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**Infringing US Presidential Foreign Policy Powers: The Case of the  
2016 Justice Against Sponsors of Terrorism Act**

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## **Dedication**

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## **Abstract**

The adoption of the Justice Against Sponsors of Terrorism Act (JASTA) of 2016 gave birth to an important debate both within and outside of the USA. This new law received a wide-ranging bipartisan backing as an allegedly effective measure in order to deal with the menace of international terrorism on American soil. Despite the widespread sympathy for the 9/11 victims and their families, the Obama administration was not in favor of this measure as it expressed serious concern about possible unintended consequences. The white House's position was that the act would harm the US economic, diplomatic, and national security interests. This substantial disagreement led to an eventual clash between the two branches of the US government. Consequently, Congress proceeded to override Barrack Obama's veto to pass the bill. This study aims to investigate how the adoption of JASTA threatened the US presidential power after crossing boundaries by Congress for the sake of fighting terrorism, where the core is to shed light on the extent to which this bill conflicts with the fundamentals of constitutional law.

## ملخص

لقد أدى اعتماد قانون العدالة ضد رعاة الإرهاب (JASTA) لعام 2016 إلى ظهور نقاش مهم داخل وخارج الولايات المتحدة الأمريكية. حيث تلقى هذا القانون الجديد دعمًا واسع النطاق من الحزبين كإجراء يُزعم أنه فعال من أجل التعامل مع خطر الإرهاب الدولي على الأراضي الأمريكية. على الرغم من التعاطف الواسع مع ضحايا 11 سبتمبر وأسرههم، لم تكن إدارة أوباما تؤيد هذا الإجراء لأنها أعربت عن قلقها الشديد بشأن العواقب المحتملة غير المقصودة. كان موقف البيت الأبيض معارضاً لهذا القانون بحجة أنه سيضر بمصالح الولايات المتحدة الاقتصادية والدبلوماسية وأمنها القومي. أدى هذا الخلاف الكبير إلى صدام في نهاية المطاف بين فرعي الحكومة الأمريكية. ونتيجة لذلك، شرع الكونجرس في تجاوز فيتو باراك أوباما لتمرير مشروع القانون. تهدف هذه الدراسة إلى التحقيق في الكيفية التي هدد بها اعتماد قانون جاستا السلطة الرئاسية الأمريكية بعد تجاوز للحدود من قبل الكونغرس من أجل مكافحة الإرهاب، حيث يتمثل جوهرها في إلقاء الضوء على مدى تعارض هذا القانون مع أسس القانون الدستوري.

## **List of Abbreviations and Acronyms**

<b>ATA</b>	Anti-Terrorism Act
<b>CIA</b>	Central Intelligence Agency
<b>FBI</b>	Federal Bureau of Investigation
<b>FSIA</b>	Foreign Sovereign Immunities Act
<b>JASTA</b>	Justice Against Sponsors of Terrorism Act
<b>NATO</b>	North Atlantic Treaty Organization
<b>NSA</b>	National Security Agency
<b>NSC</b>	National Security Council
<b>UAE</b>	United Arab Emirates

## Table of Contents

<b>Introduction</b> .....	01
<b>Chapter One: Presidential Power in Foreign Affairs: A Historical Analysis</b> .....	05
1. US Executive and Legislative Power in Foreign Affairs.....	06
1.1. Source of Presidential Power in Foreign Affairs.....	10
2. Historical Analysis of US Presidential Power in Foreign Affairs.....	11
2.1. Early Years of the Republic.....	12
2.1.1. George Washington and the Neutrality Proclamation.....	12
2.1.2. Monroe Doctrine.....	12
2.2. Expansion of US Power.....	13
2.2.1. Spanish American War.....	13
2.2.2. Roosevelt Corollary.....	14
2.3. World Wars and the Cold War.....	14
2.3.1. World War I and Wilson’s Fourteen Points.....	15
2.3.2. World War II and the Emergence of the US as a Global Superpower.....	15
2.3.3. Cold War and Containment Policy.....	16
2.4. Post-Cold War Era.....	17
2.4.1. The Golf War.....	17



2.4.2. The Intervention in Somalia.....	18
3. Factors that Affect Presidential Power in Foreign Affairs.....	18
3.1. Domestic Political Factors.....	19
3.2. International Context.....	20
3.3. Presidential Leadership and Decision-Making Style.....	21
4. War on Terror and the Use of Executive Power.....	21
<b>Chapter Two: US Counterterrorism Policy and the US FSIA.....</b>	<b>25</b>
1. Early Counterterrorism Efforts.....	27
2. US Foreign Sovereign Immunity.....	28
2.1. Tate Letter: Challenging Traditional Notions of Sovereign Immunity.....	29
2.2. The Foreign Sovereign Immunities Act.....	31
3. Post 9/11 Policy.....	38
3.1. Implementation of the USA Patriot Act.....	39
4. Path to JASTA.....	40
<b>Chapter Three: JASTA Infringed on Executive Power in Foreign Affairs.....</b>	<b>43</b>
1. Key Provisions of the Act.....	44
2. Obama’s Veto Message and the Administration’s Concerns.....	45
3. Constitutional Issues.....	47
3.1. Separation of Powers.....	47
3.2. Federalism.....	48
3.3. Foreign Affairs Preemption Doctrine.....	48
4. Domestic Implications.....	49

4.1. Increased Vulnerability of American entities to Foreign Lawsuits.....	50
4.2. Targeting of US Military Personnel and Government Officials.....	51
4.3. Potential Strain on Diplomatic Relationships with Allies.....	51
5. International Implications.....	52
5.1. Reciprocal Legislation by Foreign Governments.....	53
5.2. Retribution against US Companies Operating Overseas.....	54
5.3. Damage to America’s Reputation and Influence in the Global Arena.....	54
6. Political Implications.....	55
6.1. Partisan Division over the Implementation and Modification of JASTA.....	56
6.2. Criticism on the Legality and Constitutionality of JASTA.....	56
6.3. The Impact of JASTA on the US Presidency and its Leadership Role around the World.....	57
<b>Conclusion.....</b>	<b>60</b>
<b>Works Cited.....</b>	<b>63</b>

## Introduction

In the realm of US Foreign Policy, a delicate interplay occurs between different branches of government and the principles of sovereignty and accountability. This leads to the Justice Against Sponsors of Terrorism Act (JASTA), a bill that raises concerns about its potential to infringe upon constitutional norms, particularly within the executive branch. This legislation has the potential to violate constitutional principles by encroaching upon the powers and authority of the executive branch, specifically regarding issues of national security and individual rights.

In 2016, a contentious battle took place regarding seeking justice for acts of terrorism. JASTA was introduced as a means to hold accountable those who support and sponsor terrorism. However, concerns arose about its fairness and constitutionality. Opponents, including President Barack Obama, strongly objected to it. They argued that it undermined the principle of fairness and posed a risk to the balance between national security and individual rights.

The passing of the Justice Against Sponsors of Terrorism Act (JASTA) undermines the role of the executive branch, specifically in the realm of national security and foreign policy. JASTA's override of the executive branch's ability to waive foreign sovereign immunity for lawsuits creates potential negative consequences for US relationships with important foreign countries. It is important to consider the delicate balancing of the act necessary in matters of national security and the delicate functional relationship between the executive and legislative branches of government. JASTA's override of executive authority creates a dangerous precedent that may have greater consequences beyond its current scope, and should be a concern to those who value the interests of the United States. Furthermore, the Justice Against Sponsors of Terrorism Act not only undermines the executive branch's role in

foreign policy but also puts the United States at risk of facing similar lawsuits from foreign nations. This act sends a message to the international community that the US is willing to compromise its relationships with its allies and potentially damage its own national security interests for the sake of domestic political considerations. It sets a dangerous precedent and could cause a ripple effect in the global legal system.

The main research questions this study aims to answer are, to what extent does the executive branch control foreign affairs? How can the constitutionality of JASTA be assessed? Does the US pursuit of justice and national stability defy the principles of international law and sovereign immunity? In addition, since the act is associated with the foreign sovereign immunity doctrine and terrorism, what are its retaliatory effects? Moreover, to what extent does the passing of JASTA contradict with the fundamentals of constitutional law?

