran*,[85] or "provides a freestanding attachment immunity exception, which *in addition to* enabling veil piercing, allows terrorism victims to attach and execute upon *any* assets of foreign state sponsors of terrorism, their agencies, or instrumentalities regardless of whether the assets are connected to commercial activity in the United States,"[86] as the Ninth Circuit held in *Bennett v. Islamic Republic of Iran*.[87] In short, the disagreement is whether commercial activity is a prerequisite for § 1610(g) attachment. Under the Seventh Circuit approach, § 1610(g) is interpreted quite narrowly to only remove the *Bancec* rule.[88] This means that § 1605A judgment holders could potentially attach property that has been used in commercial activity even if the property is owned by a state-owned entity. The Ninth Circuit approach is much more favorable to plaintiffs. That circuit reads § 1610(g) as a stand-

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81 *See* National Defense Authorization Act for Fiscal Year 2008 § 1083(b)(3), 122 Stat. at 341 (codified at 28 U.S.C. § 1610(g)).

82 *Rubin*, 830 F.3d at 474.

83 *See* 28 U.S.C. § 1610(g) (applying only to property of nations with judgments against them obtained under § 1605A).

84 *See* Petition for a Writ of Certiorari at i–ii, Rubin v. Islamic Republic of Iran, 2016 WL 6124417 (U.S. Oct. 17, 2016) (No. 16-543).

85 830 F.3d 470, 473–74 (7th Cir. 2016), *cert. granted in part*, 137 S. Ct. 2326 (2017) (No. 16-534).

86 Petition for a Writ of Certiorari, *supra* note 84, at i–ii.

87 825 F.3d 949, 959 (9th Cir. 2016), *petition for cert. filed*, 85 U.S.L.W. 3098 (U.S. Sept. 12, 2016) (No. 16-334).

88 *See Rubin*, 830 F.3d at 473–74.

alone exception, not limited by the commercial activity requirement nor the *Bancec* rule.[89]

Further complicating matters is an open question over whose commercial activity counts for property that may be attached under § 1610(a), the original commercial activity attachment exception.[90] In deciding *Rubin*, the Seventh Circuit determined that the property "used for a commercial activity in the United States"[91] must be used by the foreign state itself, rather than simply be owned by the foreign state and used for commercial activity by some other party.[92] Thus, if a court finds that § 1610(g) is limited by § 1610(a), as the Seventh Circuit has, terrorism judgment-holders are limited not only by who *owns* property that is used in commercial activity, but also by who *uses* the property. Consider, for example, whether a commercial airplane, owned and operated by the Bank of Utah, should be subject to attachment to satisfy a judgment against the Republic of Congo, which holds a small ownership interest in the plane.[93] Under the Seventh Circuit's interpretation, the airplane would not be available for attachment. The Ninth Circuit is silent on the issue.

Congress intended that the FSIA would make immunity decisions somewhat predictable by detailing exactly which exceptions apply and by handing the enforcement of those provisions over to the judiciary.[94] This anticipated predictability, however, has not been borne out, as can be seen by the extant circuit split described above. Nevertheless, in cases where the Executive, acting through the State Department, designates a nation as a State Sponsor of Terrorism, both U.S. citizens and foreign nations have some warning as to what actions may be immune from liability, as the resulting lawsuit is in the hands of the judiciary.

D. The Justice Against Sponsors of Terrorism Act

Congress further complicated matters by passing JASTA, which became effective on September 28, 2016.[95] Its purpose was to provide civil litigants a way to recover damages from nations that provide "material support or resources, directly or indirectly, to persons or

89 *See Bennett*, 825 F.3d at 958–59.

90 *See* Petition for a Writ of Certiorari, *supra* note 84, at ii.

91 *Rubin*, 830 F.3d at 473 (quoting 28 U.S.C. § 1610(a) (2012)).

92 *See id*.

93 *See* Commissions Import Export S.A. v. Republic of the Congo, No. 2:16-CV-00404-BSJ, 2016 WL 3951080, at *3 (D. Utah July 20, 2016).

94 *See* Hennessy, *supra* note 26, at 859.

