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THE JUSTICE AGAINST SPONSORS OF TERRORISM ACT: AN INFRINGEMENT ON EXECUTIVE POWER

Abstract: In the more than sixteen years since September 11, 2001, the United States has resolved, through policy at home and abroad, to vindicate the heroes and victims of that attack. From the creation of the Department of Homeland Security, to the raid that resulted in the death of Osama Bin Laden, the shockwaves of 9/11 have reverberated through America's domestic and foreign policy ever since. In the only veto override of the Obama presidency, the 114th U.S. Congress brought the Justice Against Sponsors of Terrorism Act ("JASTA") into force, intending to provide U.S. citizens with a basis to seek relief against persons, entities, and foreign governments that offered material support to terrorist acts occurring on or after 9/11. Now, empowered by Congress, private citizens and the courts can disrupt the President's unified foreign policy with respect to the suspect nation, an impermissible violation of the separation of powers doctrine. This Note argues that JASTA unconstitutionally allows private litigants and the courts to delve into the executive foreign affairs power, determining America's stance on another nation's responsibility for international terrorism.

INTRODUCTION

The names of 404 U.S. citizens, each of whom lost a parent on 9/11, are signed beneath an impassioned letter to congressional leadership.[1] These citizens urged Congress to ease the pain of their loss by passing the Justice Against Sponsors of Terrorism Act ("JASTA").[2] Some of the signatories, not yet born at the time of the attack, have a parent they will never know.[3] At its core, JASTA provides U.S. citizens the ability to seek relief in the federal courts for acts of terrorism committed in the United States.[4] Prior to

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[1] *An Open Letter to Congress from the 9/11 Children for Justice Against Terrorism*, PASSJASTA.ORG (Aug. 16, 2016), http://passjasta.org/2016/08/open-letter-congress-911-children-justice-terrorism/ [https://perma.cc/FE9R-ZHZP] (describing the desire to seek resolution and recompense for the loss of their parents).

[2] *Id.*

[3] *See id.* (noting the ages, including those in utero on September 11, 2001, of children who lost parents during the attacks).

[4] *See* 28 U.S.C. § 1605B (2012 & Supp. IV 2016) (expanding the exceptions to foreign sovereign immunity by removing limitations on the number of nations over which a U.S. court may have jurisdiction for cases arising out of acts of international terrorism); *see also* 28 U.S.C. § 1604 (2012) (affording immunity from the jurisdiction of U.S courts to the government of a foreign nation, subject to the limitations in §§ 1605–1607). JASTA withdraws sovereign immunity for

JASTA's enactment, American citizens could only bring suit against a foreign nation for involvement in international terrorism if the President had previously designated that nation a state sponsor of terror.[5] JASTA eliminates this prior designation requirement through an expansion of the exceptions to the Foreign Sovereign Immunities Act ("FSIA"), which, in keeping with international norms, bars many lawsuits against foreign governments.[6]

In the more than sixteen years since September 11, 2001, the United States has resolved, through policy at home and abroad, to vindicate the heroes and victims of that attack.[7] From the creation of the Department of Homeland Security to the raid that resulted in the death of Osama Bin Laden, the shockwaves of 9/11 have reverberated through America's domestic and foreign policy.[8] JASTA is considered by many a necessary next step in the long road to vindication, allowing 9/11 families to seek justice against foreign governments that may have been involved in the attack.[9] Although JASTA is constructed to apply against any nation or agent of a nation that

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countries that may have previously been immune from terrorism suits as a jurisdictional matter, but it also expands civil liability causes of action under the Antiterrorism Act. *See* 18 U.S.C. § 2333 (2012 & Supp. IV 2016); 28 U.S.C. § 1605B; *see also* Alison Bitterly, *Can Banks Be Liable for Aiding and Abetting Terrorism?: A Closer Look into the Split on Secondary Liability Under the Antiterrorism Act*, 83 FORDHAM L. REV. 3389, 3400 (2015) (describing JASTA's role in expanding secondary liability, particularly for banks, as part of JASTA's expansion of causes of actions, distinct from the Act's impact on foreign sovereign immunity). This Note focuses on the expanded jurisdiction that JASTA creates by expanding the terrorism exception to foreign sovereign immunity. *See infra* notes 20–220 and accompanying text.

[5] *See* 28 U.S.C. § 1605A (2012) (detailing the previously existing state sponsor of terror exception to foreign sovereign immunity).

[6] *See id.* § 1605B (expanding the exceptions to the FSIA to include nations not previously designated a state sponsor of terror by the executive); Juan C. Basombrio, *Nations on Trial*, L.A. LAW., Apr. 2017, at 16, 18 (describing, in the wake of JASTA, the international norms encapsulated by the Foreign Sovereign Immunities Act).

[7] *See* 107 CONG. REC. PM43 (2001) (noting the fact that the President's address was delivered to a Joint Session of Congress); SELECTED SPEECHES OF PRESIDENT GEORGE W. BUSH, GEORGE W. BUSH WHITE HOUSE ARCHIVES 65–73 (2001), https://georgewbush-whitehouse.archives.gov/infocus/bushrecord/documents/Selected_Speeches_George_W_Bush.pdf [https://perma.cc/7T75-8A72] (committing the nation, in a speech from President Bush to the Joint session of Congress just nine days after the attacks, to a lengthy campaign to pursue terrorism).

[8] *See* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, 2142 (creating the Department of Homeland Security as a stand-alone, cabinet-level department to further coordinate and unify national homeland security efforts); Macon Phillips, *Osama Bin Laden Dead: Remarks by the President on Osama Bin Laden*, WHITE HOUSE (May 2, 2011, 12:16 AM) https://www.whitehouse.gov/blog/2011/05/02/osama-bin-laden-dead [https://perma.cc/V5Z8-LJLH] (describing the impact of the 9/11 attacks and the subsequent efforts to pursue Osama Bin Laden in an address to the nation, televised from the Yellow Room of the White House).

[9] *See* Chuck Schumer & John Cornyn, *Give 9/11 Families Legal Avenue: Opposing View*, USA TODAY (Sept. 27, 2016, 6:03 PM), http://www.usatoday.com/story/opinion/2016/09/27/911-families-chuck-schumer-john-cornyn-editorials-debates/91183890/ [https://perma.cc/2XU2-BT3N] (arguing, as the two sponsors of bill S.2040 in the U.S. Senate, in favor of giving 9/11 families legal recourse against foreign nations for harm suffered during the attacks).

engages in tortious acts providing substantial support to acts of terrorism against the United States, the principal impetus for the Act is to provide victims a basis to seek relief against the Kingdom of Saudi Arabia for its possible involvement in the 9/11 attacks.[10] JASTA further facilitates civil liability for foreign governments for aiding and abetting terrorist acts.[11]

JASTA was introduced in the Senate on September 16, 2015 and successfully passed both chambers by September 9, 2016.[12] On September 23, 2016, President Barack Obama vetoed the bill.[13] For the first and only time during the eight-year Obama Presidency, Congress legislatively overrode the President's veto five days later, and JASTA became law.[14]

This Note argues that JASTA intrudes upon the foreign affairs power of the Executive, an area in which the President's authority has long been recognized.[15] This Note further argues that JASTA unconstitutionally violates the separation of powers doctrine.[16] Part I of this Note examines the status of the law prior to JASTA with respect to executive power, foreign sovereign immunity, and the separation of powers doctrine, as well as relevant provisions of JASTA itself and public reactions to the law.[17] Part II of this Note evaluates the Executive as the best chooser for America's stance

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[10] *See id.* (noting the sponsors of the bill believe there is a moral imperative to provide 9/11 families with a day in court); The Editorial Board, *Uphold Veto on 9/11 Lawsuits: Our View*, USA TODAY (Sept. 27, 2016, 5:54 PM), http://www.usatoday.com/story/opinion/2016/09/27/911-lawsuits-saudi-arabia-congress-veto-obama-editorials-debates/91149628/ [https://perma.cc/K56C-XK7P] [hereinafter *Uphold Veto on 9/11 Lawsuits*] (recognizing the difficulties of litigating 9/11 cases and calling JASTA a last-ditch effort to allow families of 9/11 victims to bring suit against Saudi Arabia); James Zogby, *JASTA: Irresponsible and Dangerous*, HUFFINGTON POST (Oct. 1, 2016, 7:55 AM), http://www.huffingtonpost.com/james-zogby/jasta-irresponsible-and-d_b_12269448.html [https://perma.cc/MG87-HL8M] (describing the primary purpose of the Act as a vehicle for 9/11 victim suits against Saudi Arabia). This Note does not evaluate the merits of a case against the Kingdom of Saudi Arabia, but instead focuses solely upon JASTA's implications for executive power over foreign affairs. *See infra* notes 20–120 and accompanying text.

[11] *See* Justice Against Sponsors of Terrorism Act, Pub. L. No. 114-222, § 4, 130 Stat. 851, 854 (2016) (describing the alterations to the existing foreign sovereign immunity exceptions, causes of action against foreign nations, and the common law framework for judicially evaluating aiding and abetting and conspiracy liability in federal civil cases).

[12] *See S.2040—Justice Against Sponsors of Terrorism Act,* CONGRESS.GOV, https://www.congress.gov/bill/114th-congress/senate-bill/2040/all-actions [https://perma.cc/ER3X-QVM9] [hereinafter *JASTA History*] (listing all Congressional actions with respect to S.2040, from introduction to enactment by overriding a Presidential veto).

[13] *See Veto Message from the President—S.2040*, WHITE HOUSE (Sept. 23, 2016), https://obamawhitehouse.archives.gov/the-press-office/2016/09/23/veto-message-president-s2040 [https://perma.cc/R2U6-TMXM] [hereinafter *Veto Message from the President*] (describing the principal reasons President Obama returned S.2040 to Congress unsigned).

[14] *See JASTA History*, *supra* note 12 (listing all Congressional actions with respect to S.2040, from introduction to enactment by overriding a Presidential veto).

[15] *See infra* notes 20–220 and accompanying text.

[16] *See infra* notes 20–220 and accompanying text.

[17] *See infra* notes 20–123 and accompanying text.

on a foreign nation's responsibility for terror.[18] Finally, Part III argues that JASTA is unconstitutional because the Act infringes upon a function properly entrusted to the President because the nation should speak to the international community with one voice: the Executive's.[19]

I. BEFORE AND AFTER JASTA: A HISTORICAL ANALYSIS OF EXECUTIVE POWER IN FOREIGN AFFAIRS

The discord between the 114th Congress and President Barack Obama surrounding the Justice Against Sponsors of Terrorism Act ("JASTA") highlights an area of constitutional law that is long-standing, yet still unsettled: the extent of executive power in the field of foreign affairs and the ability of Congress and the Judiciary to participate in that field.[20] This area is particularly relevant because the current Presidential administration, faced with the present posture of U.S. relations with Saudi Arabia, may be forced to weigh how stridently to challenge Congress on the scope of executive power in foreign affairs.[21]

Section A of this Part examines traditional notions of executive power and Section B evaluates the constitutional doctrine of separation of powers.[22] Next, Section C discusses the Foreign Sovereign Immunities Act.[23] Section D describes JASTA's operative provisions.[24] Then, Section E weighs the response, both domestically and abroad, to the

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[18] *See infra* notes 124–169 and accompanying text.

[19] *See infra* notes 170–219 and accompanying text.

[20] *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 396–97 (4th ed. 2013) (discussing the history of the foreign affairs power); John C. Yoo, *Foreign Affairs Federalism and the Separation of Powers*, 46 VILL. L. REV. 1341, 1346 (2001) (describing the growing power of the executive over foreign affairs throughout U.S. history for reasons of structure, speed, and efficiency).

[21] *See* Mark Hensch, *Trump Slams Obama for 'Shameful' 9/11 Bill Veto*, THE HILL (Sept. 23, 2016, 6:18 PM), http://thehill.com/blogs/ballot-box/presidential-races/297558-trump-rips-obama-for-shameful-9-11-veto [https://perma.cc/3H5Y-7SRS] (releasing then-candidate Donald Trump's response to President Barack Obama's veto and explaining the candidate's disdain for the incumbent's decision, in addition to the reactions of others); Jonathan Masters, *U.S. Foreign Policy Powers: Congress and the President*, COUNCIL ON FOREIGN RELATIONS (Mar. 2, 2017), https://www.cfr.org/backgrounder/us-foreign-policy-powers-congress-and-president [https://perma.cc/B93P-PQ9A] (discussing presidential pushback to congressional efforts to curtail executive prerogatives in foreign affairs). Although possibly little more than a campaign device, Donald Trump, in a statement made in the hours following President Obama's JASTA veto, called the veto one of the low points of the Obama Presidency, and offered his intent to sign any similar legislation in the future. *See* Hensch, supra. This leaves open the question of whether, or how, the Trump administration might address legislative challenges to executive power. *See id.*

[22] *See infra* notes 27–72 and accompanying text.

[23] *See infra* notes 73–95 and accompanying text.