This study relies on variety of literature in order to ensure its credibility, such as books, academic journal and scholarly articles. By incorporating information from different perspectives and reliable sources, this research enhances its credibility and provides a solid foundation for informed conclusions and interpretations. In the article “The Justice Against Sponsors of Terrorism Act: An Infringement on Executive Power”, Dan Cahill argues that JASTA interferes with the Executive's authority in foreign affairs, an area where the President has traditionally held authority .Moreover, he states that JASTA breaches the separation of powers doctrine unconstitutionally. In addition, he believes that JASTA is unconstitutional because it interferes with a function legitimately delegated to the President, as the nation should speak with a single voice to the international community: that of the Executive (1701-1702).

This research paper is divided into three chapters. The first chapter sets the stage by delving into the constitutional framework of presidential power in foreign affairs. It examines the historical evolution of executive authority and the extent to which the executive branch has traditionally wielded power in shaping US foreign policy. Furthermore, it explores the critical role of Congress as a check on executive power and its ability to shape foreign policy through legislation. The second Chapter embarks on a captivating exploration of the intricate relationship between counterterrorism policy, the evolving concept of sovereign immunity, and the enactment of the Foreign Sovereign Immunities Act (FSIA). Through a comprehensive analysis of historical events, legal precedents, and shifting global dynamics, this chapter uncovers the driving forces behind the development of sovereign immunity principles and their application in the context of combating terrorism. The third chapter examines the circumstances surrounding the passage of the Justice Against Sponsors of Terrorism Act. It illuminates the potential infringements upon executive authority, the delicate balance of powers, and the inherent tension between national security imperatives and individual rights. It delves into the legal challenges and debates surrounding JASTA, ultimately making a compelling case for its unconstitutionality.

Overall, the three chapters of this study explored the trajectory and process through which JASTA became a potential instrument for breaching constitutional norms and principles. Through a comprehensive examination of various sources, including legal analyses, scholarly insights, and historical contexts, this research sought to establish a credible and well-supported conclusion. By shedding light on the potential threats posed by JASTA to constitutional norms, this study contributes to a deeper understanding of the complexities surrounding its implementation and raises important questions regarding the delicate balance between national security and the preservation of constitutional principles. This study relies on the historical method in order to highlight the evolution of presidential authority over

foreign affairs as well as the evolution of the principle of sovereign immunity over the years in relation to the US. Additionally, it relies on the analytical method in order to shed light on the content of the bills, namely the Foreign Sovereign Immunities Act (FSIA) and the Justice Against Sponsors of Terrorism Act (JASTA) as well as key events and legal precedents. Finally, the research follows the MLA guide eighth edition.

## Chapter One

### Presidential Power in Foreign Affairs: A Historical Analysis

US presidents have traditionally held significant power in foreign affairs. As the nation's chief diplomat and commander-in-chief, the president has the authority to negotiate treaties, appoint ambassadors, and use military force abroad. However, the scope of presidential power in foreign affairs has been a subject of debate among scholars and policymakers. Some argue that presidential power in foreign affairs has expanded over time, while others contend that the power of Congress and the courts have served as a check on presidential power. According to Powell, H. Jefferson, law professor at Duke University, the scope of presidential power in foreign affairs has expanded in response to the growth of the US as a global power. This expansion of presidential power has been influenced by a variety of factors, including changing political and legal contexts, the emergence of new technologies, and shifting global power dynamics (527). Studying presidential power in foreign affairs is crucial for understanding the dynamics of US foreign policy. As the nation's chief diplomat and commander-in-chief, the president has significant authority to make and execute foreign policy decisions. Examining the exercise of presidential power in foreign affairs can provide insights into how US foreign policy is formulated, implemented, and evaluated. Furthermore, studying executive power over international relations can help illuminate the balance of power between the branches of government. The Constitution grants the president significant authority in foreign affairs, but it also provides a role for the Congress and the courts in shaping US foreign policy. By examining the exercise of presidential power in foreign affairs, scholars and policymakers can gain a better understanding of how the three branches of government interact in matters of foreign policy.

Finally, studying diplomatic powers of the president is important for understanding the role of the US in the international system. The US has been a global superpower for much of

the 20th and 21st centuries, and its foreign policy decisions have had significant implications for the rest of the world. By examining how presidential power has been exercised in foreign affairs, scholars and policymakers can gain insight into how the US has sought to shape the international system and how other nations have responded to US foreign policy.

### **1.1. US Executive and Legislative Power in Foreign Affairs**

The United States President wields significant power in foreign affairs, both as the Commander-in-Chief of the armed forces and as the country's top diplomat. Moreover, the President has the power to recognize foreign governments and to enter into executive agreements with other countries, which do not require Senate approval like treaties do (U.S. Const. art. II).

The President's role in foreign affairs has expanded significantly over time, particularly in the 20th century, with the growth of American power and influence around the world. Today, the President has a wide range of tools at their disposal to advance American interests abroad, including economic sanctions, military force, and diplomatic pressure (Zartman 528). However, the President's power in foreign affairs is not absolute. Congress plays a key role in shaping and overseeing U.S. foreign policy, and can limit or even override the President's decisions in certain areas, such as the use of military force. Additionally, the judiciary can intervene to ensure that the President's actions are consistent with the Constitution and U.S. law (Rourke 185).

Congress plays a significant role in shaping and overseeing U.S. foreign policy. The Constitution grants Congress the power to declare war, regulate commerce with foreign nations, and make rules governing the military (U.S. Const. art. I). Additionally, Congress has the power of the purse, which means it controls funding for foreign policy initiatives and can use this authority to shape the President's agenda.



Congress can also limit or override the President's decisions in certain areas, particularly when it comes to the use of military force. The War Powers Resolution of 1973, for example, requires the President to seek congressional approval for the use of military force, except in cases of self-defense or imminent threat. If Congress does not authorize military action, the President's ability to use force is limited.

The judiciary also plays a role in overseeing U.S. foreign policy. The Supreme Court has the power to review the constitutionality of the President's actions in foreign affairs, as well as the actions of Congress and other government officials. For example, in the landmark case of *Youngstown Sheet & Tube Co. v. Sawyer* in 1952, the Court ruled that President Harry Truman had exceeded his authority when he seized control of steel mills during the Korean War (“*Youngstown Sheet & Tube Co. V. Sawyer*, 343 U.S. 579 (1952)”).

In the United States, the founding fathers established a form of government that is designed to prevent any one branch of government from becoming too powerful. This is achieved through the principle of checks and balances, a system that ensures the three branches of government- the Executive, Legislative, and Judiciary- have a level of independence but also interact and oversee each other. The system of checks and balances aims to prevent the abuse of power and ensure that the federal government operates within the limits set by the Constitution. Each branch of the government has its own distinct roles, but their powers overlap to some degree, which means that no one branch can act without constraint, and each branch is responsible for checking the other branches.

In essence, the United States governmental system has an intricate system of checks and balances designed to protect its citizens and ensure democracy lives on. The establishment of checks and balances in the United States government was a significant turning point in the country's political history. It marked the shift from a government with too much central

power to a system that divided power among different branches, ensuring that no single entity could control the government. This concept emerged as a response to the experiences of the colonists of British America, who witnessed the abuses of the British monarchy. To curb this power, the American framers, influenced by Enlightenment political philosophy, devised a system that would prevent any one branch of government from becoming too powerful. This system entrenched the principles of separation of powers, checks and balances, and federalism in American politics. The resulting power-sharing system between the executive, legislative, and judicial branches has made the United States government more accountable, legitimate, and responsive to the people (Beers).

Throughout American history, there have been instances of congress overruling or holding the President accountable for a decision regarding foreign policy, namely, the Iran-Contra affairs and the war in Yemen. In the 1980s, the Reagan administration secretly sold weapons to Iran, which was under an arms embargo, and used the profits to fund Contra rebels in Nicaragua, despite Congress's ban on such funding. When the scandal was exposed, Congress held extensive hearings and investigations, and several officials were indicted or convicted. The resulting political fallout severely damaged the Reagan administration's reputation and led to increased congressional oversight of foreign policy ("Iran-Contra Affair"). Moreover, in 2018, Congress passed a resolution directing the President to end U.S. military involvement in the war in Yemen, which was being fought by a Saudi-led coalition and had resulted in a humanitarian crisis. President Trump vetoed the resolution, but Congress overrode the veto, marking the first time in history that both houses of Congress had used the War Powers Resolution to overrule a President's veto. The resolution was seen as a rebuke of the President's handling of the conflict and a statement of Congress's authority over foreign policy matters (Sheline).