95 JASTA, Pub. L. No. 114-222, 130 Stat. 852 (2016).

organizations that pose a significant risk of committing acts of terrorism that threaten . . . the national security, foreign policy, or economy of the United States."[96] Under this framework, the judiciary determines whether a state materially sponsored terrorism, using whatever proof—often eyewitnesses and, on occasion, intelligence experts—plaintiffs and defendants are able to provide.[97]

Early draft versions of the bill would have added the material support of terrorism provision to the pre-existing non-commercial tort exception in § 1605(a)(5).[98] That location of the provision would have been given the same effect as § 1605A for the purposes of the attachment exception, § 1610(g).[99] If Congress had passed JASTA in the draft location, then plaintiffs who obtained judgments against nations that materially supported terrorism could potentially attach property under the same plaintiff-friendly conditions as plaintiffs who obtained judgments under the state-sponsored terrorism exception that existed prior to JASTA, § 1605A.[100]

Yet, at the last moment, the new terrorism exception granted by JASTA became its own immunity exception.[101] As such, the *Bancec* rule, which prevents the equivalent of veil-piercing for state-owned agencies and was abrogated for *only* § 1605A actions, applies to attachment attempts for judgments obtained under JASTA.[102] Thus, property owned by separate state-owned companies, or juridical entities, may not be attached to enforce judgments against a foreign state under the JASTA jurisdictional exception.[103] This recreates the hurdles the *Acosta* and *Heiser* plaintiffs faced prior to Congress passing the 2008 amendment allowing for attachment. Congress once again created an exception to immunity for suit with no corresponding ex-

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96 *Id.* § 2(a)(6), 130 Stat. at 852.

97 *See id.* § 5, 130 Stat. at 854; *see also* Acosta v. Islamic Republic of Iran, 574 F. Supp. 2d 15, 20–22 (D.D.C. 2008).

98 *See* Sofie G. Syed, Note, *Sovereign Immunity and* Jus Cogens*: Is There a Terrorism Exception for Conduct-Based Immunity?*, 49 COLUM. J.L. & SOC. PROBS. 251, 292 (2016).

99 *See id.*

100 Saudi Arabia certainly thought that the legislation would result in a broad exception to attachment immunity. Adel al-Jubeir, Saudi Arabia's Foreign Minister, warned that passage of the legislation may cause Saudi Arabia to sell its U.S.-based assets to avoid having them frozen in any subsequent litigation. *See* Ben Hubbard, *Angered by 9/11 Victims Law, Saudis Rethink U.S. Alliance*, N.Y. TIMES (Sept. 29, 2016), https://nyti.ms/2jLG9mR.

101 *See* Justice Against Sponsors of Terrorism Act, S. 2040, 114th Cong. (2016).

102 *See* 28 U.S.C. § 1610(a)–(g) (2012) (applying only to "the property of a foreign state against which a judgment is entered under section 1605A").

103 *See* Rubin v. Islamic Republic of Iran, 830 F.3d 470, 473–74 (7th Cir. 2016) (citing First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611, 626–29 (1983)), *cert. granted in part*, 137 S. Ct. 2326 (2017) (No. 16-534).

ception to attachment immunity.[104] There is, however, a key difference between the pre-2008 problem and the JASTA problem: who controls foreign policy. In State Sponsor of Terrorism cases, the terrorism designation—which impacts foreign policy—is made by the executive branch.[105] Under JASTA, the judiciary has control over a determination of whether a foreign nation—perhaps an ally in the eyes of the executive branch—has materially supported terrorism.[106]

In summary, Congress failed to create a workable solution for September 11th plaintiffs. JASTA creates a jurisdiction exception to foreign sovereign immunity for countries that materially support terrorism, but attachment attempts are limited to property used in commercial activity by the defendant nation only, and not by any of its wholly-owned agencies or entities. This recreated the problems the Iran-sponsored terrorism victim plaintiffs faced prior to the 2008 passage of the § 1610(g) attachment exception, and simultaneously took the terrorism support determination from the Executive and placed it in the hands of the judiciary.

II. JASTA Is Unworkable

This Part discusses three key problems with JASTA. First, JASTA gives false hope to plaintiffs who will be trapped in years of litigation with little to no chance of recovering even their legal fees, let alone compensation for which the foreign sovereign is liable.[107] Second, these cases, which take years to decide and provide no remedy, waste judicial resources.[108] Third, JASTA violates fundamental concepts of separation of powers, placing the designation of which nations are sponsors of terrorism in the hands of the judiciary rather than the executive branch.[109] This constitutional violation also creates practical problems with foreign policy—and may open the United States up to retaliatory litigation abroad.