[24] *See infra* notes 96–102 and accompanying text.

legislation.[25] Finally, Section F discusses the political question doctrine of prudential standing.[26]

A. Executive Power in Foreign Affairs Prior to JASTA

There is no express foreign affairs power provision in the U.S. Constitution.[27] Rather, the power to direct the nation's foreign policy decisions is drawn from several places throughout the document.[28] Congress is vested with the power to regulate foreign commerce, to define and punish offenses against the law of nations, to declare war, and the Senate must advise and consent to the appointment of ambassadors and entering into treaties.[29] The Executive, in contrast, is responsible for a distinct set of foreign affairs functions, including commander in chief of the armed forces, the power to make treaties and appoint ambassadors, and the responsibility of receiving foreign ambassadors and other public ministers.[30]

The Constitution presumes the Legislature and the Executive will both fill important roles in pursuing the nation's interests abroad.[31] The division of discrete responsibilities, which cumulatively compose one broader foreign affairs power, is an inevitable source of tension, requiring judicial determinations to the extent each branch may act independently of the other without overstepping constitutional bounds.[32]

For example, in 1936, in *United States v. Curtiss-Wright Export Corporation*, the Supreme Court afforded unparalleled deference to the President's power over foreign affairs.[33] Congress resolved to grant the President

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[25] *See infra* notes 103–113 and accompanying text.

[26] *See infra* notes 114–123 and accompanying text.

[27] *See* CHEMERINSKY, *supra* note 20, at 369 (describing the absence of a single express provision for foreign affairs). *See generally* U.S. CONST. (noting the absence of a singular provision dedicating an express foreign affairs power to one branch of government, but rather enumerating foreign affairs functions in multiple locations).

[28] *See generally* U.S. CONST. (noting the delegation of authority to regulate foreign commerce, declare war, powers to appoint, confirm, and receive ambassadors, and to raise and command armed forces).

[29] U.S. CONST. arts. I–II (enumerating the powers of the legislature).

[30] *Id.* at art. II.

[31] *See, e.g.*, Zivotofsky v. Kerry, 135 S. Ct. 2076, 2090 (2015) (describing Congress's role in conducting foreign affairs and recognizing that Congress may limit the array of options available to the President through legislative measures with respect to international relations); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (recognizing the Constitution's contemplation that the structure of American government would diffuse power for the greater preservation of liberty, but the branches of government, although separate, would be interdependent).

[32] *See* Masters, *supra* note 21 (discussing tensions between the White House and Capitol Hill with respect to power over American foreign policy).

[33] *See* 299 U.S. 304, 319 (1936) (discussing the foreign affairs power inherent in government and the role of the executive, specifically).

discretion to impose an embargo on arms shipments to Latin American countries engaged in conflict.[34] The Curtiss-Wright Export Corporation was charged with violating an embargo promulgated in accordance with that resolution.[35] The Court acknowledged the singular and discretionary power of the President to conduct international relations, referring to the President as the "sole organ" of foreign affairs authority.[36] The Court noted that the President possesses some non-textual, yet significant and generally unilateral, foreign affairs power—even though President Roosevelt drew upon a congressional grant of authority.[37]

The *Curtiss-Wright* understanding of executive power is, however, far from unassailable.[38] Scholars have challenged Justice Sutherland's decision as misreading the separation of foreign affairs responsibilities made explicit in the Constitution.[39]

In 2000, in *Crosby v. National Foreign Trade Council*, the U.S. Supreme Court evaluated a Massachusetts law that conflicted with federal law with respect to trade and the broader relationship between the United States and Burma.[40] Congress expressly granted the President sweeping authority to develop a comprehensive scheme for enhancing American-Burmese relations as the Burmese government took additional steps to ease U.S. concerns regarding human rights violations in Burma.[41]

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[34] *See id.* at 311–13 (discussing the joint resolution of Congress and President Roosevelt's subsequent ban on the sale of arms and munitions to Latin American countries engaged in conflict).

[35] *See id.* at 311 (discussing the corporation's indictment); *see also* Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 YALE L.J. 140, 208 (2009) (describing *Curtiss-Wright*'s recognition of the President as the sole representative for the nation in the conduct of foreign affairs).

[36] *Curtiss-Wright*, 299 U.S. at 319 (noting that despite the vastness of the realm of foreign affairs, the President alone is the nation's representative).

[37] *See id.* (explaining the degree of latitude and freedom from statutory restraint due a President engaging in international relations); *see also* KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner, 647 F. Supp. 2d 857, 877–78 (N.D. Ohio 2009) (describing *Curtiss-Wright* in relation to the steel mill seizures in *Youngstown,* and noting the Court's deference to the executive's unique and nearly unilateral authority over foreign relations in *Curtiss-Wright*); Hathaway, *supra* note 35, at 208 (noting even the President's power as the sole communicator for the nation should not be viewed as unfettered power).

[38] *See* Louis Fisher, *The Law*: *Presidential Inherent Power: The "Sole Organ" Doctrine*, 37 PRESIDENTIAL STUD. Q. 139, 149–50 (2007) (evaluating academic criticisms of Justice Sutherland's opinion); Hathaway, *supra* note 35, at 209 (arguing that sole empowerment to speak is not equivalent to singularity as a relevant actor in foreign affairs).

[39] *See* Fisher, *supra* note 38 (listing scholars' opinions as to the misleading descriptions of presidential power in *Curtiss-Wright*, the tenuous distinctions between foreign and domestic affairs, and more modern conceptualizations of the earliest American sovereignty).

[40] 530 U.S. 363, 368 (2000) (discussing the fullness of the record with respect to the evidence of the infringement on the President's ability to conduct foreign affairs).

[41] *See id.* at 373–74 (describing the Court's view of the state law as an obstacle to the effective implementation of the federal act). The President was empowered to limit new investment and

In reviewing the conflict between the state and federal laws, the *Crosby* Court placed great emphasis on "the very capacity of the President to speak for the Nation with one voice in dealing with other governments."[42] The Court invalidated the state law by applying the doctrine of preemption because the state law hindered "the President's power to speak and bargain effectively with other nations."[43]

Much like *Curtiss-Wright's* sole organ theory, *Crosby's* one-voice theory of foreign relations powers is subject to critique.[44] Scholars criticize the one-voice theory as failing to adequately account for the nuance of the American constitutional system and the shared responsibilities of the Executive and the Legislature in conduct of international relations.[45] Nonetheless, although multiple participants speaking a single message in foreign affairs is possible in theory, such consistency is difficult to marshal in practice.[46]

The belief that the nation should speak with one voice, the driving theoretical force behind the consolidation of foreign affairs power into the executive branch, is laced throughout constitutional jurisprudence.[47] For example, in cases where the Supreme Court is reviewing a regulatory scheme with the potential to embarrass the United States, the Court is hesitant to allow the diffusion of foreign affairs authority to many voices because the

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to work with regional partners, including multinational organizations, to create a comprehensive strategy for the improvement of democratic government in Burma. *Id.* at 368–69.

[42] *Id.* at 381–82.

[43] *Id.*

[44] *See* David Moore, *Beyond One Voice*, 98 MINN. L. REV. 953, 957, 991–1023 (2014) (discussing the theoretical and practical drawbacks of the one-voice doctrine, after noting the limited quantity of scholarship centered on the doctrine).

[45] *See id.* at 998–99 (describing the distribution of powers relating to foreign affairs to all three coordinate branches of government and also highlighting the interdependence of the branches, such that even those powers dedicated to the executive rely on related authorities granted to the legislature).

[46] *See id.* (noting instances where a supermajority is necessary in the Senate to execute the full array of foreign affairs functions); *see also* Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 237–41 (2001) (asserting that no theory adequately advances the notion of executive primacy in foreign affairs and considers the effort to develop such a theory a "fruitless search").

[47] *See generally* Moore, *supra* note 44 (discussing the history of the one-voice doctrine and arguing the doctrine is divorced from practical application, but also noting the doctrine has received little scholarly attention). The doctrine is equally relevant in dormant Commerce Clause jurisprudence and the preemption of state action with respect to foreign affairs, in addition to its significance for the relationship between the political branches of government. *See id.* (evaluating the relationship between the dormant Commerce Clause, federal preemption, and the one-voice doctrine)*; see also* Michael G. Keeley, Comment, Barclay's Bank PLC v. The Franchise Tax Board*: Has the Supreme Court Emasculated the One Voice Doctrine?*, 8 DEPAUL BUS. L.J. 133, 152–53 (1995) (describing the one-voice doctrine when the federal government regulates commerce with a foreign nation, particularly with respect to conflicting state and federal tax policy).

ensuing cacophony imperils the clarity of the United States' position and may result in embarrassing, contradictory statements.[48]

This is not to say, however, the President's foreign affairs power is without limit.[49] In 2015, in *Zivotofsky ex rel Zivotofsky v. Kerry*, the Supreme Court held that Congress plays a critical role in foreign policy and may act independent of the President in some legislative decisions relating to international affairs, binding the President's international actions by the laws it enacts.[50] *Zivotofsky* is also meaningful because it delineated recognition of a foreign government, under the power enumerated in Article II of the U.S. Constitution to receive ambassadors.[51] The President has singular recognition authority, meaning only the Executive may determine whether the U.S. formally recognizes a foreign government.[52]

The significant principle in *Zivotofsky,* though*,* that Congress may act independently of the President and may limit some of the executive's international actions by the laws Congress enacts, is not a recent development.[53] In 1804, in *Little v. Barreme*, Chief Justice Marshall found that President John Adams had no special authority to expand the scope of the embargo powers

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[48] *See* Zschernig v. Miller, 389 U.S. 429, 440–41 (1968) (describing the potential for an Oregon inheritance statute to cause controversy on the international scene because of Oregon's departure from the centralized position of the federal government).

[49] *See* Daniel Abebe, *One Voice or Many? The Political Question Doctrine and Acoustic Dissonance in Foreign Affairs*, 2012 SUP. CT. REV. 233, 244 (discussing how centralization of the foreign affairs "voice" from the states to the federal government is appropriate, but such logic may not carry over with respect to Congress and the President, or even the courts).

[50] *See* 135 S. Ct. 2076, 2090 (2015) (noting in both foreign and domestic spheres, primacy in the creation of law resides with the legislature, but also recognizing the President should not be forced by Congress to contradict himself in foreign affairs). The law challenged by the executive branch in *Zivotofsky* required a U.S. consulate to issue a passport to a child born in Jerusalem to American parents and to designate the child's birthplace as Israel, rather than Jerusalem, the administration's preferred designation. *See id.* at 2083. The Court held the law exceeded the scope of Congress's power to regulate passports and impermissibly interfered with United States foreign policy by contradicting the President's recognition decision. *See id.* at 2086. This challenge came only after a prior Supreme Court determination the case was justiciable and not a political question. *See generally* Zivotofsky v. Clinton, 566 U.S. 189 (2012) (describing the previous case, limited in scope to the issue of standing).

[51] *See Zivotofsky*, 135 S. Ct. at 2090 (noting the uniquely executive power of recognition as an outgrowth of the reception power and describing the practical significance of that authority).

[52] *See id.* (affirming the President's constitutional authority to receive ambassadors necessarily endows the executive with the singular power to identify which governments the United States will recognize in the conduct of international relations).

[53] *See* Little v. Barreme, 6 U.S. (2 Cranch) 170, 177 (1804) (barring an additional grant of authority, the Commander in Chief was not empowered to expand the scope of vessel seizure during hostilities between the United States and France); *see also* Hathaway, *supra* note 35, at 208 (discussing the limitations on the President's foreign affairs power, even as the sole representative of the nation).

enacted by Congress, suggesting a very early understanding that executive power in foreign affairs could be limited through acts of Congress.[54]

B. Separation of Powers Doctrine

The separation of powers doctrine, like the foreign affairs power, is not expressly mentioned in the Constitution.[55] Yet separation of powers is inherent in the document's structure.[56] In the creation of a tri-part government, the inclusion of enumerated powers, and in granting each branch mechanisms from which to police the outer bounds of the others' power, the founders assured a system of checks and balances with a distinct and enduring separation of powers.[57]

The absence of explicit constitutional text describing this separation makes enforcing the principle all the more difficult.[58] The self-imposed restraints of each branch are an initial safeguard, but when these are insufficient, it falls to the courts to resolve questions of separation of powers.[59] There is little history of a precise and consistent analytic framework applied by the courts to resolve separation of powers controversies, but Justice Powell has offered perhaps the most useful description.[60] Concurring in

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[54] *Little*, 6 U.S. at 177.

[55] *See* CHEMERINSKY, *supra* note 20, at 369 (describing the separation of powers doctrine). *See generally* U.S. CONST. (observing the absence of a singular, comprehensive foreign affairs power).

[56] *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (describing the Constitution's diffusion of power to secure liberty, but also recognizing the interdependence of the three branches necessary to form a functional government capable of serving the needs of the people). *See generally* U.S. CONST. (noting the decentralized delegation of power throughout the broader government).

[57] *See* Humphrey's Ex'r v. United States, 295 U.S. 602, 629 (1935) (describing the implicit constitutional mandate, for each of the three general branches of government to remain free from coercion by the other branches).

[58] *See* CHEMERINSKY, *supra* note 20, at 369–70 (describing the role of the courts in striking the appropriate balance of power between coordinate branches of government, the absence of constitutional textual provisions regarding separation of powers, and the difficulties of relying on the framers' intent in this area).

[59] *See* Mistretta v. United States, 488 U.S. 361, 380–83 (1989) (describing the role of the Court in giving voice to and reaffirming the separation of powers, a feature of the Constitution the framers believed was imperative to the preservation of liberty in America).