When the President and Congress come from different political parties, it can create a conflict of interests that can make it difficult to achieve consensus on foreign policy issues. In such cases, the President may be more inclined to pursue policies that align with their party's platform and ideology, while Congress may be more focused on maintaining their own political power and advancing their own agenda. This can lead to political gridlock, with Congress using its power of oversight and budgetary control to limit the President's authority in foreign affairs. The President, in turn, may resort to executive orders and other unilateral actions to advance their foreign policy agenda, further exacerbating the tension between the two branches of government. To overcome this challenge, it is important for both the President and Congress to engage in constructive dialogue and seek common ground on foreign policy issues, while also respecting the constitutional roles and responsibilities of each branch of government.

Overall, both the President and Congress play important roles in shaping and overseeing U.S. foreign policy, and the balance of power between them has shifted over time. As we have discussed, both branches have several important powers related to foreign policy. While the President has broad authority in foreign affairs, Congress serves as a check on that authority and can play an important role in shaping U.S. foreign policy. A cooperative relationship between the President and Congress is essential for effective foreign policy-making that represents the interests of the American people. Both branches of government have important roles to play in foreign affairs, and cooperation between them can lead to better outcomes for the United States and its allies. This can include joint efforts to negotiate treaties and trade agreements, as well as coordinated strategies for responding to global threats and challenges. However, when there is conflict or disagreement between the President and Congress on foreign policy matters, it can lead to confusion, inefficiency, and even damage to the nation's reputation and security. Therefore, finding ways to work together

and maintain a healthy balance of power is crucial for ensuring that U.S. foreign policy reflects the values and interests of the American people.

### **1.1.1. Source of Presidential Power in Foreign Affairs**

The source of presidential power in foreign affairs can be traced back to the US Constitution, which contains several provisions related to foreign affairs that define the powers of the president and Congress. Article I, Section 8 grants Congress the power to regulate commerce with foreign nations, declare war, and raise and support armies and navies (U.S. Const. art. I, § 8). Article II, Section 2 appoints the president as commander-in-chief of the armed forces and grants him the authority to negotiate treaties with foreign nations, determined by Senate approval. The president also has the authority to nominate ambassadors, meet ambassadors and other public ministers, and recognize governments abroad (U.S. Const. art. II, § 2). The Supreme Court has recognized that the president has broad discretion in foreign affairs and that his power is at its highest point when acting in defense of the nation's security and interests.

The Constitution also provides for a system of checks and balances in foreign affairs. While the president has significant authority in matters of foreign policy, Congress can limit his powers by refusing to fund military actions or by exercising its oversight powers through investigations and hearings. The judiciary can also play a role in foreign affairs by interpreting the Constitution and federal laws related to foreign policy.

While the U.S. Constitution is the primary source of presidential power in foreign affairs, there are several other sources that give the President significant authority in this area. One such source is statutory authority. Congress has passed numerous laws that grant the President specific powers in foreign affairs, such as the International Emergency Economic Powers Act, which allows the President to impose economic sanctions on foreign entities,

and the Arms Export Control Act, which gives the President the power to control the export of military goods and technology. Another source of presidential power is executive agreements. These are agreements between the President and a foreign government that are made without the Senate's advice and consent, as required for treaties. While executive agreements do not carry the same legal weight as treaties, they can still be used to establish important diplomatic relationships and facilitate cooperation on key issues. Furthermore, the President's role as commander-in-chief of the armed forces is also a significant source of power in foreign affairs. This gives the President the ability to use military force to protect U.S. interests and respond to threats to national security. Finally, the President's role as the face of American diplomacy gives them significant soft power in foreign affairs. The President can use their platform to shape public opinion and influence foreign leaders, even in the absence of legal authority or formal agreements (Rourke 179-183).

## **1.2. Historical Analysis of US Presidential Power in Foreign Affairs**

The history of U.S. presidential power in foreign affairs is a dynamic tapestry of shifting approaches and challenges. From the early days of the nation to the present, presidents have played a pivotal role in shaping America's engagement with the world (Masters). The expansion of executive authority accelerated during periods of international conflict, however, debates over the limits of the administration's involvement in foreign affairs have persisted (Hubert). The history of presidential power in foreign affairs reflects an ongoing tension between executive leadership and the constitutional checks and balances that shape the nation's engagement with the international community.

### **1.2.1. Early Years of the Republic**

In the early years of the republic, the US was a relatively weak and isolationist nation, with limited engagement in foreign affairs. The first few presidents, including George

Washington and John Adams, focused primarily on building the nation's economy and establishing domestic institutions. However, the US did engage in some foreign policy initiatives during this time, including the negotiation of treaties with European powers and the suppression of piracy in the Mediterranean (Gilderhus 6-10).

### **1.2.1.1. George Washington and the Neutrality Proclamation**

In 1793, George Washington faced a significant foreign policy challenge when war broke out between France and Great Britain. As a young and weak nation, the US was not in a position to become involved in the conflict. Washington responded by issuing the Neutrality Proclamation, which declared the US neutral in the conflict and prohibited Americans from providing any assistance to either side (Washington). This proclamation was significant because it established the principle of American neutrality in foreign conflicts, which became a cornerstone of US foreign policy for many years to come.

### **1.2.1.2. Monroe Doctrine**

In 1823, US President James Monroe issued a declaration to European powers known as the Monroe Doctrine, which stated that the Western Hemisphere was no longer open to European colonization and that any attempts by European powers to interfere in the affairs of the American continent would be viewed as acts of aggression (Gilderhus 5).

The Monroe Doctrine was significant because it marked the emergence of the US as a dominant power in the Western Hemisphere and established a framework for US foreign policy in the region. The doctrine also had important implications for US relations with Europe, as it signaled a growing willingness to challenge European authority in global affairs.

### **1.2.2. Expansion of US Power**

Throughout the 19th and early 20th centuries, the US gradually expanded its power and influence in the world. The acquisition of new territories such as Alaska, Hawaii, and Puerto Rico, as well as the expansion of US economic and political influence in Latin America and the Pacific, marked a significant shift in US foreign policy. This period was also marked by increased engagement with Europe, including US involvement in World War I and World War II. These events helped to establish the US as a dominant global power and set the stage for the Cold War era and beyond.

There have been several key historical events that have shaped executive authority over foreign affairs. One such event was the Spanish-American War in 1898, which marked the emergence of the US as a global power and expanded the president's authority in foreign affairs. Another important event was the Cold War, which led to a significant expansion of presidential power in matters of national security and foreign policy. The terrorist attacks of September 11, 2001, also had a significant impact on presidential power, leading to the expansion of executive authority in areas such as surveillance and detention of suspected terrorists.

#### **1.2.2.1. Spanish American War**

The Spanish-American War was a conflict fought between the US and Spain in 1898. The war was triggered by a series of events, including the sinking of the USS Maine in Havana Harbor and the brutal suppression of a Cuban rebellion by Spanish forces. The US emerged victorious in the war, gaining control of Puerto Rico, Guam, and the Philippines and establishing itself as a major player in global affairs. The war also marked a shift in US foreign policy towards imperialism and expansionism. Some scholars argue that the Spanish-American War was a turning point in US history, as it set the stage for US involvement in world affairs in the 20th century (Herring 299-301).

### **1.2.2.2. Roosevelt Corollary**

The Roosevelt Corollary was an extension of the Monroe Doctrine, which declared that the US would not tolerate European intervention in the affairs of the Western Hemisphere. The Corollary, named after President Theodore Roosevelt, added that the US had the right to intervene in the affairs of Latin American countries if they were unable to govern themselves effectively or if their actions threatened the peace and stability of the region. The Corollary was first invoked in 1904 when Roosevelt sent US troops to the Dominican Republic to restore order and collect outstanding debts owed to European nations (“Roosevelt Corollary”). The Roosevelt Corollary marked a significant departure from traditional US foreign policy, which had previously been based on non-interventionism. It also signaled the US's growing involvement in Latin America and its desire to assert itself as a major player on the global stage.