A. JASTA Gives False Hope to Plaintiffs

JASTA failed to create an attachment exception that would allow successful plaintiffs to escape the *Bancec* rule or attach property not

104 *See* Bennett v. Islamic Republic of Iran, 799 F.3d 1281, 1284 (9th Cir. 2015), *opinion withdrawn and superseded by* 817 F.3d 1131 (9th Cir. 2016).

105 28 U.S.C. § 1605A; *see* Bureau of Counterterrorism & Countering Violent Extremism, *supra* note 28, at 229.

106 *See* JASTA, Pub. L. No. 114-222, 130 Stat. 852, 853 (2016); Hubbard, *supra* note 100.

107 *See infra* Section II.A.

108 *See infra* Section II.B.

109 *See infra* Section II.C.

used in commercial activity.[110] This recreates the problems for the Iran-sponsored terrorism victim plaintiffs faced prior to 2008.[111] At that time, "the state-sponsored terrorism exception to the FSIA created an anomaly—it abrogated a foreign sovereign's immunity from judgment, but not its immunity from collection. Terrorism victims therefore had a right without a meaningful remedy."[112] In those cases, plaintiffs who succeeded in obtaining a judgment against executive-branch-designated State Sponsors of Terrorism found themselves unable to pierce immunity when it came to attaching and executing that judgment. JASTA recreates that same situation for plaintiffs who bring claims under the new § 1605B exception: they have a right to bring suit, but no ability to collect the remedy.

While these judgements might feel like moral victories to plaintiffs, they are Pyrrhic victories that cannot be justified given their exorbitant unrecoverable costs.[113] It is nearly impossible to find an attachable asset under this regime, and it is unlikely plaintiffs will be able to recover even the legal fees that they will incur over the years of litigation.[114] Thus, even though Saudi Arabia owns roughly $750 billion in assets in the United States,[115] judgment-holding plaintiffs would not be able to access almost any of it. After spending an average of ten years in litigation before obtaining a judgment,[116] plaintiffs would then need to find property that Saudi Arabia uses in commercial activity. Oil company property, planes owned by Saudi Arabia-owned entities, and the like would all be unavailable for attachment. If the plaintiffs are lucky, they might be able to find, for example, a Saudi-owned museum artifact on loan that could be seized, but likely only if the museum sells entrance tickets.[117] Thus, what Congress intended as a solution allowing September 11th plaintiffs to bring suit

110 *See supra* Sections I.B, I.D.

111 *See supra* Introduction, Section I.B.

112 Bennett v. Islamic Republic of Iran, 799 F.3d 1281, 1284 (9th Cir. 2015), *opinion withdrawn and superseded by* 817 F.3d 1131 (9th Cir. 2016).

113 *See, e.g.*, *In re* Islamic Republic of Iran Terrorism Litig., 659 F. Supp. 2d 31, 55 (D.D.C. 2009) ("[T]his Court began to refer to [FSIA terrorism] judgments as 'Pyrrhic Victories.'").

114 *See* ARYEH PORTNOY ET AL., CROWELL & MORING, THE FOREIGN SOVEREIGN IMMUNITIES ACT: 2008 YEAR IN REVIEW 26–28 (2009), https://www.crowell.com/documents/Foreign-Sovereign-Immunities-Act-FSIA_08-Review.pdf (detailing the length of time FSIA appeals cases take in each circuit, because immunities cases are appealable at nearly every stage of the litigation).

115 *See* Mark Mazzetti, *Saudi Arabia Warns of Economic Fallout if Congress Passes 9/11 Bill*, N.Y. TIMES (Apr. 15, 2016), https://nyti.ms/2k2pmfb.

116 *See supra* text accompanying note 12.

117 *See, e.g.*, Rubin v. Islamic Republic of Iran, 709 F.3d 49, 50–51 (1st Cir. 2013) (detailing case regarding Iranian antiquities in the possession of two museums in the United States).

and recover for their injuries, merely gives plaintiffs false hope, as it is nearly impossible that they would ever collect on a favorable judgment.