[60] *See* INS v. Chadha, 462 U.S. 919, 963 (1983) (Powell, J., concurring) (creating two categories of actions that may violate the separation of powers doctrine: impermissible interference in the performance of a function constitutionally assigned to a coordinate branch of government, or assumption of a function ore properly entrusted to another branch); *see also Mistretta*, 488 U.S. at 383 (describing the diverse sources from which separation of powers doctrine and jurisprudence is drawn, and also noting additional jurisprudence relating specifically to the integrity of the courts, not addressed by Justice Powell's *Chadha* concurrence); Matthew James Tanielian, *Separation of Power and the Supreme Court: One Doctrine, Two Visions*, 8 ADMIN L.J. AM. U. 961, 965–73 (1995) (providing a discussion of functionalist and formalist strands of separation of powers jurisprudence).

1983 in *Immigration and Naturalization Service v. Chadha,* Justice Powell wrote:

> Functionally, the doctrine [of separation of powers] may be violated in two ways. One branch may interfere impermissibly with the other's performance of its constitutionally assigned function. Alternatively, the doctrine may be violated when one branch assumes a function that more properly is entrusted to another.[61]

Case law demonstrates the function of each of the two types of separation of powers violations.[62] In the first of these two distinct types of violations, which Justice Powell called an impermissible interference with a constitutionally assigned function of a coordinate branch, courts balance the interests of the two competing branches of government.[63]

The Supreme Court determined in both *United States. v. Nixon* and *Nixon v. Administrator of General Services* that an absolute separation of the branches of government was undesirable and some interference by one branch of government into the interests of another branch was inevitable.[64] To determine whether an interference was constitutionally impermissible, the Court noted the appropriate legal standard was a functionalist balancing of undue disruption to the accomplishment of constitutionally assigned functions against the need to promote objectives clearly within the constitutional authority of a coordinate branch of government.[65]

In its 1986 decision, *Bowsher v. Synar*, the Supreme Court weighed the degree to which Congress had interfered with the enforcement of a law Congress itself had enacted, an intrusion into the executive function to en-

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[61] 462 U.S. at 963 (Powell, J., concurring).

[62] *See Mistretta*, 488 U.S. at 382–83 (describing the Court's separation of powers jurisprudence and describing the veins of cases that collectively ensure the inherent tendencies of each branch of government to exceed the bounds of its authority remain in check).

[63] *See Chadha*, 462 U.S. at 963 (Powell, J., concurring) (detailing the two separate analyses for differing types of separation of powers violations).

[64] *See* United States v. Nixon, 418 U.S. 683, 707 (1974) (holding President's Nixon claim of presidential privilege regarding certain White House tapes was insufficient). The Court found that where the only interest asserted by the President was one of general confidentiality, and not a particularized need for secrecy surrounding specific elements of presidential activity, the interest failed to overcome the value of the truth-seeking function of the judiciary. *Id.*; *see also* Nixon v. Admin. of Gen. Servs., 433 U.S. 425, 439–46 (1977) (finding a law requiring the archiving and screening of presidential materials did not violate the separation of powers doctrine). The Court held that because retention of the materials in archives did not interfere with the accomplishment of functions constitutionally assigned to the executive, but instead merely required the maintenance of documents produced in the course of accomplishing constitutionally assigned functions, any interference was permissible. *Id.*

[65] *See Nixon v. Admin. of Gen. Servs*., 433 U.S. at 442–43 (balancing the need for recordkeeping against the minimal disruption to executive functions); *United States v. Nixon*, 418 U.S. at 707 (weighing the function of the judiciary against the occasional need for executive secrecy).

force the laws the Legislature passes.[66] Although the *Bowsher* Court applied a slightly different formulation than the *Nixon* test, both tests examine the impact of a coordinate branch's action on the other branch and the need for action by the interfering branch.[67]

Youngstown Sheet & Tube Co. v. Sawyer is an example of the second form of separation of powers violation described by Justice Powell, assumption of a function more properly entrusted to a coordinate branch of government.[68] In *Youngstown*, President Truman's attempt to take possession of and operate the majority of the nation's steel mills did not interfere with congressional lawmaking functions, but instead amounted to an impermissible legislative act.[69] In essence, the President had usurped the lawmaking function of Congress in his effort to regulate steel production.[70] The analysis for this type of separation of powers violation evaluates the degree to which one branch performs the function of another branch.[71] This is distinct from an impermissible interference violation, which is analyzed by balancing undue disruption to the accomplishment of constitutionally assigned functions against the need to promote objectives clearly within the constitutional authority of a coordinate branch of government.[72]

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[66] *See* 478 U.S. 714, 734 (1986) (detailing the legislature's improper intrusion into executive powers). In *Bowsher*, the Court examined whether a newly enacted law intended to control budget deficits was unconstitutional. *Id.* at 733. The Court determined that Congress had delegated authority to the Comptroller General, a legislative branch official, to execute budget cuts. *Id.* By passing the law and granting a member of the larger legislative apparatus the power to enforce the law, a function constitutionally assigned to the executive, Congress had violated the separation of powers doctrine. *Id.* at 734.

[67] *See id.* at 734 (invalidating an attempt by Congress to exercise the removal function over an official performing executive enforcement functions); *Nixon v. Admin. of Gen. Servs.*, 433 U.S. at 442–43; *United States v. Nixon*, 418 U.S. at 707.

[68] *See* 343 U.S. at 588 (describing the President's actions and the unlawfulness of a legislative act by the executive); *see also Chadha*, 462 U.S. at 963 (Powell, J., concurring) (describing the two principle categories of separation of powers violations); Gillian E. Metzger, *Appointments, Innovation, and the Judicial-Political Divide*, 64 DUKE L.J. 1607, 1636 (2015) (linking *Youngstown* and *Chadha* as similar examples of one branch's failure to curb unconstitutional overreach by a coordinate branch of government).

[69] *See Youngstown*, 343 U.S. at 582–88 (describing the facts and rationale for the holding).

[70] *See id.* (describing the facts of the case).

[71] *See generally Bowsher*, 478 U.S. 714 (1986) (employing a balancing test to determine the appropriateness of one branch of government's interference with another branch); *Nixon v. Admin. of Gen. Servs.*, 433 U.S. 425 (balancing the need for recordkeeping against the minimal disruption to Executive functions); *United States v. Nixon*, 418 U.S. 683 (weighing the function of the judiciary against the occasional need for executive secrecy).

[72] *See Youngstown*, 343 U.S. at 588 (analyzing President Truman's impermissible legislative act).

C. Congress and the Foreign Sovereign Immunities Act

In 1976, Congress passed the Foreign Sovereign Immunities Act (FSIA).[73] The Act grants immunity to foreign states from jurisdiction in U.S. courts, subject to limited exceptions.[74] This Section addresses the pre-JASTA status of the FSIA.[75]

The FSIA advanced the principal thrust of the then-existing common law, that a foreign state is presumptively immune from civil suits in the United States, but created a series of exceptions from such immunity, particularly where the foreign state is involved in commercial activity in the United States.[76] In the next three subsections, this Section discusses the two exceptions relevant to JASTA, the tort and terrorism exceptions, as well as Congressional power over the courts.[77]

1. State Sponsors of Terror

Each year, the Secretary of State is statutorily required to submit to Congress country reports on terrorism.[78] In that report, the State Department weighs the extent to which foreign nations repeatedly provide support to acts of international terror.[79] The Secretary of State produces a finding that

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[73] *See* 28 U.S.C. §§ 1330, 1391(f), 1441(d), 1602–1611 (2012).

[74] 28 U.S.C. § 1605 (2012 & Supp. IV 2016) (codifying the Foreign Sovereign Immunities Act and providing exceptions to the general presumption a foreign state is immune from the jurisdiction of U.S courts); 28 U.S.C. § 1604 (providing a general grant of immunity to foreign nations); *see also* 28 U.S.C. § 1330 (granting original jurisdiction over civil actions against foreign nations to the U.S. District Courts in those cases where an exception to the FSIA is applicable).

[75] *See infra* notes 78–95 and accompanying text.

[76] *See* 28 U.S.C. § 1604 (providing a general grant of immunity to foreign nations); *id.* § 1605 (describing instances when foreign sovereign immunity may not be invoked by a foreign state defendant in U.S. courts); *id.* § 1605A (creating a foreign sovereign immunity exception for suits arising out of terrorist actions when defendant countries have been designated a state sponsor of terror). Immunity does not apply in cases of voluntary waiver, when the foreign government is conducting commercial activity in the United States, property is taken in violation of international law, property acquired by the United States is at issue, the case relates to tortious acts, suits in admiralty, or suits relating to certain mortgage transactions. *See id.* § 1605. Prior to the enactment of the FSIA, the President made grants of sovereign immunity on a case-by-case basis, largely in conformity with prevailing international common law. *See e.g. Ex parte* Republic of Peru, 318 U.S. 578, 586–88 (1943) (noting the courts are required to promptly accept an executive determination of immunity because such antagonistic jurisdiction is an affront to the dignity of foreign nations and may cause significant embarrassment to the executive in conducting foreign relations).

[77] *See infra* notes 78–95 and accompanying text.

[78] *See* 22 U.S.C. § 2656f (2012) (delineating the content requirements for the Secretary of State's annual report to Congress on terrorist activity and subsequent foreign government responses).

[79] U.S. DEP'T OF STATE, COUNTRY REPORTS ON TERRORISM, CHAPTER 3: STATE SPONSORS OF TERRORISM OVERVIEW (2015), http://www.state.gov/j/ct/rls/crt/2015/257520.htm [https://perma.cc/Q8XA-3FYY] [hereinafter STATE SPONSORS OF TERRORISM OVERVIEW] (describing the rationale for designating three foreign nations state sponsors of terror).

a foreign nation is a state sponsor of terror and that nation is subsequently designated under the Export Administration Act, the Arms Export Control Act, and the Foreign Assistance Act.[80] This designation, which imposes several financial sanctions and economic barriers, may only be rescinded by a presidential report to Congress, certifying the foreign state's change in posture.[81]

In essence, Congress has delegated authority to the Executive through the Export Administration Act, the Arms Export Control Act, and the Foreign Assistance Act to designate and enforce state sponsor of terror status and has created an annual timeline and reporting mechanism.[82] This statutory delegation of power from the legislature to the President is similar to those granted to Presidents Clinton and Roosevelt by Congress in *Crosby* and *Curtiss-Wright*, respectively.[83] In both of those cases, as with designating a state sponsor of terror, the President's inherent foreign affairs powers have been given greater sanction through congressional delegations of authority; thus the President's actions, at the zenith of executive power, are accorded great deference by the courts.[84]

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[80] *State Sponsors of Terrorism*, U.S. DEP'T OF STATE, http://www.state.gov/j/ct/list/c14151.htm [https://perma.cc/GHA2-WTDF] [hereinafter *State Sponsors*] (detailing the four principal types of sanctions that arise from designation as a state sponsor of terror under § 6(j) of the Export Administration Act, § 40 of the Arms Control Act, and § 620A of the Foreign Assistance Act).

[81] *See id.* (explaining the economic consequences of designation as a state sponsor of terror); STATE SPONSORS OF TERRORISM OVERVIEW, *supra* note 79. First, the President may submit a report to Congress certifying a fundamental change in leadership, support for international terrorism, or assurances of such fundamental change. STATE SPONSORS OF TERRORISM OVERVIEW, *supra* note 79. Second, the President may, giving Congress forty-five days' notice prior to rescission, certify that the government in question has not supported international terrorism in the preceding six months and has provided assurances that the government will not provide future support to international terrorism. *Id.*

[82] *See, e.g.*, 22 U.S.C. § 2371 (2012) (precluding the prevision of assistance to any country the Secretary of State has determined has repeatedly provided support for acts of international terrorism); *id.* § 2656f (delineating the content requirements for the Secretary of State's annual report to Congress on terrorist activity and subsequent foreign government responses); 22 U.S.C. § 2780 (2012 & Supp. II 2014) (prohibiting the sale of military equipment to nations designated by the Secretary of State as having provided support for acts of international terrorism); 50 U.S.C. § 4605(j) (2012) (requiring a validated license prior to the export of any good or technology to a country that the Secretary has determined repeatedly provided support for acts of international terrorism).

[83] *See* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 363, 382 (2000) (describing scheme enacted by Congress to grant the President broad latitude to develop a comprehensive plan for U.S. relations with Burma); U.S. v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 311–13 (discussing the joint resolution of Congress and President Roosevelt's subsequent ban on the sale of arms and munitions to Latin American countries engaged in conflict).

[84] *See Crosby,* 530 U.S. at 382 (describing the scheme enacted by Congress to grant the President broad latitude to develop a comprehensive plan for U.S. relations with Burma); *Youngstown*, 343 U.S. at 635–36 (Jackson, J., concurring) (envisioning presidential power as being at its zenith, when expressly supported by a congressional grant of authority); *Curtiss-Wright*, 299 U.S. at 311–13 (discussing the joint resolution of Congress and President Roosevelt's subsequent ban on the

2. The Tort and State Sponsor of Terrorism Exceptions

The Foreign Sovereign Immunities Act contains two exceptions relevant to JASTA: the tort exception and the terrorism exception.[85] The former includes an exception to foreign sovereign immunity for tortious acts that occur on U.S. soil.[86] The exception's original intent largely centered on incidents between U.S. citizens and a foreign national acting as an agent of their home country.[87] For example, motor vehicle accident involving members of the diplomatic community on official business and U.S. citizens fall into this category.[88]

The Act creates a terrorism exception to foreign sovereign immunity, distinct from the tort exception, permitting suits against foreign governments involved in terrorist action against U.S. citizens, but only when that foreign government has been designated a state sponsor of terrorism.[89]

The statutory text suggests that where a foreign nation may be linked to an act of terrorism, but has not been designated a state sponsor of terror, a civil litigant would be required to rely on a separate statutory exception to

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sale of arms and munitions to Latin American countries engaged in conflict). *See generally* U.S. CONST. art. II (describing the general powers of the executive, particularly with respect to foreign affairs).