### **1.2.3. World Wars and the Cold War**

The two World Wars and the Cold War were major events that shaped US foreign policy and presidential power. The US emerged as a superpower following World War II, and its leaders had to navigate a rapidly changing global landscape, including the rise of the Soviet Union and the spread of communism. During the Cold War, US presidents played a crucial role in containing Soviet influence and promoting democracy and capitalism around the world. This era also saw the development of a vast national security apparatus, including the Central Intelligence Agency (CIA) and the National Security Council (NSC). Additionally, the US's involvement in the Vietnam War challenged the limits of presidential power in foreign affairs, as some presidents faced significant opposition to their military actions (“Cold War History”).

#### **1.2.3.1. World War I and Wilson's Fourteen Points**



World War I was a major turning point in the history of US foreign policy and presidential power. President Woodrow Wilson initially tried to keep the US neutral in the conflict, but after German submarines began targeting American ships, he declared war on Germany in 1917. Wilson saw the war as an opportunity to promote democracy and peace around the world, and in 1918 he proposed his famous Fourteen Points, which outlined his vision for a post-war international order. Among other things, the Fourteen Points called for an end to secret treaties, free trade, disarmament, and the establishment of a League of Nations to resolve international disputes peacefully (Throntveit).

While the Fourteen Points were not fully implemented, they had a lasting impact on US foreign policy and the development of international institutions. The League of Nations, although ultimately unsuccessful, laid the foundation for the United Nations, and the idea of promoting democracy and human rights became a cornerstone of US foreign policy in the 20th century.

### **1.2.3.2. World War II and the Emergence of the US as a Global Superpower**

World War II was a pivotal moment in the history of US foreign policy and presidential power, as it marked the emergence of the US as a global superpower. After initially trying to remain neutral, President Franklin D. Roosevelt ultimately led the US into the war following the attack on Pearl Harbor in 1941. With its vast industrial capacity and military might, the US played a decisive role in defeating the Axis powers and reshaping the post-war international order. Following the war, the US became the dominant economic, military, and political power in the world, and US presidents used this newfound power to shape global affairs. Presidents like Truman and Eisenhower oversaw the development of the post-war international system, which included the creation of the United Nations, the establishment of US military bases around the world, and the implementation of containment policy to counter

the spread of communism (“World War 2”). The US emerged from World War II as a global superpower, and its influence and power in the international arena would shape US foreign policy for decades to come.

### **1.2.3.3 Cold War and Containment Policy**

The Cold War, which lasted from the end of World War II until the fall of the Soviet Union in 1991, was a period of intense ideological, political, and military competition between the United States and the Soviet Union. During this time, the US implemented a policy of containment, which aimed to prevent the spread of communism around the world. The policy was first articulated by diplomat George F. Kennan in a 1946 article in *Foreign Affairs*, in which he argued that the Soviet Union was inherently expansionist and aggressive, and that the US should adopt a policy of containing Soviet influence through political, economic, and military means. The US implemented a number of policies aimed at containing Soviet influence during the Cold War, including the Truman Doctrine, which provided economic and military aid to countries threatened by communist aggression, and the Marshall Plan, which aimed to rebuild European economies after World War II and prevent the spread of communism through economic development. Additionally, the US formed military alliances such as NATO, and engaged in proxy wars, such as the Korean War and the Vietnam War, to contain Soviet influence (Throntveit).

Overall, the Cold War and the policy of containment had a profound impact on US foreign policy and the role of the US in the world, shaping the country's approach to international relations and its position as a global superpower.

### **1.2.4. Post-Cold War Era**

The post-Cold War era witnessed significant changes in the US foreign policy as the Soviet Union disintegrated, and the bipolar world gave way to a unipolar world with the United States as the sole superpower. The US faced new challenges in the form of terrorism, nuclear proliferation, and global economic interdependence. The US foreign policy during this era has been marked by a mix of continuity and change. The US continued to pursue a policy of global leadership and interventionism but also faced challenges to its power and legitimacy. The US has been involved in several military interventions, including the Gulf War, Somalia, Kosovo, Afghanistan, and Iraq. The US also faced criticism from some quarters for its use of coercive diplomacy and its pursuit of unilateralism (Lugar 15).

#### **1.2.4.1 The Gulf War**

The Gulf War was a significant event in US foreign policy, as it marked a major shift towards a more aggressive stance in the Middle East. According to Zartman, I. William, Professor Emeritus at the Paul H. Nitze School of Advanced International Studies, the war "embodied a shift from a policy of containment to one of forward defense" (2). The US-led coalition's military victory over Saddam Hussein's Iraq was a clear demonstration of American military power and a signal to other nations in the region. Furthermore, the Gulf War set the stage for future US interventions in the Middle East, as the US continued to be involved in the region in the following decades. ("Persian Gulf War: Dates & Operation Desert Storm")

#### **1.2.4.2. Intervention in Somalia**

In 1992, President George H. W. Bush authorized the deployment of U.S. military forces to Somalia as part of a United Nations peacekeeping mission. The mission's goal was to provide humanitarian assistance and restore order in the country following a civil war that led

to famine and widespread violence. However, the situation in Somalia quickly deteriorated as the U.S. military found itself caught in the middle of a complex civil conflict involving various warlords and clans. The operation became increasingly dangerous, with US forces facing ambushes and attacks by armed groups. The mission ended in disaster when 18 US soldiers were killed in an ambush in Mogadishu in October 1993, which led to a withdrawal of U.S. forces from Somalia (Bruton 3-5). The intervention in Somalia was a significant moment in the history of US presidential power in foreign affairs. It demonstrated the limits of US military power and the challenges of intervening in complex civil conflicts. The failure of the mission led to increased scrutiny of U.S. military interventions and a reevaluation of US foreign policy objectives.

### **1.3. Factors that Affect Presidential Power in Foreign Affairs**

The exercise of presidential power in foreign affairs is influenced by various factors that shape and impact the decision-making process. These factors include domestic politics, public opinion, historical context, the role of Congress, and the use of executive orders and emergency powers. Domestic politics, including partisan politics, can shape a president's foreign policy approach as they seek to align with their party's agenda and maintain domestic support. Public opinion can also influence presidential decision-making, as presidents may take into account public attitudes and perceptions towards foreign affairs. International events, such as crises, conflicts, and alliances, can have significant implications for a president's foreign policy decisions. Historical context, including past foreign policy experiences and lessons learned, can shape a president's approach to current foreign affairs. The role of Congress, including its oversight powers and approval of treaties, can also affect presidential power in foreign affairs. Additionally, the use of executive orders and emergency powers can impact a president's ability to take unilateral actions in foreign affairs.

Understanding these various factors is essential in analyzing and comprehending the complex dynamics that shape and influence presidential power in foreign affairs.

### **1.3.1. Domestic Political Factors**

One of the significant factors that affect presidential power in foreign affairs is domestic political factors. The President's ability to exercise foreign policy power is closely tied to the domestic political landscape, including the dynamics within Congress, public opinion, and interest groups. For instance, the President's party affiliation and control of Congress can shape the level of support or opposition the President receives in pursuing their foreign policy agenda. Additionally, public opinion can impact the President's ability to exert foreign policy power, as popular support or opposition can influence the President's decisions and actions, as John T. Rourke states, "The conclusion of a number of scholars... is that regardless of what objective reality may be, policy is subjectively concerned with public opinion" (180). Interest groups, such as advocacy organizations and lobbyists, can also exert influence on the President's foreign policy decisions through their lobbying efforts and influence on public opinion.

Advocacy organizations and think tanks often have expertise in specific areas of foreign policy, such as arms control, human rights, or international development. They may provide research, analysis, and policy recommendations to the President and other government officials, as well as mobilize public support for their positions through media campaigns, rallies, and other forms of advocacy. Lobbyists, on the other hand, work to influence government officials directly by advocating for the interests of their clients, which may include businesses, foreign governments, or interest groups. Lobbyists may provide campaign contributions, access to influential policymakers, or other forms of political support in exchange for favorable treatment on foreign policy issues. In addition to their direct influence

on policymakers, interest groups can also shape public opinion on foreign policy issues. By sponsoring media campaigns, organizing public events, and using social media to disseminate information and mobilize supporters, interest groups can help to shape the public's understanding of foreign policy issues and influence public opinion (Fearon).