B. JASTA Wastes Judicial Resources

Judgment victories without a parallel attachment immunity do not contain an achievable remedy.[118] *In re Terrorist Attacks on September 11, 2001*,[119] the primary vehicle September 11th plaintiffs used to hold Saudi Arabia liable for the attacks, took ten years before the Supreme Court denied certiorari, and the plaintiffs have since commenced new suits.[120] Immunity decisions are appealable at many stages, because if the party is found to be immune at any point in the proceeding, the action is dismissed.[121] Because of the multiple opportunities for interlocutory appeal, the litigation will often drag out while the court of appeals reviews the litigation each step of the way. In the Iran cases, the district court noted that, even after the 2008 amendment, "[c]ivil litigation against Iran under the FSIA state sponsor of terrorism exception represents a failed policy."[122] The court explained, "After more than a decade spent presiding over these difficult cases, this Court now sees that these cases do not achieve justice for victims, are not sustainable, and threaten to undermine the President's foreign policy initiatives during a particularly critical time in our Nation's history."[123] Further, the court wrote, "The truth is that the prospects for recovery upon judgments entered in these cases are extremely remote."[124]

These cases do not provide a remedy for the plaintiffs because the plaintiffs do not have the ability to attach assets and execute a judgment; thus, not only is this a largely illusory procedure in practice for the plaintiffs, but it is a waste of judicial resources. While it is the role of the courts to decide cases, without a potential remedy, the time spent by the courts is not justified. In the main September 11th case, approximately 186 motions and memoranda were filed at the trial

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118 *In re Islamic Republic of Iran Terrorism Litig.*, 659 F. Supp. 2d at 55.

119 714 F.3d 109 (2d Cir. 2013).

120 *See* Hennessy, *supra* note 26; Jonathan Stempel, *Saudi Arabia Seeks to End U.S. Lawsuits over Sept. 11 Attacks*, REUTERS (Aug. 1, 2017), https://www.reuters.com/article/us-usa-saudi-sept11/saudi-arabia-seeks-to-end-u-s-lawsuits-over-sept-11-attacks-idUSKBN1AH4RL.

121 Initial jurisdiction determinations are immediately appealable, for if the trial court is wrong, the litigation must end for want of jurisdiction. *See* 28 U.S.C. §§ 1602–1611 (2012); *see also* PORTNOY ET AL., *supra* note 114, at 31.

122 *In re Islamic Republic of Iran Terrorism Litig.*, 659 F. Supp. 2d at 37.

123 *Id.*

124 *Id.*

court level, along with eighty-eight briefs before the circuit court.[125] If these plaintiffs bring a case under § 1605B, they will have to make all these same arguments again, further prove that Saudi Arabia did materially support terrorism, and, even if successful, will still have no way to collect on a favorable judgment.[126]

Much of standing doctrine emanates from the idea that the role of the judiciary is to decide cases and controversies where a judgment will have some effect on the relationship between parties that are before the court.[127] Requiring that a case or controversy exists helps avoid wasting the finite resources of the judicial branch. Here, the judiciary's designation of a sovereign as providing material support for terrorism could have great impact on U.S. foreign policy, but no tangible effect on the successful plaintiff, aside from the legal fees expended over years of litigation. Without a remedy, these cases are quite reminiscent of unconstitutional advisory opinions that require many years and several appeals to produce.[128] For these reasons, allowing jurisdiction without a useable attachment exception is an unjustifiable waste of judicial resources.

C. JASTA Intrudes on the Executive's Recognition Power

"[T]he Nation must have a single policy regarding which governments are legitimate in the eyes of the United States and which are not."[129] Article II of the U.S. Constitution grants the President the power to conduct the armed forces and recognize foreign govern-

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125 These numbers come from the list of available filings on Westlaw in *In re Terrorist Attacks on September 11, 2001*, 714 F.3d 118 (2d Cir. 2013).

126 *See supra* Sections I.B, I.D; *see also In re Terrorist Attacks on September 11, 2001*, 714 F.3d at 112–13 (discussing dismissal of several defendants for failing to satisfy the pre-JASTA jurisdiction exceptions in prior stages of the litigation).

> The FSIA's legislative history also supports the proposition that the noncommercial tort exception should apply to relatively few situations. Indeed, one of our sister circuits has noted that the primary purpose of this exception to the FSIA "was to enable officials and employees of foreign sovereigns to be held liable for the traffic accidents which they cause in this country, whether or not in the scope of their official business."

In re Terrorist Attacks on September 11, 2001, 714 F.3d at 116 n.8 (quoting Asociacion de Reclamantes v. United Mexican States, 735 F.2d 1517, 1525 (D.C. Cir. 1984)).

127 *See, e.g.*, Flast v. Cohen, 392 U.S. 83, 101 (1968) ("[T]he question of standing is . . . whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.").

128 While common in some countries, advisory opinions by the federal courts are prohibited by Article III of the U.S. Constitution. *See, e.g.*, *Flast*, 392 U.S. at 96 ("[T]he oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions." (quoting C. WRIGHT, FEDERAL COURTS 34 (1963))).