[85] *See* 28 U.S.C. § 1605 (2012 & Supp. IV 2016); 28 U.S.C. § 1605A (2012) (discussing the ability of U.S. citizens to press suits for tortious acts committed against them by foreign states as well as for acts of terror supported by a foreign state previously designated a state sponsor of terror).

[86] *See* 28 U.S.C. § 1605 (discussing the ability of U.S. citizens to press suits for tortious acts committed against them by foreign states). The tort exception allows for recovery when "money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment." *Id.*

[87] *See Justice Against Sponsors of Terrorism Act: Hearing on H.R. 2040 Before the Subcomm. on the Const. and Civil Just. of the H. Comm. on the Judiciary*, 114th Cong. 27 (2016) [hereinafter *JASTA Hearing on H.R. 2040*] (statement of Brian Egan, Legal Advisor for the U.S. Department of State) (describing the principal impetus for the noncommercial tort exception to sovereign immunity as traffic accidents).

[88] *See, e.g.*, Moran v. Kingdom of Saudi Arabia, 27 F.3d 169, 171 (5th Cir. 1994) (holding the tort exception to the FSIA did not apply to a Saudi Air Force representative at fault for a vehicle accident with a U.S. citizen in Mississippi because the foreign national was travelling outside the scope of official employment on behalf of the Saudi government); Asociacion de Reclamantes v. United Mexican States, 735 F.2d 1517, 1525 (D.C. Cir. 1984) (noting, in a decision by then-Judge Scalia, the primary purpose of the tort exception as a remedy for traffic accidents).

[89] *See* 28 U.S.C. § 1605A (detailing the additional terrorism exception to foreign sovereign immunity); *see, e.g.*, Bluth v. Islamic Republic of Iran, 203 F. Supp. 3d 1, 16–19, 22–26 (D.D.C. 2016) (awarding damages to an American citizen injured in a Hamas attack after determining the court could exercise jurisdiction over Iran, a designated state sponsor of terrorism, under 28 U.S.C. 1605A's terrorism exception to the FSIA for the actions of the Ministry of Information and Security and the Iranian Revolutionary Guard Corps in support of Hamas).

press their suit.[90] The U.S. Court of Appeals for the Second Circuit, however, in 2008, in *In re Terrorist Attacks on September 11, 2001*, observed that courts are hesitant to shoehorn an action that did not adequately fall within the most applicable statutory exception into a different sovereign immunity exception.[91] Without an express and applicable statutory exception, a claim against a foreign nation for its alleged support of terrorist acts occurring in the United States could only be prosecuted if that nation had been designated a state sponsor of terror.[92]

3. Congressional Power over Federal Courts

Congress has broad power to regulate the structure and administration of the courts, and significantly, the authority to allocate jurisdiction in the federal court system.[93] In its 1983 decision in *Verlinden B.V. v. Central Bank of Nigeria*, the U.S. Supreme Court affirmed, based on Congress' constitutional authority over foreign commerce and foreign relations, that Congress has an undisputed power to determine whether foreign nations may be amenable to suits in the United States.[94]

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[90] *See* 28 U.S.C. § 1605A (delineating clearly the requirements of the exception).

[91] *See* 538 F.3d 71, 89–90 (2d Cir. 2008) (discussing how the requirements for plaintiffs to demonstrate an exception to foreign sovereign immunity applies to the case after a defendant has shown it is a foreign state, and further discussing the litigant's inability to make the facts of their case fit an exception when the most obviously-applicable exception is unavailable). The court noted that permitting an action clearly predicated on a state sponsored terror theory to move forward under the tort exception to foreign sovereign immunity would eviscerate the exception. *See id.* (noting that terrorist acts were concurrently tortious acts, and thus assuming jurisdiction over a foreign state for terrorist actions under the tort exception would merge the two exceptions in a certain class of cases). Unwilling to allow such manipulation of the FSIA, the court dismissed the case. *See id.* at 75, 89 (dismissing claims against the Kingdom itself, the "Four Princes" personally named in the suit, and several Saudi entities alleged to have directed funds that were ultimately used by Al Qaeda operatives).

[92] *See id.* at 75 (noting very clearly that because the Kingdom of Saudi Arabia had not been designated a state sponsor of terror, the plaintiffs' claim did not fall within the § 1605A statutory exception to the FSIA).

[93] *See* U.S. CONST. arts. I, III (granting Congress that authority to establish courts inferior to the Supreme Court and to appropriate funds, but silent on the jurisdiction of inferior courts); *see, e.g.*, Pub. L. No. 94-583, 90 Stat. 2891, 2982 (1976) (enacting the Foreign Sovereign Immunities Act, thereby directing the jurisdictional limits of the federal courts over foreign nations). *See generally* ELIZABETH BAZAN ET AL., CONG. RESEARCH SERV., RL32926, CONGRESSIONAL AUTHORITY OVER THE FEDERAL COURTS (2005) (describing the array of authorities by which Congress may exert influence over the structure and operations of the federal court system and Congress's power to legislatively alter the jurisdiction of the federal court system).

[94] *See* Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 493 (1983) (describing congressional power to determine the jurisdictional limits of the federal courts). The *Verlinden* Court, however, did not make clear whether such power was exclusive to Congress alone, and the Court noted that, historically, the judiciary has deferred to the executive branch on whether to exercise jurisdiction over foreign nations. *See id.* at 486–90 (explaining the history of the doctrine of for-

Congress holds clear authority to set the jurisdictional bounds of the federal courts, within constitutional limits, but when jurisdiction has involved the narrowly limited issue of foreign sovereign immunity, that power has not historically been exclusive.[95]

D. The Justice Against Sponsors of Terrorism Act

JASTA broadens the previously-existing state sponsor of terrorism exception to foreign sovereign immunity, § 1605A, by adding § 1605B, resulting in several noteworthy consequences.[96] First, § 1605B removes the immunity of any nation providing substantial assistance for acts of terrorism perpetrated against the United States without regard for an executive designation as a state sponsor of terrorism.[97]

Second, JASTA eliminates any territorial restrictions on a foreign government's action.[98] Regardless of where in the world the foreign government's tortious activity took place, if the action resulted in terrorist acts against the United States, the foreign government cannot invoke sovereign immunity in a U.S. court.[99]

Third, JASTA includes a congressional finding that the decision of the U.S. District Court of Appeals for the District of Columbia in *Halberstam v. Welch* provides the proper legal framework for analyzing a foreign nation's civil liability in a federal aiding and abetting or conspiracy case.[100] Finally,

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eign sovereign immunity in the United States and the deference typically afforded the President as a result of the broader political considerations of the State Department).

[95] *See id.* at 486–90 (describing the history of executive suggestions of immunity). The courts may still afford deference to the executive in determinations of foreign sovereign immunity. *See* Samantar v. Yousef, 560 U.S. 305, 311–14 (2010) (failing to clearly delineate the extent to which a presidential suggestion of immunity applies in a more recent context); *Verlinden*, 461 U.S. at 486–90 (describing the history of executive suggestions of immunity).

[96] *See* 28 U.S.C. § 1605B (2012 & Supp. IV 2016) (detailing the expanded exception for jurisdictional immunity of a foreign state for international terrorism against the United States).

[97] *Id.* Distinct from its jurisdictional component, JASTA also expands civil causes of actions, previously created by the Antiterrorism Act; JASTA withdraws sovereign immunity, but the cause of action against foreign nations would likely arise under the Antiterrorism Act. 18 U.S.C. § 2333 (2012 & Supp. IV 2016); *see also* Bitterly, *supra* note 4, at 3400 (describing JASTA's role in expanding secondary liability, particularly for banks).

[98] *See* 28 U.S.C. § 1605B (expressly granting jurisdiction regardless of the location of the tortious activities supporting acts of terror, when such acts occur in the United States).

[99] *See id.*; *JASTA Hearing on H.R. 2040*, *supra* note 87, at 24 (statement of Ambassador Anne W. Patterson, Assistant Secretary of State for Near Eastern Affairs) (describing the impact of removing territorial limitations on the exceptions for foreign sovereign immunity, especially the potential disruption to relationships with important partners in the global war on terror).

[100] *See* Pub. L. No. 114-222, 130 Stat. 852, 852–53 (2016) (describing the congressional findings undergirding JASTA); Halberstam v. Welch, 705 F.2d 472, 487 (D.C. Cir. 1983) (describing civil conspiracy as requiring: an agreement to do an unlawful act or a lawful act in an unlawful manner, an overt act in furtherance of the agreement by someone participating in it, and injury caused by the act). *Halberstam* further lists the elements of aiding and abetting as "(1) the party

JASTA contains a noteworthy provision allowing the Executive to seek to stay a proceeding against a foreign state after immunity has been withdrawn under Section 1605B.[101] Such a stay may only be granted, however, when the Attorney General verifies the Secretary of State is engaged in good faith discussions with the foreign nation to resolve the claims against that nation.[102]

E. Reaction to JASTA

The legislative override enacting JASTA garnered significant media attention, for reasons ranging from its novelty as the only veto override of the Obama Presidency, to its domestic political fallout, and its impact on U.S. relations overseas.[103]

September 11 families were among the most outspoken in their reaction to the measure, many having long sought resolution of their grief through legal accountability.[104] In November of 2016, just weeks after JASTA's enactment, the daughters of a 9/11 victim filed *McCarthy v. Kingdom of Saudi Arabia* in the Southern District of New York, relying on 28 U.S.C. section

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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 he provides the assistance; and (3) the defendant must knowingly and substantially assist the principal violation." 705 F.2d at 487–88.

[101] *See* Pub. L. No. 114-222, 130 Stat. 852, 854 (describing the scope of executive intervention in JASTA-based proceedings).

[102] *See id.* (describing the requirements for the executive to successfully request a stay of proceedings against a foreign nation).

[103] *See, e.g.*, Ted Barrett & Dierde Walsh, *Congress Suddenly Has Buyer's Remorse for Overriding Obama's Veto*, CNN (Sept. 29, 2016, 9:42 PM), http://www.cnn.com/2016/09/29/politics/obama-911-veto-congressional-concerns/ [https://perma.cc/YSU3-5HES] (asking President Obama about his response to lone veto override of his presidency and quoting Senator McConnell's wish that the President had expressed the potential downsides of JASTA earlier); Daniel W. Drezner, *The Unbearable Idiocy of Congress*, WASH. POST (Sept. 30, 2016), https://www.washingtonpost.com/posteverything/wp/2016/09/30/the-unbearable-idiocy-of-congress/?utm_term=.62e5024766c6 [https://perma.cc/U9LC-627P] (discussing the consolidation of foreign affairs power to the executive and Congress's failure to adequately handle its constitutional foreign affairs obligations). Senators Lindsay Graham and John McCain have spoken jointly on the Senate floor to propose amendments to JASTA, calling its modification an issue of "transcendent importance" to the nation. *See Sens. Graham and McCain Speak on Senate Floor Regarding JASTA Legislation*, LINDSEY GRAHAM (Dec. 9, 2016), http://www.lgraham.senate.gov/public/index.cfm/videos?ID=8B175428-CBA1-4F95-AD88-9E91B08946C8 [https://perma.cc/2YT6-5Q4L] (describing the need to amend the text of JASTA).

[104] *See Counter Terrorism Bill JASTA Becomes Law*, PASSJASTA.ORG (Sept. 28, 2016), http://passjasta.org/2017/10/counter-terrorism-bill-jasta-becomes-law/ [https://perma.cc/VN4N-LVLE] (describing the desire of 9/11 families and survivors to find answers regarding the 9/11 attacks through the judicial system upon the enactment of JASTA); *see also Uphold Veto on 9/11 Lawsuits*, *supra* note 10 (recognizing the difficulties of litigating 9/11 cases and calling JASTA a last-ditch effort to allow families of 9/11 victims to bring suit against Saudi Arabia).