However, the influence of interest groups on foreign policy is not always positive or democratic. Powerful interest groups, particularly those representing wealthy and influential individuals or corporations, may have undue influence on government decision-making and undermine the public interest. Therefore, it is important to ensure that the voices of a diverse range of interests and perspectives are heard in the foreign policy-making process, and that decisions are made based on the best available evidence and analysis, rather than the interests of powerful or well-connected groups.

### **1.3.2. International Factors**

The international context plays a crucial role in shaping and constraining presidential power in foreign affairs. The global political landscape and international crises are significant elements that influence the President's ability to pursue foreign policy initiatives (Peterson 228). During times of global instability, such as armed conflicts or geopolitical tensions, the President's room for maneuver may be restricted or expanded depending on the circumstances. For instance, in the aftermath of the 9/11 terrorist attacks, President George W. Bush faced a challenging international environment that called for a proactive response to terrorism. The threat of terrorism and the ongoing war on terror constrained his foreign policy options while also expanding his presidential powers in the area of national security. Similarly, the recent COVID-19 pandemic has constrained presidential power in foreign affairs as the President's focus has been primarily on domestic issues, including public health and economic recovery (Gostin 1547). In summary, the international context plays a vital role

in shaping and constraining presidential power in foreign affairs, and it is essential for presidents to take into account the global political landscape and international crises when pursuing foreign policy objectives.

### **1.3.3. Presidential Leadership and Decision-Making Style**

Presidential leadership and decision-making style play a crucial role in shaping the foreign affairs of the United States. The President's personality, leadership style, and decision-making approach can significantly impact foreign policy outcomes (Hermann and Preston 75). For instance, some Presidents may adopt a more assertive and proactive approach in foreign affairs, while others may prioritize diplomatic efforts and multilateralism. The decision-making style of the President can also vary, ranging from a unilateral or autocratic approach to a more inclusive and collaborative one. Some Presidents may rely heavily on advice from their close advisors or inner circle, namely, Richard Nixon. While others such as Barack Obama and George W. Bush, may seek a broader range of inputs from various stakeholders, including Congress, the State Department, and the intelligence community.

### **1.4. War on Terror and the Use of Executive Power**

After the 9/11 terrorist attacks, the United States launched a global war on terror, which led to significant changes in U.S. foreign policy and the use of presidential power in foreign affairs. President George W. Bush's administration took a proactive approach to fighting terrorism, emphasizing the use of military force, intelligence gathering, and diplomatic pressure to combat terrorist organizations and their supporters. The administration justified its actions under the concept of the unitary executive, for instance, President Bush authorized the National Security Agency to conduct warrantless wiretapping of American citizens and the creation of military commissions to try suspected terrorists without due process protections. Arguing that the president's inherent powers under the Constitution gave him broad authority

to act unilaterally in the face of national security threats. This approach led to the controversial use of tactics such as rendition, which involved the transfer of suspected terrorists to foreign countries for interrogation, resulting in instances of torture and abuse, as well as criticism from human rights groups. Enhanced interrogation techniques such as waterboarding were also employed, which some argue constituted torture and violated international law. The use of drone strikes increased under the Obama administration, leading to concerns about civilian casualties and the legality of targeted killings. These techniques raised questions about the balance between national security and civil liberties. According to Franz-Josef Meiers, The war on terror also saw an expansion of executive power through the use of executive orders, signing statements, and secret memos, which allowed presidents to bypass Congress and the courts in pursuing their foreign policy objectives (249).

The expansion of executive power and the use of controversial tactics in the war on terror sparked a heated debate about the limits of presidential power in foreign affairs and the need for congressional oversight. Critics argued that the Bush administration's actions violated civil liberties and undermined the constitutional checks and balances that are essential to a healthy democracy. Others defended the administration's approach, arguing that the president has a duty to protect the nation from terrorist threats and that the use of executive power was necessary to achieve this goal (Meiers 249).

In conclusion, the Bush administration's approach was misguided and ineffective in achieving its goals. The use of military force and aggressive tactics such as rendition and enhanced interrogation undermined America's moral standing and fueled anti-American sentiment around the world. Furthermore, the expansion of executive power through executive orders and secret memos circumvented the checks and balances of the US government and eroded constitutional protections. Overall, the war on terror was a costly and destructive venture that ultimately failed to make America safer or more secure.



As the United States continues to navigate the complex terrain of foreign affairs, several implications are to be considered in this area. First, domestic political factors, such as public opinion, interest groups, and the function of Congress, will continue to shape the extent and scope of the president's decision-making authority in foreign policy. Presidents will need to be aware of the domestic political climate and navigate the obstacles that may arise from competing interests and perspectives. Second, the international context will have a substantial effect on US foreign policy. To effectively advance U.S. national interests on the global stage, presidents will have to adjust to shifting international dynamics and balance competing priorities. Furthermore, the leadership and decision-making manner of the president will continue to influence US foreign policy. Foreign policy strategies of different presidents may range from assertive to cautious, unilateral to multilateral, and interventionist to isolationist. The future direction and tone of U.S. foreign policy will be influenced by the president's leadership manner and decision-making process.

Finally, the use of executive power in the combat against terrorism, especially after the 9/11 attacks, has been a major source of ongoing debate and controversy, as the war on terror saw the expansion of executive power through the use of executive orders, which allowed presidents -as the case with Presidents Bush and Obama- to bypass Congress and the courts in pursuing foreign policy objectives. Consequently, the administration's approach violated civil liberties and undermined constitutional checks and balances. While some argue that the approach was necessary to protect the nation from terrorist threats, the expansion of executive power and the use of aggressive tactics caused more harm than good, and the war on terror was ultimately an ineffective and costly endeavor that failed to enhance the security or safety of the United States.



## Chapter Two

### US Counterterrorism Policy and the US FSIA

The United States' counterterrorism policy has evolved significantly since the beginning of the 20th century. In the early 1900s, the focus was on dealing with domestic threats, such as anarchist bombings and assassinations. This led to the creation of the Federal Bureau of Investigation (FBI) in 1908, which was tasked with investigating and preventing domestic terrorism. Looking back, the US has a long history of isolationism that limited its involvement in foreign affairs, but this changed dramatically after World War II (“American Isolationism in the 1930s”). From that point on, the US has become increasingly involved in global security issues, leading to the creation of various counterterrorism policies. During the Cold War, the United States shifted its focus to combating international communism and Soviet influence. This led to the establishment of intelligence agencies such as the Central Intelligence Agency (CIA) and the National Security Agency (NSA), which were tasked with gathering intelligence and conducting covert operations to counter perceived threats. The 1970s saw a shift in the focus of US counterterrorism policy towards Islamic terrorism following several high-profile incidents, including plane hijackings in 1970. The 1980s marked a significant shift in US counterterrorism policy, with the US government's increasing reliance on military force to combat terrorism, especially after the terrorist bombing of the Pan Am flight 103 in Scotland. This approach was exemplified in the 1986 bombing of Libya and the 1989 invasion of Panama. Following the 9/11 attacks in 2001, the United States launched the Global War on Terror, which has shaped its counterterrorism policy for the past two decades. This policy involved the implementation of various measures aimed at preventing terrorism, including the Patriot Act, the creation of the Department of Homeland Security, as well as increased surveillance and intelligence-gathering activities.

The US has also worked with international partners to combat terrorism, particularly through the United Nations and NATO. This has included sharing intelligence, providing training and equipment to partner countries, and conducting joint military operations (Alexander and Kraft 29-32). Despite these efforts, the threat of terrorism remains a significant challenge for the United States and the world. The US government continues to prioritize counterterrorism efforts, with a focus on preventing attacks before they occur while balancing civil liberties and privacy concerns (“Terrorism: Perspective from the Behavioural and Social Sciences”)

Sovereign immunity is a legal principle that originated from English common law. This principle is based on the belief that "the king can do no wrong," and was established as a judicial doctrine that limited the king's exposure to legal action. Essentially, sovereign immunity provides governments with protection from being sued without their consent. Historically, foreign states have enjoyed absolute sovereign immunity under "traditional precepts of international law" (“Sovereign Immunity”). However, as international relations evolved and the United States became more engaged in global affairs, the absolute immunity doctrine faced challenges. The U.S. government began to realize that it could be problematic when foreign states engaged in commercial activities within U.S. territory. Thus, exceptions to sovereign immunity were gradually recognized to address situations where a foreign state engaged in commercial activities or violated certain norms of international law (Hammers 2). In 1976, The United States codified the principle of sovereign immunity by introducing the Foreign Sovereign Immunities Act (FSIA), which contains several exceptions to immunity.