129 Zivotofsky *ex rel.* Zivotofsky v. Kerry, 135 S. Ct. 2076, 2086 (2015).

ments and their diplomats.[130] The Supreme Court recently recognized in *Zivotofsky ex rel. Zivotofsky v. Kerry*,[131] that "the Court has long considered recognition to be the exclusive prerogative of the Executive."[132] To conduct foreign policy, it is necessary for the President to speak as one for the entire United States when designating which countries the United States recognizes and the status of those relationships.[133] Otherwise, other nations cannot be sure which branch of the government truly speaks for the United States.

Here, JASTA allows the judiciary to decide if the United States views another nation as one that provided material support for terrorism.[134] While the judiciary cannot officially designate a nation as a State Sponsor of Terrorism, under JASTA, the judiciary determines whether a nation is responsible for "international terrorism against the United States."[135] Further, the term "judiciary" is slightly misleading. As this is a jurisdictional exception based on a factual finding,[136] the immunity determination is made by an individual district court judge, likely only reviewed by a deferential three judge panel. Even more, due to issue preclusion, that determination will likely apply to all similarly injured plaintiffs, across the country and around the world, from the same terrorist event.[137]

If the presiding judge and the executive branch give two conflicting statuses to a single country, not only is the constitutional separation of powers violated, but foreign policy becomes very difficult for the Executive to conduct. The executive branch may have opted against naming the country as a sponsor of terrorism because, for example, the Executive may want to avoid opening the United States up to liability in foreign courts.[138] If the judiciary finds that a country is

130 "The President shall be Commander in Chief of the Army and Navy of the United States," U.S. CONST. art. II, § 2, cl. 1, and "he shall receive Ambassadors and other public Ministers," U.S. CONST. art. II, § 3, cl. 4.

131 135 S. Ct. 2076 (2015).

132 *Id.* at 2089.

133 *See id.* at 2086.

134 *See* JASTA, Pub. L. No. 114-222, § 3(a), 130 Stat. 852, 853 (2016) (to be codified at 28 U.S.C. § 1605B).

135 *Id.* The section title is "Responsibility of foreign states for international terrorism against the United States." *Id.*

136 *See id.*

137 A draft JASTA bill would have eliminated this concern by making preclusion non-applicable to the bill, but this provision did not make it into the final statute. *Compare id.*, *with* H.R. 3143, 113th Congress § 4 (2013).

138 *See* Faisal J. Abbas, *Davos 2017: Saudi Foreign Minister Says US Has 'Most to Lose' from JASTA*, ARAB NEWS (Jan. 17, 2017), http://www.arabnews.com/node/1040286/saudi-arabia.

"The country that has the most to lose from dilution of sovereign immunities is the

responsible for terrorism—under a law officially titled the "Justice Against *Sponsors of Terrorism* Act"—the foreign sovereign may see this determination as an official label placed on it by a separate sovereign.[139] In response, the country, perhaps an ally, may cut off relations with the United States, divest its U.S.-based assets, or waive the United States' foreign sovereign immunity in its own courts.[140] These threats are not mere hypotheticals—Saudi Arabia made exactly these threats in response to early drafts of JASTA.[141]

While JASTA contains a provision allowing the Attorney General to stay proceedings nearly indefinitely, as long as the United States is in negotiations with foreign nations, this does not remove decisionmaking power from the judiciary—it merely delays the process.[142] Though it can be argued that the burden should be on the executive branch to halt a judicial proceeding brought by the plaintiffs who have been harmed where there may be negative foreign policy consequences, this provision does not solve the separation of powers problem. Even with stays available to help minimize damage to foreign policy, the judiciary is still the final decisionmaker. Further, allowing the State Department to certify to the Attorney General that negotiations are ongoing in order to stay a proceeding does nothing to help the plaintiffs seeking to obtain a judgment as the plaintiffs would still lack the ability to attach following a favorable judgment on liability.

Adopting the approach Congress used in § 1610(g) to fix the attachment issue the Iran-sponsored terrorism victims faced would only exacerbate the separation of powers problem with JASTA. Under

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> US itself. And American officials know this. Because America has the largest footprint in the world, they [sic] operate all over the world, they're [sic] fighting wars all over the world," [the Saudi foreign minister] told the [World Economic Forum] meeting . . . .

Id.

139 *See* JASTA, Pub. L. No. 114-222, § 1, 130 Stat. 852, 852 (2016) (emphasis added); Abbas, *supra* note 138.