1605B, JASTA's terrorism exception to sovereign immunity.[105] The case has been referred to a magistrate judge for pretrial motions and the Kingdom of Saudi Arabia has filed a motion to dismiss.[106]

The particular case of Saudi Arabia's involvement, however, presents a unique situation for a President Trump because, as both his decision not to include Saudi Arabia in his "travel ban" executive order and President Obama's veto indicate, the American-Saudi relationship is a vital one that presidents are loathe to upset.[107] The broader policy question, then, is how to balance victims' access to court in terrorism cases against the national need for stability in foreign affairs.[108] At present, the balance has shifted in favor of individual plaintiffs' use of the courts, rather than national foreign affairs interests.[109] A judgment against the Kingdom in cases like *McCarthy* may drastically alter the American relationship to Saudi Arabia.[110]

Indeed, under the factors laid out in *Crosby*, the most constitutionally significant of the reactions to JASTA are the reactions of foreign governments because this most directly impacts U.S. foreign policy.[111] JASTA was called a "breach of Dutch Sovereignty" in a parliamentary motion in the

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[105] Complaint ¶¶ 11–19, McCarthy v. Kingdom of Saudi Arabia, No. 1:16-cv-o8884 (S.D.N.Y Nov. 15, 2016) (explaining the suit's reliance on JASTA to support the court's jurisdiction of the matter); *see also* Jonathan Stempel, *Saudi Arabia Faces $6 Billion U.S. Lawsuit by Sept. 11 Insurers*, REUTERS (Apr. 5, 2017), https://www.reuters.com/article/us-usa-saudi-sept11/saudi-arabia-faces-6-billion-u-s-lawsuit-by-sept-11-insurers-idUSKBN16V1ZP [https://perma.cc/3RVG-VGRW] (describing the suits, enabled by JASTA of insurers seeking recompense through compensatory damages, as well as triple and punitive damages, all in addition to seven other lawsuits filed on behalf of individuals).

[106] Order of Reference to a Magistrate Judge, McCarthy v. Kingdom of Saudi Arabia, No. 1:16-cv-o8884 (S.D.N.Y. Jan. 31, 2017).

[107] *See* Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Feb. 1, 2017) (excluding the Kingdom of Saudi Arabia from the modified travel ban); *Readout of the President's Call with King Salman bin Abd Al-Aziz Al Saud of Saudi Arabia*, WHITE HOUSE (Jan. 19, 2017), https://www.whitehouse.gov/the-press-office/2017/01/29/readout-presidents-call-king-salman-bin-abd-al-aziz-al-saud-saudi-arabia [https://perma.cc/P97Q-WYE7] [hereinafter *Readout of the President's Call*] (affirming the longstanding, strategically-important relationship between the United States and Saudi Arabia, and committing the respective heads of state to continued cooperation); *Veto Message from the President*, *supra* note 13 (describing the principal reasons that President Obama returned S.2040 to Congress unsigned).

[108] *See Uphold Veto on 9/11 Lawsuits*, *supra* note 10 (noting that JASTA lawsuits place U.S. foreign policy in the hands of litigants rather than, properly, with the President and Secretary of State).

[109] *See* 28 U.S.C. § 1605B (2012 & Supp. IV 2016) (liberalizing litigants' ability to pursue claims against foreign governments for support of terrorist acts occurring within the United States).

[110] *See Readout of the President's Call*, *supra* note 107 (affirming the longstanding, strategically-important relationship between the United States and Saudi Arabia, and committing the respective heads of state to continued cooperation).

[111] *See* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 381–82 (2000) (describing three factors that courts consider when weighing the degree of obstruction to the conduct of the nation's foreign affairs, including the protests of a foreign state and the likelihood of reciprocity).

Netherlands, and Great Britain has expressed concern over their possible increase in legal exposure as a result of the passage of JASTA.[112] Further, the Kingdom of Saudi Arabia was particularly vocal in its opposition to JASTA and expended significant resources to lobby against its passage.[113]

F. Prudential Standing

As the reaction to JASTA indicates, the Act invoked noteworthy political concerns.[114] Such significant political implications are occasionally so great that a court may decline to exercise jurisdiction over a particular issue, despite the court's legal ability to hear the case.[115] Article III of the Constitution limits courts to hearing only "cases and controversies" and thus courts do not offer speculative or advisory opinions.[116] Courts may also self-impose prudential standing limitations, like an avoidance of political questions, to conserve judicial capital and hear only those cases properly suited to resolution by the Judiciary, rather than issues best remedied by the political branches of government.[117]

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[112] *See JASTA Hearing on H.R. 2040*, *supra* note 87, at 24 (statement of Ambassador Anne W. Patterson, Assistant Secretary of State for Near Eastern Affairs) (listing specifically the Dutch and British concerns). One member of Parliament worried a British failure to stop a terror plot executed in the United States might expose the United Kingdom to liability and open up discovery to MI5 and MI6 intelligence secrets, causing serious damage to the long-standing "special relationship" between the United Kingdom and the United States. Tom Tugendhat, *Why a US Law to Let 9/11 Families Sue Saudi Arabia Is a Threat to Britain and Its Intelligence Agencies*, THE TELEGRAPH (June 5, 2016, 7:34 PM), http://www.telegraph.co.uk/news/2016/06/05/why-a-us-law-to-let-911-families-sue-saudi-arabia-is-a-threat-to/ [https://perma.cc/2FKT-WDB2].

[113] Julie Hirschfield Davis, *Fight Between Saudis and 9/11 Families Escalates in Washington*, N.Y. TIMES (Sept. 21, 2016), https://www.nytimes.com/2016/09/22/us/politics/9-11-saudi-bill-veto-obama.html [perma.cc/UWM5-6AKW] (describing Saudi Arabia's efforts to convince American law makers not to legislatively override President Obama's veto and the Kingdom's retention of lobbying firms in Washington to support the effort).

[114] *See supra* notes 103–113 and accompanying text (describing the politically-charged reaction, at home and abroad, to JASTA).

[115] *See* Baker v. Carr, 369 U.S. 186, 210–11 (1962) (embracing the notion that some actions by the political branches of government demand a certain degree of finality, and should not be reviewed by the courts).

[116] *See* U.S. CONST. art. III (creating a limitation on U.S. courts to hear only cases and controversies); Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547–50 (2016) (describing the requirements of Article III standing); *see also* Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73, 78 (2007) (describing the case and controversy requirement as well as the prohibition on advisory opinions).

[117] *See Baker*, 369 U.S. at 210 (describing the political question doctrine as principally a separation of powers doctrine, to ensure decision-making by the appropriate authority); *see also* Siegel, *supra* note 116 (describing the separation of powers theory of justiciability, but also noting the lack of clear theoretical underpinnings).

The Supreme Court's 1962 decision in *Baker v. Carr* is the seminal ruling in political question doctrine jurisprudence.[118] *Baker* enumerated six factors courts should apply when determining whether a political question is justiciable: the potential embarrassment from multiple branches of government speaking on one issue, the unusual need for unquestioning adherence to a previously made political decision, the impossibility of resolving the issue without disrespecting a coordinate branch of government, the impossibility of resolving the issue without an initial policy decision, the absence of judicially manageable standards to resolve the question, or a textually demonstrable constitutional commitment of the issue to a coordinate branch of government.[119]

Not all questions with political implications, however, are non-justiciable.[120] In 2014, the Supreme Court noted in its *Lexmark* v. *Static Control Components* decision that courts may not avoid hearing cases Congress has empowered courts to hear simply because it would be imprudent.[121] Courts have an affirmative duty to hear cases and resolve disputes.[122] Thus, courts must carefully balance the *Baker* factors and perhaps discount the practical wisdom of prudence to determine whether a case is justiciable, even one with consequences as significant as a terrorism liability suit enabled by JASTA.[123]

II. The Executive Is Best Positioned to Make Determinations of a Foreign State's Responsibility for Terror

JASTA expands opportunities to seek civil relief against foreign nations when that nation's actions resulted in terrorist acts within the United States on or after September 11, 2001.[124] Such litigation had previously been barred by FSIA's limited withholding of sovereign immunity in only

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[118] *See* CHEMERINSKY, *supra* note 20, at 369; *see also* Abebe, *supra* note 49, at 234 (noting that *Baker v. Carr* elucidated the political question doctrine).

[119] *See Baker*, 369 U.S. at 217 (laying out the six "Brennan Factors" for analysis when courts determine whether a political question is justiciable).

[120] *See id.* at 209 (affirming that the mere fact a suit involves disputes over political rights or issues does not necessarily mean the case is non-justiciable).

[121] *See* Lexmark Intern, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1387–88 (2014) (holding the role of the courts is not to ask whether they should, as a normative matter, hear cases, but whether, as a matter of affirmative empowerment, they must hear a case).

[122] *Id.*; *see also* David E. Marion, *Judicial Faithfulness or Wandering Indulgence? Original Intentions and the History of* Marbury v. Madison, 57 ALABAMA L. REV. 1041, 1062 (2006) (describing the efforts of several Supreme Court justices to ensure *Marbury's* continued value as a source of the judiciary's responsibility to assess the validity of legislative action that affects rights).

[123] *See Lexmark*, 134 S. Ct. at 1387–88 (describing the judicial responsibility to hear cases, even those with potentially disruptive consequences).

[124] *See* 28 U.S.C. § 1605B (2012 & Supp. IV 2016) (detailing the expanded exception for jurisdictional immunity of a foreign state for international terrorism against the United States).

those cases where the foreign nation was designated by the executive branch as a state sponsor of terror.[125] Under the scheme imposed by JASTA, a U.S. court could find a foreign nation liable for substantial support of terrorism, even without an executive state sponsor of terror determination.[126]

A critical assumption undergirding an analysis of JASTA is the coequal status of the branches of the federal government.[127] An executive determination that a nation is a state sponsor of terror should properly be equated to a federal court finding of liability for state support of terrorist acts occurring in the United States.[128] Both instances represent a branch of the U.S. government making a public declaration of a foreign state's participation in terrorism, even if the procedural consequences (a finding of liability and judgment awarded to a private party rather than economic sanctions) are distinct.[129] Assuredly, the functional impact on the tenor of the relationship between the United States and the suspect country declines in a markedly similar fashion, even if the nation faces differing consequences as a result of which branch makes the finding.[130]

Section A of this Part examines executive determinations of state sponsors of terror under a *Curtiss-Wright* theory of executive power.[131] Section

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[125] *See generally* 28 U.S.C. § 1605A (2012) (detailing the previously-enacted state sponsor of terrorism exception to foreign sovereign immunity).

[126] *See* 28 U.S.C. § 1605B (describing the revocation of the presumption of foreign sovereign immunity but making no reference to a Secretary of State determination that a government has repeatedly provided support for acts of international terrorism).

[127] *See, e.g.*, Baker v. Carr, 369 U.S. 186, 214 (1962) (affirming the three branches of the federal government are coequal and independent, while also recognizing an appropriate degree of judicial restraint in political questions); Humphrey's Ex'r v. United States, 295 U.S. 602, 629–30 (1935) (stressing the fundamental importance of the constitutional structure and its implications for the coequality of each of the three departments of the federal government, and recognizing the need for each department to be free from coercion or control by the other departments).

[128] *See Humphrey's Ex'r*, 295 U.S. at 629–30 (stressing the fundamental importance of the constitutional structure and its implications for the coequality of each of the three departments of the federal government, creating the implication that a pronouncement from one branch is coequal to a pronouncement from another).

[129] *See id.; see also* 18 U.S.C. § 2333 (2012 & Supp. IV 2016) (awarding threefold monetary damages plus fees for injuries resulting from an act of international terrorism); 22 U.S.C. § 2371 (2012) (precluding the provision of assistance to any country that the Secretary of State has determined has repeatedly provided support for acts of international terrorism); 22 U.S.C. § 2780 (2012 & Supp. II 2014) (prohibiting the sale of military equipment to nations designated by the Secretary of State as having provided support for acts of international terrorism); 50 U.S.C. § 4605 (2012) (requiring a validated license prior to the export of any good or technology to a country the Secretary has determined repeatedly provided support for acts of international terrorism).

[130] *See* 162 CONG. REC. S6611–13 (daily ed. Nov. 30, 2016) (Senators McCain and Graham conducting a colloquy on the Senate floor regarding statements by a number of senior military, diplomatic, and political figures on the fallout of JASTA); *see also* 162 CONG. REC. S7005–08 (daily ed. Dec. 9, 2016) (Senator Hatch describing the negative public response to JASTA and the perception of the possible adverse consequences to relationships abroad).

[131] *See infra* notes 133–139 and accompanying text.

B evaluates these determinations utilizing the one-voice theory, and, finally, Section C details the President's recognition power.[132]

A. Executive Determinations Under a Curtiss-Wright *Theory of Executive Power*

The high-water mark for executive power analysis is the Supreme Court's 1936 *United States v. Curtiss-Wright Corporation* decision.[133] *Curtiss-Wright* embraced the notion, attributed to Justice John Marshall, of the President as the "sole organ" of international relations for the United States.[134] The *Curtiss-Wright* Court assumed an inherent, extra-textual power resides with President for the conduct of foreign relations.[135] The Court also noted a President must be afforded freedom of action that would be impermissible domestically, but necessary abroad, because the maintenance of international ties and the protection of the United States from serious embarrassment are best achieved by a single executive.[136]

The President's decision not to designate a state a sponsor of terror may rest on confidential information, made known by the ambassadors, diplomats, and consular officials responsible for carrying out the President's foreign affairs policy.[137] Disrupting the President's ability to exclusively make determinations regarding the U.S. government's belief that a foreign nation participated in terrorist activities against the United States places decision-making authority in the hands of in a less informed decision maker: the courts.[138] *Curtiss-Wright* dealt with these imbalances of institutional competence through great deference to the more competent decision-maker: the Executive.[139]

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[132] *See infra* notes 140–169 and accompanying text.

[133] *See* Fisher, *supra* note 38, at 145 (describing the impact of the *Curtiss-Wright* decision in ongoing judicial understandings of inherent, extra-constitutional executive power).