Many different foreign corporate entities, some wholly private, some fully state-owned, and many more somewhere in between, regularly deal with U.S. firms and persons. Stuck in the crossfire of economic privatization following socialism and residual concerns about free market competition. When these transactions go wrong, the parties sometimes turn to

litigation to settle their differences. Whether or whether the foreign entity is covered by the law of sovereign immunity affects whether or not relief is available in such cases (Terry 1029). Consequently, foreign sovereign immunity is important for American citizens doing business with foreign companies as well as for the foreign companies themselves.

### **2.1. Early Counterterrorism Efforts**

Early counterterrorism efforts against anarchists began in the late 19th century as anarchists were seen as a threat to national security due to their violent tactics and anti-government ideologies. In 1901, President William McKinley was assassinated by an anarchist, prompting the passing of the Anarchist Exclusion Act and the Anarchist Act in 1903, which allowed the government to deport or imprison anarchists and prohibited anarchist literature and symbols. The Palmer Raids of 1919 and 1920, led by Attorney General A. Mitchell Palmer, were a series of raids and arrests targeting suspected anarchists and communists. Thousands were detained and deported, but the raids were eventually criticized for violating civil liberties. These early counterterrorism efforts against anarchists set the stage for future government efforts against terrorism, laying the foundation for extensive surveillance and strict laws and policies (Broubalow).

These early efforts set the stage for future government efforts against terrorism and established the foundation for extensive surveillance and strict laws and policies. In conclusion, early counterterrorism efforts against anarchists had a significant impact on future government policies towards terrorism. It shows how concerns over national security can lead to the erosion of civil liberties, and how counterterrorism measures can have a lasting impact on society.

The US departure from its isolationist policy signaled a commitment to engaging in global affairs and taking an active role in shaping international relations as well as a willingness to take on the responsibilities of being a global superpower (“American Isolationism in the 1930s”).

The rise of terrorist organizations in the US has been a cause of concern for policymakers and security agencies. Since the opening of borders for commercial activity and trade, there has been a corresponding increase in the presence and activity of terrorist groups. One reason for this is that the influx of goods and people across borders has made it easier for terrorists to move and operate without being detected (Laite 3). Additionally, globalization has increased the interconnectedness and interdependence of nations, providing terrorist organizations with new means of funding, communication, and recruitment. The lack of effective border control measures and the lack of cooperation among nations in sharing intelligence information have also contributed to the rise of terrorism in the US (Smelser et al.).

## **2.2. US Foreign Sovereign Immunity**

US foreign sovereign immunity has somewhat obscure doctrinal roots. Although one can observe the emergence of this theory in the works of philosophers such as Grotius and Vattel, its first discernible articulation is found in nineteenth-century judicial opinions. The earliest manifestations of sovereign immunity are manifested primarily in two areas: the protection provided to diplomatic agents and cases involving foreign public ships. In both instances, the courts adopted an absolute theory of immunity, recognizing that "all states are equal and no state may exercise authority over another." (Baletsa 1251-52)

The notion of sovereign immunity has been important in promoting international relations and diplomatic interactions among nations. While sovereign immunity facilitates communication and commerce among countries by safeguarding their mutual interests and

promoting cooperation, critics argue that sovereign immunity can also be exploited by governments to shield themselves from accountability for violations of human rights and other wrongdoings (Chemerinsky 1208).

Consequently, the United States has established exceptions to sovereign immunity for certain types of claims or legal actions, such as terrorism or torture.

### **2.2.2. Tate Letter: Challenging Traditional Notions of Sovereign Immunity**

On May 19, 1952, Department of State Legal Adviser Jack Tate notified Attorney General Philip Perlman of a dramatic shift in State's litigation practice regarding foreign sovereign immunity. The so-called "Tate Letter" informed the Department of Justice that State would transition from the "classical" to the "restrictive" approach to sovereign immunity. According to Tate, the classical approach allows suits against a foreign sovereign in national courts if the foreign sovereign consents to the suit. The restrictive approach, on the other hand, distinguishes between sovereign acts and commercial or private acts (Jerome). The restrictive approach grants sovereigns jurisdictional immunity for suits arising from acts in the first category, but not for suits arising from acts in the second.

Today, the Tate Letter is little more than a footnote in legal history, but it continues to shed light on the separation of powers in international matters. The Tate Letter surveyed the international law and judicial decisions of national tribunals from Chile to China at the time. It cited growing support among foreign judges and academicians as the primary justification for acceding to a growing trend in which foreign sovereigns' immunity from suit had been eroded. The letter also emphasized the significance of ensuring some form of reciprocity between the treatment the United States received in foreign courts and the treatment foreign sovereigns traditionally received in U.S. courts. Specifically, because the United States followed a "long established policy" of foregoing immunity for its commercial vessels, Tate

thought the U.S. government should refrain from suggesting that similarly situated foreign vessels gain immunity (Fakhoury 30).

The Tate Letter emphasizes two themes fundamental to transnational litigation: the separation of powers in cases involving international relations and the role of international law in U.S. courts (Murphy 597). Both themes were prominent in *Schooner Exchange v. McFaddon*, the preeminent early United States case on foreign sovereign immunity. In that case, Chief Justice Marshall applied sovereign immunity principles to bar a lawsuit against a French warship docked in the United States. Whether or not the Court in *Schooner Exchange* granted foreign sovereign immunity based on customary international law (“*The Schooner Exch. V. McFaddon*”). Over the course of the next century, the courts would move away from an impartial evaluation of international concepts in favor of deference to the executive branch's "suggestions of immunity." In *Berizzi Bros. Co. v. The Pesaro*, the Supreme Court had disregarded the State Department's suggestion that sovereign immunity should not be applied in a lawsuit against a steamship owned by the Italian government (“*Berizzi Bros. Co. V. S.S. Pesaro*”). Even after the courts' independent evaluation of international law gave way to executive dominance on the issue of foreign sovereign immunity, international law continued to guide the State Department's actions. Tate emphasized that the State Department's policy shift was the result of an exhaustive effort by his office's attorneys to ascertain the content of international law regarding foreign sovereign immunity. While Tate's staff was unable to identify a binding international law rule pertaining to the classical or restrictive approach, he appears to have taken international law's role in formulating U.S. policy seriously. Tate's consideration of international law will not come as a surprise to attorneys who practice in this area, especially those in the executive branch, but it's worth mentioning here because international law is typically obscure in the U.S. legal system. In multiple ways, executive judgments of foreign sovereign immunity under the Tate Letter regime were problematic. In



cases where the executive branch did not file a request for immunity, the courts were unsure of how to decide immunity. Concerns were also raised regarding the State Department's procedure for deciding whether to file an application of immunity, which did not automatically include the foreign sovereign's input or a right of appeal (Jerome).

### **2.2.3. The Foreign Sovereign Immunities Act**

Implemented in 1976, the FSIA establishes the "sole and exclusive standards to be used in resolving questions of sovereign immunity raised by foreign states before Federal and State courts in the United States." The Foreign Sovereign Immunities Act (FSIA) codified the "restrictive" view of foreign sovereign immunity that has shaped U.S. decision-making since 1952, despite instituting significant procedural modifications. Recognizing the growing role of foreign states in international commerce, the restrictive view grants sovereign immunity only for public acts and denies it for commercial acts ("Jurisdictional Immunities of Foreign States"). This modern theory is codified by the FSIA, which qualifies its broad grant of immunity with multiple exceptions. The FSIA's general immunity provision specifies that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States," albeit with a number of exceptions. The most significant exception is when the action is predicated on a commercial activity with an association to the United States.