140 *See, e.g.*, Hubbard, *supra* note 100 (discussing Saudi Arabia's threats in wake of JASTA).

141 *See id.*

142 JASTA, Pub. L. No. 114-222, § 5, 130 Stat. 852, 854 (2016).

> (b) Intervention.—The Attorney General may intervene in any action in which a foreign state is subject to the jurisdiction of a court of the United States under section 1605B . . . if the Secretary of State certifies that the United States is engaged in good faith discussions with the foreign state defendant concerning the resolution of the claims against the foreign state, or any other parties as to whom a stay of claims is sought.

Id.

§ 1605A, the jurisdiction exception used by the Iran-victim plaintiffs, the Executive, through the State Department, makes a terrorism-sponsorship determination prior to any judicial proceedings.[143] If § 1610(g) were amended to resolve attachment concerns in light of JASTA, the *judiciary* would be making the terrorism-sponsorship determination.[144] Most concerning, if § 1610(g), the attachment exception Congress added in 2008, were extended to cover judgments obtained under § 1605B, and the executive and the judicial branches had opposing views of a foreign sovereign's sponsorship of terrorism, the plaintiff would be free to start an attachment proceeding, allowing the judiciary to attach nearly any asset of the foreign state,[145] while the executive branch publicly takes a different approach to the foreign sovereign's role in terrorism.

Adding to the practical problems created by the separation of powers violation, "the Executive also has an interest in protecting United States officials [and allies] from charges in foreign courts."[146] In *Samantar v. Yousuf*,[147] where the liability of foreign government officials under the FSIA was addressed, the Supreme Court noted the State Department's political interests abroad.[148] And suggestions to grant immunity to foreign sovereigns by the State Department frequently recognize the "special sensitivities of exposing [government leaders] to civil litigation in foreign courts, particularly while they are still in office."[149] Similarly, here, when the United States waives immunity for terrorism sponsorship without the approval of the Executive, other countries may begin to litigate against the United States for sponsoring what that state views to be terrorist activities. For example, some nations see drone strikes by the United States on foreign soil as potential terrorist activity for which they might attempt to hold the United States or its service members liable in court.[150]

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143 *See* 28 U.S.C. § 1605A (2012).

144 *See* JASTA, Pub. L. No. 114-222, § 3, 130 Stat. 852, 853 (2016) (to be codified at 28 U.S.C. § 1605B (2012)).

145 *See supra* Sections I.C, I.D.

146 Lauren Manns, Note, *An Unusual Separation of Power Episode:* Samantar v. Yousuf *and the Need for the Executive Branch to Assert Control over Foreign Official Sovereign Immunity Determinations*, 20 Wm. & Mary Bill Rts. J. 955, 975 (2012).

147 560 U.S. 305 (2010).

148 *Id.* at 312.

149 Manns, *supra* note 146, at 975 (quoting John Bellinger, *Immunities*, Opinio Juris (Jan. 18, 2007, 7:00 AM), http://opiniojuris.org/2007/01/18/immunities/).

150 *See* Abbas, *supra* note 138 ("When you dilute sovereign immunities, you turn the international order into the law of the jungle. . . . Using drones could subject you to lawsuit." (quoting Saudi Arabia's Foreign Minister)).

Thus, it is clear that the enacted version of JASTA is unworkable. Plaintiffs receive little benefit from this jurisdictional waiver of sovereign immunity, as there is no real chance that they will recover any damages they might be awarded. Judicial resources are wasted deciding long, complicated cases that lack options for viable remedies. And serious damage to U.S. foreign policy looms as a result of the separation of powers violation. Congress failed in its mission to help the September 11th plaintiffs and should replace JASTA with an effective, constitutional solution.

III. Repeal JASTA and Leave Terrorism Determinations with the Executive Branch

Congress should repeal JASTA and replace it with a complaint procedure at the State Department. Under this proposed system, plaintiffs who wish to sue under § 1605A, the pre-JASTA terrorism exception, may petition the State Department in a formal hearing process to have the potentially-liable foreign sovereign—in the case of the September 11th plaintiffs, Saudi Arabia—designated as a State Sponsor of Terrorism for the act that is the basis of their claim. A time limit should be placed on the State Department decisionmaking, though it may extend that deadline where it can provide a reasoned explanation to the potential plaintiffs. If plaintiffs want to challenge the agency's denial of the designation or its request for a time extension, a suit can then be brought against the State Department in district court rather than against a foreign country. If the would-be plaintiffs are successful in petitioning the State Department, then the plaintiffs could bring their action under § 1605A. This solution leaves the determination of the foreign country's terrorism activities entirely within the executive branch, and the determinations of damages and attachment within the judiciary. And because the judgment would be under § 1605A, plaintiffs could seek to attach property unencumbered by the limitations of the *Bancec* rule.