[134] *See id; see also* United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319–20 (1936) (describing the plenary and exclusive power of the President in foreign affairs). Congress granted the President discretion to impose an embargo on arms shipments to select South American countries; the Curtiss-Wright Export Corporation was charged with violating that embargo. *Curtiss-Wright*, 299 U.S. at 311.

[135] *See Curtiss-Wright*, 299 U.S. at 319–20 (discussing the vesting of the executive with power not express in the Constitution).

[136] *See id.* (describing the plenary and exclusive power of the President in foreign affairs).

[137] *See id.* (describing the resources that may be uniquely available to the executive at critical decision points). *But see* James R. Ferguson, *Government Secrecy After the Cold War: The Role of Congress,* 34 B.C. L. REV. 451, 468 (1993) (explaining, in the cold war context, the constitutional separation of powers perils of allowing the executive to operate with secrecy).

supra

[139] *See Curtiss-Wright*, 299 U.S. at 319–23 (finding a plenary executive power in foreign relations). *Curtiss-Wright's* "sole organ" language is an important landmark for executive power in international relations and evaluating the inherent, extra-textual authorities of the Office of the Presi-

B. Executive Determinations Under the One-Voice Theory

The Supreme Court decision in *Curtiss-Wright* was heavily focused on the source of presidential power in foreign affairs.[140] There is a distinct notion, however, that regardless of the source of power to conduct foreign affairs, the United States should speak with one voice.[141] Where the "sole organ" language places the President at the focal point of American foreign relations, the one-voice theory is more focused on the consistency of the American message, rather than the identity of the speaker.[142] In concert, these two understandings of American foreign relations suggest not only that America must speak with one voice, but that voice should be the Executive's alone.[143]

The one-voice theory focuses on ensuring consistency in the American message and predictability in the conduct of foreign affairs, which is best espoused in *Crosby v. National Foreign Trade Council*.[144] The *Crosby* Court, reiterating prior precedent, noted three principal considerations for determining if a legislative action disrupted the ability of the nation to speak with one voice: formal diplomatic protest, the consistent representations of the executive, and the risk of foreign retaliation.[145]

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dent. *See* Fisher, *supra* note 38, at 139–40 (describing contemporary legal arguments relying upon the inherent executive power found in *Curtiss-Wright*).

[140] *See Curtiss-Wright*, 299 U.S. at 319–23 (granting great deference to the executive in foreign affairs).

[141] *See* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 381–82 (2000) (finding the ability of the President to speak with one voice for the nation, without exception, is vital to the presentation of a coherent American position in the best interest of the entire national economy).

[142] *See id.* (stressing speaking with one voice, albeit in the context of the executive for the particular case at bar); *Curtiss-Wright*, 299 U.S. at 319–23 (discussing inherent and exclusive presidential authority).

[143] *See Crosby*, 530 U.S. at 381–82 (stressing speaking with one voice, albeit in the context of the executive for the particular case at bar); *Curtiss-Wright*, 299 U.S. at 319–323 (discussing inherent and exclusive presidential authority).

[144] *See Crosby*, 530 U.S. at 381–82 (finding the ability of the President to speak with one voice for the nation, without exception, is vital to the presentation of a coherent American position in the best interest of the entire national economy). Although the "sole organ" language of *Curtiss-Wright* admittedly does speak to a consistent American message abroad, the one-voice theory is more clearly discussed in *Crosby*. *Compare Crosby*, 530 U.S. at 381–82 (finding the ability of the President to speak with one voice for the nation is central to effective execution of foreign policy), *with Curtiss-Wright,* 299 U.S. at 319–23 (finding a plenary executive power in foreign relations).

[145] *See Crosby*, 530 U.S. at 381–82 (describing three factors that courts consider when weighing the degree of obstruction to the conduct of the nation's foreign affairs). In *Crosby*, the Supreme Court evaluated a Massachusetts law that conflicted with federal law respecting trade and the broader relationship between the United States and Burma. *See id.* at 382. Congress had expressly granted the President sweeping authority to develop a comprehensive scheme for enhancing American-Burmese relations, which was hindered by the legislative actions of an individual state. *Id.*

JASTA is an obstacle to diplomatic objectives because it has the potential to create all three of the factors noted by the *Crosby* Court.[146] The protests of the United Kingdom, the Netherlands, and others have been significant.[147] Additionally, the European Union memorialized its concerns in a diplomatic démarche, and the Kingdom of Saudi Arabia warned it would consider removing approximately $750 billion in assets from the United States if JASTA exposed the Kingdom to legal liability.[148] Second, the Obama administration consistently represented, particularly in the President's veto memorandum, its objections to the foreign relations obstacles JASTA might impose.[149] Although it remains unclear to what extent, if any, the Trump administration objects to JASTA, America's special relationship with the United Kingdom and critical ties to Saudi Arabia may give the administration pause in fully embracing JASTA.[150] Lastly, JASTA may expose the United States to reciprocal jurisdiction; that is, other nations may limit

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[146] *See id.* at 382 (explaining the factors for determining under what circumstances legislative action burdens the conduct of foreign affairs).

[147] *See JASTA Hearing on H.R. 2040*, *supra* note 87, at 24 (statement of Ambassador Anne W. Patterson, Assistant Secretary of State for Near Eastern Affairs) (describing the reactions of numerous European and Middle East governments that objected to JASTA, and the subsequent strain in foreign relations).

[148] *See* Mark Mazzetti, S*audi Arabia Warns of Economic Fallout if Congress Passes 9/11 Bill*, N.Y. TIMES (Apr. 15, 2016), https://www.nytimes.com/2016/04/16/world/middleeast/saudi-arabia-warns-ofeconomic-fallout-if-congress-passes-9-11-bill.html?_r=0 [perma.cc/78TH-UMXW] (detailing the message from the Saudi Foreign Minister, delivered personally to American lawmakers, regarding the potential sale of Saudi held treasury securities and other assets); Kristina Wong, *EU Expresses Concern over 9/11 Bill*, THE HILL (Sept. 21 2016, 1:56 PM), http://thehill.com/policy/defense/297054-eu-expresses-concern-over-9-11-bill [https://perma.cc/R5WA-ZFJ2] (describing the contents of the European Union's diplomatic communication to Washington, which commented on JASTA's departure from prevailing sovereign immunity norms); *see also Démarche*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining démarche as "an oral or written diplomatic statement, esp. one containing a demand, offer, protest, threat, or the like").

[149] *See Veto Message from the President*, *supra* note 13 (describing the principal reasons President Obama returned S.2040 to Congress unsigned).

[150] *See, e.g.*, *President Trump and Prime Minister May's Opening Remarks*, WHITE HOUSE (Jan. 27, 2017), https://www.whitehouse.gov/the-press-office/2017/01/27/president-trump-and-prime-minister-mays-opening-remarks [https://perma.cc/SW9A-LAYA] (pledging President Trump's lasting support to the special relationship between the United States and the United Kingdom at a joint press conference with Prime Minister May during her visit to the White House); *Readout of the President's Call*, *supra* note 107 (affirming the longstanding, strategically important relationship between the United States and Saudi Arabia, and committing the respective heads of state to continued cooperation); *see also* Rosalind Helderman, *Countries Where Trump Does Business Are not Hit by New Travel Restrictions*, WASH. POST (Jan. 28, 2017), https://www.washingtonpost.com/politics/countries-where-trump-does-business-are-not-hit-by-new-travel-restrictions/2017/01/28/dd40535a-e56b-11e6-a453-19ec4b3d09ba_story.html?utm_term=.ef036a5462ac [https://perma.cc/9G9E-L99J] (detailing that the Trump Organization had expressed interest in doing business in the Kingdom not long before President Trump excluded Saudi Arabia, where fifteen of the nineteen 9/11 hijackers originated, from his travel ban). Notably, however, prior to the election, the company cancelled several limited liability incorporations that had laid initial groundwork for building a hotel in Saudi Arabia. Helderman, supra.

the ability of the United States to claim sovereign immunity in foreign courts, imperiling national assets and personnel abroad, and opening the country to embarrassing and costly litigation.[151]

Although *Crosby* dealt more specifically with the preemption of a state statute relating to foreign affairs, the *Crosby* factors for analyzing whether a legislative action disrupts the ability of the nation to speak with one voice apply to JASTA.[152] Here, the federal statute at issue impairs the authority delegated to the President through the Export Administration Act, the Arms Export Control Act, and the Foreign Assistance Act to exclusively make determinations regarding a foreign nation's responsibility for acts of terror.[153] The Executive is hampered by the possibility that the judiciary may find a foreign nation provided substantial support for acts of terrorism, regardless of a president's unwillingness to make such a determination.[154] The potential for a disjointed message from the executive and the judiciary is high, and runs contrary to the predictability and consistency in foreign affairs, which the one-voice theory protects.[155]

Despite the critiques of the one-voice theory, its tenets make clear that Congress, through JASTA, has created obstacles to the consistent and predictable conduct of American foreign policy, interfering with a function more properly in the province of the Executive.[156]

C. Executive Recognition Power Under Zifotovsky

In American foreign relations, the recognition power, or the acknowledgement of a particular entity's statehood and territorial boundaries, is

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[151] *See Veto Message from the President*, *supra* note 13 (describing the risks of reciprocal jurisdiction).

[152] *See Crosby*, 530 U.S. at 381–82 (detailing the courts' considerations for evaluating obstacles to the execution of foreign affairs).

[153] *See* David B. Rivkin, Jr. & Lee A. Casey, *Hold on JASTA Minute!*, WALL ST. J. (Nov. 20, 2016, 7:15 PM), https://www.wsj.com/articles/hold-on-jasta-minute-1480551317?mod=rss_opinion_main [https://perma.cc/H255-EJJA] (describing the impropriety of Congress's impairment of the President's responsibility for designating state sponsors of terror).

[154] *See* 28 U.S.C. § 1605B (2012 & Supp. IV 2016) (detailing the expanded exception for jurisdictional immunity of a foreign state for international terrorism against the United States, giving room for the courts to adjudicate the liability of a foreign nation without regard for the Secretary of State determination that the foreign state provided repeated support for acts of terrorism).

[155] *See id.* (creating the possibility of discordant messages in U.S. foreign policy); *Crosby*, 530 U.S. at 381–82 (describing how the state's message may obscure that of the President); *Curtiss-Wright*, 299 U.S. at 320 (describing the embarrassment that may result from the nation's failure to speak with a unified message).

[156] *See Crosby*, 530 U.S. at 381–82 (describing the significance of the United States speaking to foreign nations with a unified message and the factors courts evaluate when determining whether that ability has been burdened); Moore, *supra* note 44 (discussing the history of the one-voice doctrine and arguing the doctrine is divorced from practical application, but also noting the doctrine has received little scholarly attention).

rooted in the Reception Clause of Article II, which empowers the President to receive ambassadors and other diplomats.[157] Recognition is an endorsement that a particular regime is the legitimate government of a foreign nation.[158] As *Zivotofsky* evinced, the Reception Clause and recognition power have been long considered the exclusive prerogative of the Executive.[159] Under an expanded understanding of the recognition power, JASTA may prevent the President from exclusively determining the manner in which the United States recognizes a foreign nation: as a sponsor of terror, or not—a question directly tied to a regime's legitimacy in the international order.[160]

The act of receiving a foreign envoy is a proxy for recognition, because the reception is a tacit endorsement of the legitimacy of the envoy's home government.[161] Thus, recognition, reception, and regular diplomatic relations are all closely linked.[162] Recognition is thought of as binary in nature: either the President recognizes a foreign government or does not.[163] This binary understanding of recognition is limiting to both foreign policy and the ability to qualify recognition.[164] The President should be empowered to find that a

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[157] *See* U.S. CONST. art. II (stating that the President shall receive ambassadors and other public ministers); Zivotofsky v. Kerry, 135 S. Ct. 2076, 2084–85 (2015) (describing the relationship between reception and recognition).

[158] *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 203 cmt. a, at 84 (AM. LAW. INST. 1987) (defining recognition).

[159] *See Zifotovsky*, 135 S. Ct. at 2084–85 (discussing the legal consequences of recognition when Congress enacted a law on consular actions that might result in listing Israel, rather than Jerusalem, as a citizen's birthplace, in direct contradiction to the foreign relations stance promulgated by the executive). This authority could be critical as the Trump administration considers how it will move forward with the "One China" policy and complexities related to the recognition of Taiwan. *See e.g.*, *Trump Says U.S. Not Necessarily Bound by 'One China' Policy*, REUTERS (Dec. 12, 2016, 3:21 PM), http://www.reuters.com/article/us-usa-trump-china-idUSKBN1400TY [https://perma.cc/S4XY-B92H] (describing the possibility of recognition for Taiwan if China is unwilling to craft new trade agreements). Even if the Trump administration's stance is at odds with congressional preferences, the President's exclusive recognition power will likely prevail. *See Zifotovsky*, 135 S. Ct. at 2086 (acknowledging that recognition is a topic on which the nation is best served by speaking with one voice and by the President's unilateral authority to affect recognition).

[160] *See Zifotovsky*, 135 S. Ct. at 2086 (discussing the legal consequences of recognition).

[161] *See id.* at 2084–85 (discussing the legal consequences of recognition); *see also* Jean Galbraith, Zivotofsky v. Kerry *and the Balance of Power*, 109 AJIL UNBOUND 16, 20 (2015) (describing the Court's theory of recognition in *Zivotofsky* as one rooted in the Constitution, historical practice, and international law).