Although the FSIA made few conceptual changes to the U.S. doctrine of foreign sovereign immunity, it introduced two significant and interrelated modifications to the legal decision-making process. First, the FSIA intended to establish statutory criteria for sovereign immunity determinations. Prior to the FSIA, decisions regarding foreign sovereign immunity were made on a political basis that lacked predictability for parties seeking to assert or vanquish the defense (Murphy 590-591). Congress raised concern that "a private party who deals with a foreign government entity cannot be certain that his legal dispute with a foreign state will not be decided on the basis of non-legal considerations through the foreign government's

intercession with the Department of State." Second, the FSIA transferred the State Department's sovereign immunity decision-making authority to the courts. Prior to 1976, although nominally vested with the authority to determine sovereign immunity, courts deferred to the Office of the Legal Adviser of the State Department, which conducted quasijudicial hearings on immunity. By transferring the authority to make decisions regarding sovereign immunity from the State Department to the judiciary, Congress aimed to foster the development of a consistent and predictable body of law (Feldman 303). Prior to the enactment of the FSIA, the State Department was in the "uncomfortable position of a political institution attempting to apply a legal standard to pending litigation." The outcome was "considerable uncertainty" for private parties and foreign states alike. Transferring authority to the courts significantly depoliticized sovereign immunity determinations (Hammers 2). Congress hoped that by permitting courts to come to autonomous judgments of immunity, "the Department of State would be freed from pressures from foreign governments... and from any adverse consequences resulting from the Department's unwillingness to support that immunity"(Terry 1032). Although the FSIA was largely successful in depoliticizing the process, even judicial decisions of immunity can have political and economic consequences.

Unless one of the FSIA provisions to general immunity applies, foreign states are immune from the jurisdiction of all U.S. courts under the Foreign Sovereign Immunities Act. The courts first determine whether the defendant is a "foreign state" as defined by the FSIA. If the action does not fall under an exception and the defendant is a state, federal courts have subject-matter and personal jurisdiction ("Jurisdictional Immunities of Foreign States").

In the past, Congress has altered the FSIA to address particular issues. In 1978, the FSIA was first amended to clarify that the act applies not only to foreign states, but also to their political subdivisions, agencies, and instrumentalities. This amendment was necessary because the original language of the FSIA only referred to foreign states, which created some

ambiguity as to whether it applied to other entities that might be considered part of a foreign state. By explicitly including political subdivisions, agencies, and instrumentalities, the amendment clarified that the FSIA applies to a wide range of entities that might be considered part of a foreign state. This new exception contains a limitation to foreign sovereign immunity for torts committed on American soil. The original intent of the exception focused primarily on incidents involving U.S. citizens and a foreign national acting as an agent of their native country. The Act establishes a terrorism exception to foreign sovereign immunity, separate from the tort exception, allowing suits against foreign governments implicated in terrorist action against U.S. citizens, but only if that foreign government has been designated as a state sponsor of terrorism. In cases where a foreign nation may be associated with a terrorist act but has not been designated as a state sponsor of terrorism, the text of the statute implies that a civil litigant must rely on a distinct statutory exception in order to proceed with a lawsuit (“Jurisdictional Immunities of Foreign States”). .

The 1983 bombing of the U.S. Marine barracks in Beirut, Lebanon was a terrorist attack that killed 241 American service members and injured many more when a suicide bomber drives a vehicle filled with explosives into the U.S. Marine barracks in Beirut. In a separate suicide terrorist attack, 58 French soldiers were killed in their barracks two miles distant the same morning. The United States Marine Corps was part of a multinational force dispatched to Lebanon in August 1982 to supervise the Palestinian withdrawal. Since its inception, the mission has been beset by problems and a rising death toll. The attack was carried out by Hezbollah, a militant group with ties to Iran, and was widely seen as a response to the U.S. military presence in Lebanon. The attack was a major blow to the U.S. military and the Reagan administration, and led to a significant shift in U.S. policy in the Middle East. In the aftermath of the attack, the U.S. withdrew its troops from Lebanon and began a policy of

supporting proxy forces in the region rather than directly intervening (“Beirut Barracks Blown Up”). This tragic event was a contributing factor to the 1984 amendment to the FSIA.

The 1984 amendment to the Foreign Sovereign Immunities Act added the tort exception to the act. This exception allows U.S. citizens to sue foreign states for money damages in cases where the foreign state or its officials commit tortious acts in the United States that cause personal injury or property damage. The tort exception is limited to cases where the tortious act occurs within the United States and is caused by an act or omission of the foreign state or its officials while acting within the scope of their employment. However, the exception does not apply to certain types of torts, including those arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights. The tort exception has been the subject of much litigation and debate, and its scope and application continue to be refined by courts in the United States (Bradley and Goldsmith).

Another key event that led to further amendments to the FSIA was the bombing of Pan Am Flight 103, which was a commercial airline flight that exploded over the town of Lockerbie, Scotland on December 21, 1988. The bombing killed all 259 people on board, including 189 Americans, as well as 11 people on the ground. The investigation of the bombing revealed that it was carried out by Libyan agents, who were acting on orders from the Libyan government. The attack was widely condemned by the international community and led to increased tensions between Libya and the United States. The investigation and subsequent trial of the suspects involved in the bombing were complex and drawn-out, with multiple international agencies involved in the process. In 1991, the United States and the United Kingdom jointly indicted two Libyan intelligence officers, Abdelbaset al-Megrahi and Lamin Khalifah Fhimah, for their roles in the bombing. After years of diplomatic pressure and negotiations, al-Megrahi was eventually extradited to the UK in 1999 to stand trial. He was found guilty and sentenced to life imprisonment in 2001. The bombing of Pan Am Flight 103

was one of the deadliest terrorist attacks on American civilians at the time, and it had a significant impact on international aviation security. The tragedy also prompted the US government to take a more active role in counterterrorism efforts and led to the creation of new laws and policies to prevent similar attacks from happening in the future. In 2003, Libya officially accepted responsibility for the bombing and agreed to pay compensation to the victims' families (“The Bombing of Pan Am Flight 103”).

In 1996, Congress passed the Antiterrorism and Effective Death Penalty Act to address the issue of terrorism. The Act was modified by creating a new subsection, section 1605 of the FSIA was amended to introduce a new exception to foreign sovereign immunity. If a foreign government is listed as a state sponsor of terrorism, Americans may file a lawsuit against it for personal injuries caused by torture, extrajudicial killing, air sabotage, hostage taking, or provision of material support or services, or any action of that caliber, provided that the foreign state is labeled as a sponsor of terrorism (Baletsa 1261). This amendment to the FSIA merely added an additional exception, following the original FSIA drafting pattern. This exception has several limitations on its applicability, despite its broad scope. The amendment will only apply if the State Department designates the foreign nation as a state sponsor of terrorism. Even if a state is so defined courts will deny jurisdiction if the victim was not a U.S. citizen or if a plaintiff cannot demonstrate that the offending state was given a reasonable opportunity to settle the claim in accordance with internationally accepted arbitration rules (Defeis 369-370)

The jurisdictional exceptions added with the 1996 amendment to the FSIA are as follows:

§1605(a) (5) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case in which 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; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

§1605A (a) In General.—

(1) No immunity.—A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency (“Jurisdictional Immunities of Foreign States”).

In 2008, Congress expanded the FSIA's provisions of the relevant law. The provision also stipulates that the claimant or victim must be a U.S. citizen or a military official or employee at the time the claim is filed. If these elements qualify for an exception under the "terrorism exception" The terrorism exception applies only if the foreign state is identified as a state sponsor of terrorism at the time of (or as a consequence of) the court's exercise of subject matter jurisdiction (“Jurisdictional Immunities of Foreign States”). In addition to establishing a framework for what types of lawsuits can be filed against foreign states, the

Foreign Sovereign Immunities Act provides comprehensive immunities against the attachment of a foreign state's property. If a judgment is rendered against a foreign state, the courts must independently determine the extent to which the foreign state's assets are subject to seizure or execution (Holcombe 365-366). However, in *In re Terrorist Attacks of September 11, 2001*, the U.S. Court of Appeals for the Second Circuit stated that courts are reluctant to force actions that are not included within the most eligible statutory exception into a distinct sovereign immunity exception (Howe). A claim against a foreign nation for its supposed support of terrorist acts committed in the United States could only be pursued if that nation had been labeled a state sponsor of terrorism, in the absence of an explicit and applicable legislative exception (“Jurisdictional Immunities of Foreign States”). In other words, The Foreign Sovereign Immunities Act contains several exceptions that limit the jurisdictional immunity of foreign states. Essentially, this means that foreign states cannot claim immunity from the jurisdiction of U.S. courts in specified cases. As Drew Watkins, professor at University of Kentucky, indicates, “If the United States continues to invite foreign suits through additional waivers of sovereign immunity, the amount of foreign litigation to which the United States is a party can be expected to grow exponentially”(152).