First, Congress should repeal JASTA and grant the State Department rulemaking power to develop a formal hearing process and timeline for designations of state sponsors of individual terrorist acts. Congress should also provide general parameters for the hearing, including the standard for when the State Department should initiate a decisionmaking process. One option would be to create a probable cause standard requiring the State Department to make a determination once the plaintiffs provide enough evidence to show probable cause that the foreign nation sponsored terrorism. Once the plaintiff

has met its burden to prove probable cause, the State Department would be obligated to evaluate the information available to it—both classified and unclassified—and provide a decision for the requestors within a timeframe set either explicitly by Congress, or by the agency during the notice-and-comment rulemaking process.

The State Department's determinations and requests for extensions would be reviewable in Article III courts under the Administrative Procedure Act.[151] By seeking judicial review, the plaintiffs would be challenging the State Department's decisionmaking—not filing a complaint against a foreign country.[152] In particular, the plaintiffs would ask the court to ensure that the Department provided due process and came to a conclusion through rational, well-supported decisionmaking.[153] While the State Department could keep portions of its reasoning classified, it would be required to provide a reasoned statement of why it chose to designate or not designate a foreign nation as a sponsor of terrorism for the act in question. Courts often give deference to foreign policy decisions, but can review classified information under seal where necessary.[154] One example of where this occurs is judicial review of Freedom of Information Act ("FOIA")[155] request denials.[156] In response to the challenge, the agency files either a

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151 5 U.S.C. § 706 (2012) (describing scope of review). "The reviewing court shall (1) compel agency action unlawfully withheld or unreasonably delayed; and (2) . . . set aside agency . . . conclusions found to be . . . not in accordance with law . . . [or] without observance of procedure required by law." *Id.*

152 While it is an open question whether judicial discretion would allow a foreign country to intervene in the suit challenging the State Department's adherence to process, it seems unlikely that a country would try to do so. The challenge is to the State Department's conduct, not the foreign nation's. If the nation was trying to support the State Department's favorable decision, intervening would create public relations issues as it would tend to indicate the State Department might be covering something up or not reaching an unbiased result. If the nation were challenging the State Department's conclusions, the case would already be proceeding under § 1605A.

153 *See* Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 41 (1983) (finding that agency action "may be set aside if found to be 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' " (quoting 5 U.S.C. § 706(2)(A) (2012))).

154 *See* De Sousa v. Dep't of State, 840 F. Supp. 2d 92, 104–05 (D.D.C. 2012) (collecting cases and authorities on disclosure of classified information). District courts have the power to "control any discovery process . . . so as to balance [a plaintiff's] need for access to proof which would support a colorable constitutional claim against the extraordinary needs of the CIA for confidentiality and the protection of its methods, sources, and mission." Webster v. Doe, 486 U.S. 592, 604 (1988). While the Supreme Court has not yet addressed this power in non-constitutional civil cases, the U.S. District Court for the District of Columbia has found that it has this power to review classified materials in camera. *See De Sousa*, 840 F. Supp. 2d at 100, 104.

155 5 U.S.C. § 552 (2012).

156 *See, e.g.*, Elec. Privacy Info. Ctr. v. Customs & Border Prot., 160 F. Supp. 3d 354, 361

Glomar response—explaining why it cannot respond to the request at all—or a detailed report listing what the agency is withholding along with the privilege that permits it to do so.[157] The reviewing court, relying on the agency's explanation and, where necessary, in camera review of classified documents, then determines whether the request was properly denied.[158]

Under this proposal, should the State Department fail to provide adequate due process, a court would order the agency to reconsider the decision using correct procedures. Thus, the focus of the judicial inquiry will not be into the actual classification of the country as either a sponsor or not-a-sponsor of terrorism, which is likely not challengeable in an Article III court under the political question doctrine.[159] It would instead focus on the adequacy of the procedures and decision-making used in reaching that determination. Under this framework, the factual determination of terrorism sponsorship would be left to the Executive, and judgment and attachment determinations will remain with the judiciary.