[162] *See Zifotovsky*, 135 S. Ct. at 2086 (describing the relationships between these diplomatic functions); *see also* Harlan Grant Cohen, Zivotofsky II*'s Two Visions for Foreign Relations Law*, 109 AJIL UNBOUND 10, 11 (2016) (noting that sending and receiving ambassadors, negotiating treaties, and opening diplomatic channels are all linked through the recognition power, and are all "dependent on Presidential power").

[163] *See Zifotovsky*, 135 S. Ct. at 2086 (declining to describe recognition in terms of gradation, but instead, describing it only in terms of whether or not such an act has been completed, and once completed, not to be contradicted by congressional action).

[164] *See* Cohen, *supra* note 162, at 12 (describing the logical inferences, functionalist considerations, common sense, and necessity imbued in Justice Kennedy's decision in *Zivotofsky*).

regime is the actual leadership of a foreign nation, but choose to qualify recognition or question the legitimacy of the regime's leadership.[165]

This is particularly true in cases of state sponsors of terror.[166] Indeed, it has often been the case that a recognized government, once determined by the Executive to be a state sponsor of terror, is no longer received in the United States, and ceases to receive American diplomats.[167] The breakdown of normal diplomatic relations and reception is often the consequence of a determination that a foreign state has repeatedly supported acts of international terror.[168] The President should be empowered, because of the authority that flows from the reception power in Article II, to qualify the United States' belief in the legitimacy of a foreign regime on the basis of that regime's relationship with international terror.[169]

III. APPLICATION OF THE *CHADHA* TEST FOR SEPARATION OF POWERS VIOLATIONS AND POSSIBLE REMEDIES FOR VIOLATION OF CONSTITUTIONAL PRINCIPLES

The perils of JASTA's removal of the President's exclusive power to decide for the United States whether a foreign nation bears responsibility for

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[165] *See id.* (describing the logical inferences, functionalist considerations, common sense, and necessity imbued in Justice Kennedy's decision in *Zivotofsky*). *But see* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 203 cmt. a, at 84 (AM. LAW. INST. 1987) (defining recognition more narrowly).

[166] *See State Sponsors*, *supra* note 80 (detailing the dates on which Iran, Sudan, and Libya, the currently-designated state sponsors of terror, were designated as such); *A Guide to the United States' Recognition, Diplomatic, and Consular Relations, by Country, Since 1776: Iran*, U.S. DEP'T OF STATE: OFF. OF HISTORIAN, https://history.state.gov/countries/iran [https://perma.cc/4N9L-BCAT] [hereinafter *Iran Guide*] (describing the severing of diplomatic relations with Iran); *A Guide to the United States' Recognition, Diplomatic, and Consular Relations, by Country, Since 1776: Libya*, U.S. DEP'T OF STATE: OFFICE OF THE HISTORIAN, https://history.state.gov/countries/libya [https://perma.cc/K64J-G6ME] [hereinafter *Libya Guide*] (describing the breakdown of formal diplomatic relations with Libya); *A Guide to the United States' Recognition, Diplomatic, and Consular Relations, by Country, Since 1776: Sudan*, U.S. DEP'T OF STATE: OFF. OF HISTORIAN, https://history.state.gov/countries/sudan [https://perma.cc/ZAM6-T6D6] [hereinafter *Sudan Guide*] (describing the breakdown of formal diplomatic relations with Sudan).

[167] *See Iran Guide*, *supra* note 166 (noting that diplomatic ties with the United States have remained severed since the hostage crisis in 1980); *Libya Guide*, *supra* note 166 (describing the recall of diplomats and U.S. embassy closure in 1980, the year after Libya was designated a state sponsor of terror); *Sudan Guide*, *supra* note 166 (describing the repeated severing and re-establishment of diplomatic relations with the United States).

[168] *See Iran Guide*, *supra* note 166 (noting diplomatic ties with the United States have remained severed since the hostage crisis in 1980); *Libya Guide*, *supra* note 166 (describing the recall of diplomats and U.S. embassy closure in 1980, the year after Libya was designated a state sponsor of terror); *Sudan Guide*, *supra* note 166 (describing the repeated severing and re-establishment of diplomatic relations with the United States).

[169] *See Zifotovsky*, 135 S. Ct. at 2086 (acknowledging that recognition is a topic on which the nation is best served by speaking with one voice and the President's unilateral authority to affect recognition).

terrorist acts seem apparent under several theoretical frameworks.[170] Whether the Act is unconstitutional, in addition to being unwise, is a larger question that remains open.[171] Section A of this Part applies constitutional separation of powers analysis to JASTA.[172] Section B weighs whether JASTA's executive intervention provision may save the constitutionality of the Act.[173] Lastly, Section C addresses possible remedies and the future of JASTA.[174]

A. Evaluating the Constitutionality of JASTA

The effect of JASTA, whether viewed as a disruption of the inherent, extra-textual foreign affairs power of the President, a divergence from the one-voice theory, or an infringement on the President's recognition power, should still be measured against the two-prong framework for analyzing violations of the constitutional separation of powers principle espoused in Justice Powell's 1983 concurrence in *Chadha*.[175] The dispositive questions under *Chadha* are whether JASTA impermissibly interferes with the executive's ability to perform constitutionally assigned functions or whether JASTA allows the judiciary to assume a function more properly entrusted to the Executive.[176]

JASTA allows the Judiciary to determine the American stance on a foreign nation's responsibility for terror—a function more properly entrusted to the President.[177] Through the Export Administration Act, the Arms Export

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[170] *See*; Zivotofsky v. Kerry, 135 S. Ct. 2076, 2086 (2015) (acknowledging that recognition is a topic on which the nation is best served by speaking with one voice and the President's unilateral authority to affect recognition); Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 381–82 (2000) (stressing the significance of the nation speaking with one voice); United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319–23 (1936) (discussing inherent and exclusive presidential authority).

[171] *See* INS v. Chadha, 462 U.S. 919, 963 (1983) (Powell, J., concurring) (creating two categories of actions that may violate the separation of powers doctrine: impermissible interference in the performance of a function constitutionally assigned to a coordinate branch of government, or assumption of a function more properly entrusted to another branch).

[172] *See infra* notes 175–196 and accompanying text.

[173] *See infra* notes 197–204 and accompanying text.

[174] *See infra* notes 205–219 and accompanying text.

[175] *See Chadha*, 462 U.S. at 963 (Powell, J., concurring) (creating two categories of actions that may violate the separation of powers doctrine: either the impermissible interference with another branch's performance of constitutionally assigned functions or the assumption of a function more properly entrusted to another branch); *see also* NLRB v. Noel Canning, 134 S. Ct. 2559, 2593 (2014) (Scalia, J., dissenting) (noting that *Chadha* is illustrative of the Court's vital function of policing the enduring structure of constitutional government); CHEMERINSKY, *supra* note 20 at 369 (describing the significance of the *Chadha* decision in separation of powers jurisprudence); Metzger, *supra* note 68, at 1636 (describing *Chadha*, like *Youngstown*, as a fabled separation of powers case).

[176] *Chadha*, 462 U.S. at 963 (Powell, J., concurring).

[177] *See* 28 U.S.C. § 1605B (2012 & Supp. IV 2016) (granting federal courts jurisdiction to hear cases against foreign nations for substantial support of international terrorism); *Chadha*, 462

Control Act, the Foreign Assistance Act, and the Secretary of State's annual reporting requirements to Congress, the Legislature has properly entrusted this function to the Executive.[178] More fundamentally, the President's constitutional recognition and other foreign affairs authorities suggest a textually demonstrable rationale for entrusting this function to the President.[179]

The determination of a foreign powers' responsibility for terrorist acts more properly belongs with the Executive because the unity of the Executive, unlike the diversity of individual state interests represented by legislators, is a more apt structure for unity of message to foreign nations.[180] JASTA reduces unity within the federal government's message by allowing separate branches to dictate the United States' views of a foreign state's responsibility for terrorism.[181] Indeed, JASTA satisfies all three of the *Crosby* factors used by the courts to identify when legislative action disrupts the ability of the nation to speak with one voice.[182] JASTA creates multiple organs for the transmission of America's message, rather than a unified voice, by allowing private citizens to have their cases adjudicated in the courts.[183]

The mismanagement of the broader American message could result in the very embarrassment the *Curtiss-Wright* Court warned against, should the Executive and the Judiciary find themselves at odds over the American posture toward a foreign nation's responsibility for terrorist acts.[184] Entrusting the President to determine the American position on a foreign nation's responsibility for terrorism places the decision with the most informed decision maker, one with access to confidential information, and allows for much

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U.S. at 963 (Powell, J., concurring); *see also* Rivkin & Casey, *supra* note 153 (describing the impropriety of federal courts determining whether a foreign state has intentionally sponsored acts of terror, in place of the President).

[178] *See* 22 U.S.C. § 2371 (2012) (precluding the provision of assistance to any country the Secretary of State has determined has repeatedly provided support for acts of international terrorism); *id.* § 2656f (delineating the content requirements for the Secretary of State's annual report to Congress on terrorist activity and subsequent foreign government responses); *id.* § 2780 (2012 & Supp. II 2014) (prohibiting the sale of military equipment to nations designated by the Secretary of State as having provided support for acts of international terrorism); 50 U.S.C. § 4605 (2012) (requiring a validated license prior to the export of any good or technology to a country the Secretary has determined repeatedly provided support for acts of international terrorism).

[179] *See* U.S. CONST. art. II (describing the President's authority to receive ambassadors, appoint public ministers, make treaties, and act as commander in chief of the nation's armed forces).

[180] *See Zifotovsky*, 135 S. Ct. at 2086 (describing the structural unity of the executive, in contrast to the legislature).

[181] *See id.* (discussing the structural unity of the executive).

[182] *See Crosby*, 530 U.S. at 381–82 (describing three factors that courts consider when weighing the degree of obstruction to the conduct of the nation's foreign affairs).

[183] *See Uphold Veto on 9/11 Lawsuits*, *supra* note 10 (noting that JASTA lawsuits place U.S. foreign policy in the hands of litigants rather than, properly, with the President and Secretary of State).

[184] *See Curtiss-Wright*, 299 U.S. at 320 (explaining the perils of the embarrassment that may result from conflicting pronouncements from various elements of government).

broader consideration of the United States' geopolitical relationship with the foreign nation.[185] In determining liability, no court may consider information outside the case at bar, such as international cooperation agreements, trade balances, American military bases abroad, or a foreign nation's role in regional politics.[186] Thus, determining whether the United States makes a public declaration that a foreign government sponsors international terrorism is most properly entrusted to the executive, regardless of the facts of one particular case, because the national stakes are so high.[187]

Further, JASTA interferes with the reception and recognition powers of the President, which are exclusively executive powers.[188] The Executive's ability to determine the manner in which a foreign nation is recognized should also be exclusive, and JASTA impermissibly grants the Judiciary ability to shade the manner in which the United States recognizes a foreign nation's relationship with terrorism.[189] Concededly, it can be argued that although the President has exclusive and unreviewable power to recognize foreign sovereigns, the longer course of American diplomatic relations with a recognized country relies on congressional action and constitutional authorities.[190] A president's ability to recognize a foreign nation, with the qualification the state is a sponsor of terror, is vital to conduct of American foreign relations.[191] Recognition, properly viewed as a malleable process,

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[185] *See id.* (describing how the President may rely on confidential information and information not available to others in decision-making).

[186] *See* FED. R. EVID. 401–403 (defining "relevant evidence" and limiting federal courts to admitting only relevant evidence during proceedings).

[187] *Curtiss-Wright*, 299 U.S. at 320 (describing the embarrassment that may result from the nation's failure to speak with a unified message).

[188] *See* 28 U.S.C. § 1605B (2012 & Supp. IV 2016) (granting jurisdiction to the courts to hear a wider swath of cases involving the responsibility of a foreign nation for acts of terror)*; Zifotovsky*, 135 S. Ct. at 2080–81 (describing the exclusivity of recognition and reception for the President); Baker v. Carr, 396 U.S. 186, 212 (1962) (recognizing how little action the judiciary may take with respect to a foreign nation until executive recognition).

[189] *See* 28 U.S.C. § 1605B (granting jurisdiction to the courts to hear a wider swath of cases involving the responsibility of a foreign nation for acts of terror); *Zifotovsky*, 135 S. Ct. at 2085 (holding that recognition has traditionally been exclusively the province of the President). This is the weakest of the separation of powers arguments against JASTA because it rests upon an admittedly expanded conceptualization of the reception and recognition powers, and relies on those powers' inherent link to the normal conduct of diplomatic relations. *See Zifotovsky*, 135 S. Ct. at 2090 (describing traditional notions of the recognition power to consist only of the executive's ability to recognize, or not recognize, a foreign nation and Congress's subsequent role in determining further foreign affairs policy decisions with respect to the foreign nation).

[190] *See Zifotovsky*, 135 S. Ct. at 2090 (describing traditional notions of the recognition power to consist only of the executive's ability to recognize, or not recognize, a foreign nation and Congress' subsequent role in determining further foreign affairs policy decisions with respect to the foreign nation).

[191] *See id.* (discussing the legal consequences of recognition).

with the qualification that government is a state sponsor of terror, is a distinctly executive function.[192]

As a consequence, there is a function more properly entrusted to the President carried out by the Judiciary, a violation of the second prong of Justice Powell's *Chadha* test for separation of powers violations.[193] The statutes empowering the President to designate and sanction state sponsors of terror, coupled with the executive's inherent constitutional foreign affairs powers, properly entrust determinations of a foreign state's responsibility for terrorist acts to the President.[194] JASTA allows the Judiciary to assume this function.[195] Thus, JASTA violates the separation of powers doctrine and is therefore unconstitutional.[196]

B. Executive Intervention Provisions Fail to Satisfy Constitutional Demands

JASTA does contain a provision to allow the executive to stay a proceeding against a foreign state after immunity has been withdrawn under § 1605B.[197] Such a stay, however, may only be granted when the Attorney General verifies that the Secretary of State is engaged in good faith discussions with the foreign nation to resolve the pending claims against it.[198]

This concession applies only to a narrow class of cases: those where the Executive is engaged in good faith negotiations to resolve the claim.[199] A broad array of possible scenarios would not be included in this safeguard,

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[192] *See id.*

[193] *See* 28 U.S.C. § 1605B (granting jurisdiction to courts to determine a foreign nation's responsibility for acts of terror irrespective of whether the nation has been designated a state sponsor of terror); INS v. Chadha, 462 U.S. 919, 963 (1983) (Powell, J., concurring) (creating two categories of actions that may violate the separation of powers doctrine).

[194] *See* U.S. CONST. art. II (detailing the President's powers as Commander in Chief, and to appoint and receive ambassadors); 22 U.S.C. § 2371 (2012) (precluding the provision of assistance to any country that the Secretary of State has determined has repeatedly provided support for acts of international terrorism); *id.* § 2656f (delineating the content requirements for the Secretary of State's annual report to Congress on terrorist activity and subsequent foreign government responses); 22 U.S.C. § 2780 (2012 & Supp. II 2014) (prohibiting the sale of military equipment to nations designated by the Secretary of State as having provided support for acts of international terrorism); 50 U.S.C. § 4605 (2012) (requiring a validated license prior to the export of any good or technology to a country the Secretary has determined has repeatedly provided support for acts of international terrorism).

[195] *See* 28 U.S.C. § 1605B (detailing the expanded exception for jurisdictional immunity of a foreign state for international terrorism against the United States).

[196] *See Chadha*, 462 U.S. at 963 (Powell, J., concurring); Rivkin & Casey, *supra* note 153 (describing the unconstitutionality of JASTA).

[197] *See* Pub. L. No. 114-222, 130 Stat. 852, 854 (2016) (creating an opportunity for executive intervention in § 5).

[198] *See id.* (describing the necessary preconditions to obtain a stay of proceedings).

[199] *See id.* (creating an opportunity for executive intervention in § 5).

including cases where the Executive wished to quash a suit, but was not actively negotiating a resolution.[200] JASTA's executive intervention provision fails to bring the Act into alignment with constitutional separation of powers principles because the provision merely creates a slight narrowing of the circumstances in which the Judiciary may perform a function more properly entrusted to the executive.[201] In essence, JASTA would require the Executive to negotiate a settlement agreement on the plaintiffs' behalf to prevent the negative consequences of a judicial finding that a foreign sovereign was responsible for international terrorism.[202] Congress' statutory concession to the Executive, then, is insufficient to save the Act.[203]

Even with the provision for executive intervention, Congress, through JASTA, permits the courts to perform a function more properly entrusted to the executive, a violation of the constitutional separation of powers doctrine.[204]

C. Remedy

The constitutional tension JASTA creates may be remedied through litigation, through the judiciary's application of the doctrine of prudential standing, or in the Legislature.[205]

Senators Lindsey Graham, Orrin Hatch, and John McCain have been outspoken in their desire to amend JASTA, and House leadership has contemplated altering the law.[206] Such efforts, though, may be met with consid-

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[200] *See id.* (describing the circumstances in which the executive may seek a stay of proceedings against a foreign nation, but failing to address scenarios falling outside the prescribed conditions).

[201] *See id.* (detailing the narrow class of instances in which the executive may seek a stay of proceedings against a foreign nation); INS v. Chadha, 462 U.S. 919, 963 (1983) (Powell, J., concurring) (creating two categories of actions that may violate the separation of powers doctrine).

[202] *See* Pub. L. No. 114-222, 130 Stat. 852, 854 (creating an opportunity for executive intervention in § 5 which may only be exercised when the Secretary of State is actively engaged in good faith negotiations to resolve the claims against the foreign state).

[203] *See Chadha*, 462 U.S. at 963 (Powell, J., concurring) (depicting two forms of separation of powers violations, including assumption of a function more properly entrusted to a coordinate branch of government, which JASTA violates because its provision for executive intervention is too narrow to actually preclude the courts from acting in a function more properly entrusted to the executive).

[204] *See id.* (creating two categories of actions that may violate the separation of powers doctrine).

[205] *See, e.g.*, Barrett & Walsh, *supra* note 103 (discussing Congress's dissatisfaction with JASTA in the immediate aftermath of its legislative veto override).

[206] *See id.* (discussing Leader McConnell's disappointment with the steps leading up to JASTA's enactment and Speaker Ryan's statement on the need for a legislative fix in order to protect U.S. service members abroad); *see also* 162 CONG. REC. S6611 (daily ed. Nov. 30, 2016) (Senators McCain and Graham conducting a colloquy on the Senate floor regarding the need to legislatively amend JASTA, particularly in the wake of statements by a number of senior military,

erable opposition.[207] JASTA, in its current form, garnered significant levels of support in both chambers of Congress and may very well have the support of the White House.[208] During his Senate confirmation hearing, Secretary of State Rex Tillerson testified to his belief that nations who aid and abet terror should be held accountable.[209] Furthermore, President Trump may be prepared to cede this element of executive foreign affairs power, based on his campaign statements criticizing President Obama's JASTA veto.[210]

If, however, Congress does not repeal or alter JASTA in such a way that ends the usurpation of a function more properly entrusted to the President, a nation amenable to suit under JASTA may choose to litigate JASTA's constitutionality.[211] To protect the executive power improperly infringed upon by JASTA, a litigant must bring an action to challenge the constitutionality of the Act on its face, or as applied.[212] The litigant must satisfy both Article III and prudential standing considerations, meaning the litigant must demonstrate harm, causation, and redressability, as well as demonstrating the litigant comports with the typical prudential considerations applied prior to hearing a controversy.[213]

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diplomatic, and political figures); 162 CONG. REC. S7005 (daily ed. Dec. 9, 2016) (Senator Hatch describing the negative public response to JASTA and the need to alter the law).

[207] *See* Schumer & Cornyn, *supra* note 9 (discussing the broad bipartisan support for JASTA in Congress).

[208] *See id.* (discussing the broad bipartisan support for JASTA in Congress); *Donald J. Trump Statement on Obama's Veto of the Justice Against Sponsors of Terrorism Act*, DONALD J. TRUMP (Sept. 23, 2016), https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-president-obamas-veto-of-the-justice-against-s [https://web.archive.org/web/20170429201958/https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-president-obamas-veto-of-the-justice-against-s] [hereinafter *Donald J. Trump Statement*] (releasing then-candidate Donald Trump's response to President Barack Obama's veto).

[209] *Secretary of State Designate Rex Tillerson Senate Confirmation Hearing Opening Statement*, SENATE COMM. ON FOREIGN RELATIONS (Jan. 11, 2017), http://www.foreign.senate.gov/imo/media/doc/011117_Tillerson_Opening_Statement.pdf (affirming the Secretary's belief in the need for accountable for nations supporting terrorism).

[210] *See Donald J. Trump Statement*, *supra* note 208 and accompanying text.

[211] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176–178 (1803) (determining that it is the role of the courts to determine the constitutionality of the law); 162 CONG. REC. S6611 (daily ed. Nov. 30, 2016) (Senators McCain and Graham conducting a colloquy on the Senate floor regarding the need to legislatively amend JASTA, particularly in the wake of statements made by a number of senior military, diplomatic, and political figures); 162 CONG. REC. S7005 (daily ed. Dec. 9, 2016) (Senator Hatch describing the negative public response to JASTA and the need to alter the law).

[212] *See* 16 C.J.S. *Constitutional Law* § 243 (database updated Sept. 2017) (describing the differing methods of challenging a statute's constitutionality).

[213] *See* Spokeo, Inc. v. Robins 136 S. Ct. 1540, 1547–50 (2016) (clarifying the "injury in fact" element of standing); Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992) (describing the three prongs of Article III standing); Baker v. Carr, 396 U.S. 186, 214 (1962) (describing prudential standing and the factors courts weigh when determining whether a controversy presents a nonjusticiable political question).

An as-applied challenge would most likely arise in cases where a foreign nation was unable to claim sovereign immunity as a result of § 1605B and was forced to defend a claim of supporting terror in the federal courts.[214] Only after successfully demonstrating Article III standing as a result of being forced to defend the claim could a litigant seek judicial review of the constitutionality of JASTA, and ask a court to find the law invalid for violating the separation of powers doctrine.[215]

An alternative judicial remedy for the constitutional implications of JASTA may be the invocation of the political question doctrine and an examination of the justiciability of cases like *McCarthy*.[216] JASTA likely satisfies one or more of the six political question doctrine factors detailed by Justice Brennan in *Baker v. Carr*, particularly the potential for embarrassment arising from multiple branches of government speaking on a single question, namely whether a foreign state bears responsibility for acts of international terrorism.[217] Indeed, in its ruling in *Schneider v. Kissinger*, the D.C. Circuit determined that the children of a Chilean general killed as a result of decisions by U.S. policy makers to support a 1970 Chilean coup had not presented a justiciable question because the political, military, and foreign affairs implications of the general's death were not the province of the court.[218] Similarly, the political, military, and foreign affairs implications of finding a foreign state supported acts of terror may not properly be the province of the Judiciary, and are best left to the Executive, but such judicial action is difficult to predict.[219]

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[214] *See* 28 U.S.C. § 1605B (2012 & Supp. IV 2016) (expanding the terrorism exception to sovereign immunity to include nations not designated a state sponsor of terror).

[215] *See Spokeo*, 136 S. Ct. at 1547–50 (clarifying the "injury in fact" element of standing); *Lujan*, 504 U.S. at 560–61 (describing the three prongs of Article III standing); *see also* 28 U.S.C. § 1605B (detailing the expanded exception for jurisdictional immunity of a foreign state for international terrorism against the United States).

[216] *See Baker*, 369 U.S. at 216 (laying out the six "Brennan Factors" for analysis when courts determine whether a political question is justiciable); Complaint ¶¶ 11–19, McCarthy v. Kingdom of Saudi Arabia, No. 1:16-cv-o8884 (S.D.N.Y Nov. 15, 2016) (explaining, in a suit filed against the Kingdom of Saudi Arabia by the daughters of a 9/11victim, the suit's reliance on JASTA to support the court's jurisdiction in the matter).

[217] *See* 369 U.S. at 216 (describing the *Baker* factors for determining whether a case presents a non-justiciable political question).

[218] *See* 412 F.3d 190, 196 (D.C. Cir. 2005) (noting that, in the context of national security, it is not the courts' place to second-guess expert judgments made by the executive branch in keeping with the executive's constitutionally assigned functions).

[219] *See id.; see also* El-Shifa Pharm. Indus. v. United States, 607 F. 3d 836, 842–43 (D.C. Cir. 2010) (en banc) (rejecting plaintiff's tort claim because it merely masked deeper foreign policy and national security questions in a different cause of action). *But see* Stephen I. Vladeck, *The New National Security Canon*, 61 AM. U. L. REV. 1295, 1324 (2012) (recognizing the Supreme Court jurisprudence finding that not all cases involving military decisions are barred by the political question doctrine).

CONCLUSION

Through the Justice Against Sponsors of Terror Act (JASTA), Congress has granted individual litigants and the courts the ability to infringe on foreign affairs powers typically and rightly exercised by the executive. Although differing in their procedural consequences, a finding of liability in U.S. courts against a fellow nation for aiding, abetting, or knowingly providing substantial assistance to an act of international terrorism occurring in the United States affects the tenor of America's relationship with that state in a manner largely akin to an executive designation as a state sponsor of terror. Allowing for this disjointed foreign relations decision making, by lesser informed decision makers, threatens to upend the unity of America's message to the world and disrupt the President's role as America's constitutionally empowered representative to foreign nations. This disruption violates long standing principles of separation of powers. Moreover, JASTA cannot be constitutionally salvaged by the Act's executive intervention provisions. Unfortunately, Congress' effort to promote the individual litigant's interest in access to the court's truth seeking function fails to overcome the greater national need for coherent and stable foreign relations. Congress, in its delegation of jurisdiction to the courts, has permitted an unconstitutional assumption of a function rightly coordinated by the President. Even though Congress has an important role to play in the foreign affairs of the United States, neither their foreign affairs authority nor the power to shape elements of the American court system suffice to justify a possible upending of diplomatic relations. As a result, the Justice Against Sponsors of Terrorism Act is an unconstitutional infringement by the legislature on a power more properly entrusted to the executive.

DAN CAHILL[220]

[220] The opinions expressed in this article are solely those of the author, and do not necessarily reflect the position of the United States Coast Guard, the Judge Advocate General, or any other U.S. Government office. The author dedicates this Note to the memory of all those lost in the 9/11 attacks.