Although requiring plaintiffs to navigate this procedure sounds burdensome, it helps plaintiffs by creating an avenue to actually collect on a judgment by avoiding the *Bancec* block they would encounter under § 1605B—the JASTA exception.[160] In other words, by getting the State Department to designate a country as a State Sponsor of Terrorism for the specific act, the plaintiff can rely on the pre-JASTA immunity exception in § 1605A and the broad attachment exception in § 1610(g).[161] Bypassing the JASTA amendment, § 1605B, would save plaintiffs the time and expense of determining whether they can proceed with the rest of the suit. With the immunity decision predetermined by the State Department, the number of potential interlocutory immunity appeals will be minimized.[162] The plaintiff will still need to prove causation and that the act at issue was terrorism at the administrative hearing, but the immunity issue would be resolved

(D.D.C. 2016) (holding federal agency did not adequately demonstrate that requested documents withheld fell within FOIA exemption).

157 *See, e.g.*, Am. Civil Liberties Union v. CIA, 710 F.3d 422, 425–26, 426 n.1 (D.C. Cir. 2013) (explaining *Glomar* response).

158 *See De Sousa*, 840 F. Supp. 2d at 104–05.

159 *See* Baker v. Carr, 369 U.S. 186, 211–13 (1962) (holding that foreign relations is an area where "issues frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature" and therefore likely are nonjusticiable).

160 *See supra* Section II.A.

161 *See* 28 U.S.C. §§ 1605A, 1610(g) (2012).

162 *See supra* Section II.B.

before the jurisdiction stage. At the attachment stage, plaintiffs would likely be able to move faster through the attachment proceedings under § 1610(g), as they would merely need to prove ownership of the property under the Ninth Circuit's interpretation[163] or ownership and use by the nation in commercial activity under the Seventh Circuit's approach.[164] Thus, the benefit of possible attachment will make the extra step of petitioning the State Department worth it for those plaintiffs.

This solution creates a legitimate pathway for potential plaintiffs to collect on a judgment should they eventually prove that a foreign nation was responsible for terrorism. It uses judicial resources more effectively, saving judicial determinations for decisions that will have some cognizable outcome on the parties. It is also constitutionally sound, leaving the recognition power exclusively with the executive branch. Finally, it strikes the balance that Congress was initially seeking to create when it passed the FSIA in 1976.[165] It leaves in place the predictability of immunity (or lack thereof) for commercial activities and nations that the Executive deems habitual State Sponsors of Terrorism and allows exceptions to predictability for one-time egregious acts that amount to terrorism, as determined by the executive branch. Once those factual determinations are made, the judiciary handles the extent of liability and, ultimately, what property may be seized for attachment. For these reasons, Congress should repeal JASTA and grant rulemaking power to the State Department to create a formal terrorism sponsorship determination procedure.

Conclusion

In 1803, while announcing the power of the judiciary in *Marbury v. Madison*,[166] Chief Justice Marshall wrote: "It is a settled and invariable principle, that every right, when withheld, must have a remedy . . . ."[167] American jurisprudence has not evolved so simply. Just this past year, in passing JASTA, Congress created a "right without a meaningful remedy."[168] By directing the State Department to conduct

163 *See supra* Section I.C (explaining *Bennett v. Islamic Republic of Iran*, 825 F.3d 949 (9th Cir. 2016)).

164 *See supra* Section I.C (explaining *Rubin v. Islamic Republic of Iran*, 830 F.3d 470 (7th Cir. 2016)).

165 FSIA, Pub. L. No. 94-583, § 1602, 90 Stat. 2891, 2892 (describing purpose of legislation).

166 5 U.S. (1 Cranch) 137 (1803).

167 *Id.* at 147.

168 Bennett v. Islamic Republic of Iran, 799 F.3d 1281, 1284 (9th Cir. 2015) (discussing terrorism judgment creditors' enforcement attempts prior to § 1610(g), which fixed the problem

a formal hearing process for individuals who wish to hold a sovereign state accountable for sponsoring an act of terrorism, Congress can provide plaintiffs a means to bypass § 1605B, and use the current § 1605A and parallel attachment immunity exceptions. This would give potential plaintiffs a chance to be heard, save judicial resources, and give victorious plaintiffs an effective way to execute their judgments.

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of plaintiffs succeeding against Executive-designated State Sponsors of Terrorism and finding themselves unable to pierce immunity when it comes to attaching and executing that judgment), *opinion withdrawn and superseded by* 817 F.3d 1131 (9th Cir. 2016); *see* 28 U.S.C. § 1605(a)(5) (2012).