The enactment of the Foreign Sovereign Immunities Act (FSIA) has had significant international implications. One consequence has been that some foreign governments have labeled the United States a sponsor of terrorism in response to the law, this labeling has made U.S. agents and agencies operating abroad potential targets for foreign litigation, as foreign countries may seek to hold the U.S. accountable for actions perceived as promoting terrorism. Moreover, the threat of foreign litigation is not purely theoretical. In fact, at least two countries, Iran and Sudan, have passed legislation to remove U.S. sovereign immunity in their courts in response to legislation enacted by the United States. This reciprocal erosion of

sovereign immunity can lead to a breakdown in international relations and potentially create conflicts between countries (Watkins 151-52).

Therefore, it is crucial to consider the potential international implications of any legislation related to sovereign immunity and to carefully balance the interests of different stakeholders.

### **2.3. Post-9/11 Policy**

The United States has had a long-standing concept of national security since the country gained independence. In response to the events of 9/11, the US shifted its counterterrorism strategy to focus on preemption and prevention, rather than response and reaction. This new approach, sometimes referred to as the "War on Terror," has been controversial for a number of reasons, such as leading to an erosion of civil liberties at home and an increase in anti-American sentiment abroad. Despite these criticisms, the US has continued to pursue this strategy in the years since 9/11, using a combination of military force, surveillance, and cooperation with foreign partners in an attempt to prevent future terrorist attacks on US soil. One of the key features of the post-9/11 US counterterrorism policy is the emphasis on preemption, which involves a range of activities, including intelligence gathering, surveillance, and targeted killings. Some critics argue that preemption is a form of aggression that violates international law and could lead to unintended consequences, such as an increase in terrorist attacks, while supporters argue that it is necessary in order to protect the United States from terrorist threats. The use of drones and targeted killings has been a controversial aspect of US counterterrorism policy since the early 2000s.

In the aftermath of the 9/11 attacks, the United States government established its counterterrorism policy around the idea of prevention and preemption. This policy necessitates identifying and targeting potential terrorist threats before they have the chance to



strike, often abroad. In the years following the September 11th attacks, the United States shifted its foreign policy to prioritize counterterrorism efforts. This shift was evident in the establishment of the Department of Homeland Security, the adoption of the USA PATRIOT Act, and the initiation of military action in Afghanistan and Iraq. Critics of this policy argue that it infringes upon the sovereignty of foreign nations, has led to human rights abuses, and is counterproductive in the long term.

In recent years, the US has shifted towards a more targeted approach to counterterrorism, relying on drone strikes and special operations forces to eliminate key terrorist leaders. The Gulf War in 1991 and the terrorist attacks on 9/11 were a significant turning point for the US and prompted a shift towards a more aggressive counterterrorism policy. In the aftermath of the 9/11 terrorist attacks, the United States launched two major military interventions in Afghanistan and Iraq aimed at removing the Taliban and Saddam Hussein's regime respectively and the eradication of terrorism. While these policies have been controversial, they have also been effective in preventing terror attacks on US soil. However, the US now faces new challenges in the form of domestic terrorism and cyber terrorism, and policy makers must adapt accordingly (“How 9/11 Reshaped Foreign Policy”). Overall, the US counterterrorism policy reflects a complex balance between national security and civil liberties, and continues to require careful attention and adaptation in response to new threats and changing geopolitical realities.

### **2.3.1 Implementation of the USA Patriot Act**

The implementation of the USA Patriot Act following the 9/11 terrorist attacks greatly enhanced the government's ability to detect and prevent future attacks. The act allowed law enforcement agencies to share information and intelligence with each other, as well as with other agencies, which had previously been prohibited by lack of communication and conflicting regulations. Additionally, the act provided expanded surveillance abilities,

allowing the government to intercept and monitor electronic communications of suspected terrorists without a warrant. While some argue that these measures infringe on civil liberties and privacy rights, supporters of the Patriot Act assert that the tradeoff is necessary to protect national security. As a result of the act's implementation, there have been numerous arrests and disruptions of terrorist plots. Furthermore, the act has been repeatedly reviewed and renewed by Congress, indicative of its perceived importance in preventing future attacks and ensuring public safety (Duignan).

#### **2.4. Path to JASTA**

The 2016 amendment to the Foreign Sovereign Immunities Act was what is commonly known as “Justice Against Sponsors of Terrorism Act” (JASTA). JASTA was introduced in response to the September 11, 2001 attacks, and it amended the FSIA to allow victims of terrorism to sue foreign states that support or sponsor terrorism. The amendment was controversial at the time, with some arguing that it could open up U.S. citizens to lawsuits from foreign countries, and that it could harm U.S. diplomatic relations with certain countries. Despite these concerns, JASTA was ultimately passed by Congress (Hammers 6).

In the aftermath of the 9/11 attacks, there was a widespread push for justice, not only for those who lost their lives but also for their families and loved ones. It was clear that the perpetrators of the attacks had to be held accountable, but the path to bringing them to justice was not an easy one. It required a sustained effort by lawmakers, activists, and concerned citizens to come together and demand action, ultimately leading to the passing of the Justice Against Sponsors of Terrorism Act (Kirtland and Lom).

Victims' families played a significant role in advocating for the Justice Against Sponsors of Terrorism Act (JASTA). These families suffered immense loss and pain as a result of the terrorist attacks of September 11, 2001, and felt that they were not getting the justice they

deserved. They argued that foreign governments, specifically that of Saudi Arabia, played a role in the attacks and should be held accountable. Families of victims organized and formed advocacy groups, such as the 9/11 Families United to Bankrupt Terrorism, to push for JASTA. These groups lobbied Congress and the White House, They met with lawmakers and Congressmen, demanding their support for legislation that would allow them to sue foreign countries and entities that had a hand in the attacks. These efforts convinced lawmakers to override a presidential veto to pass the bill into law (Cherkaoui 2-3)

In short, the victims' families' relentlessness was crucial in bringing attention to the issue and advocating for a law that they believed would bring them justice. The families' tireless advocacy and lobbying efforts were instrumental in garnering the necessary support for the bill's passing, and their commitment to finding closure for their loved ones was a driving force behind the legislation's success.

The historical context of the Justice Against Sponsors of Terrorism Act is deeply intertwined with the relationship between the United States and Saudi Arabia, particularly in the aftermath of the 9/11 attacks. In the years since the tragedy, there have been questions and concerns regarding the potential involvement of Saudi nationals in the planning and execution of the attacks. While the Saudi Arabian government has consistently denied any involvement, there has been ongoing criticism of the US government's relationship with the country, which has often been viewed as prioritizing political and economic interests over addressing potential security threats. To many advocates of JASTA, the legislation represented an important step towards greater accountability and justice for the victims of 9/11, as well as a reconsideration of relations with Saudi Arabia (Riedel).

Ultimately, while JASTA has undoubtedly had a significant impact on US-Saudi relations, its long-term effects remain uncertain. The law has opened the door to potential legal action against the Saudi government, but it has also raised concerns about the erosion of sovereign

immunity and the potential for retaliatory measures. As such, the future of US-Saudi relations will likely depend on a complex mix of economic, strategic, and legal considerations.

In conclusion, the evolution of US counterterrorism policy in relation to the Foreign Sovereign Immunities Act (FSIA) has been a multifaceted and intricate process. The FSIA, enacted in 1976, established the legal framework for determining when foreign states can be held accountable in US courts. Over time, as the threat of terrorism grew, the application of the FSIA became more complex. While the FSIA generally grants immunity to foreign states, exceptions were carved out for acts of terrorism. This allowed victims of terrorism to seek redress in US courts against state sponsors of terrorism. The passage of the Justice Against Sponsors of Terrorism Act (JASTA) in 2016 exemplifies a significant development in US counterterrorism policy. JASTA amended the FSIA and provided an avenue for victims of terrorist attacks, such as the September 11, 2001, attacks, to sue foreign governments believed to have supported the perpetrators. JASTA's passage reflected a prioritization of the interests of terrorism victims over potential diplomatic or foreign policy considerations.

Looking ahead, the future trajectory of US counterterrorism policy remains uncertain, particularly in light of the complexities presented by the FSIA and the intricacies of international relations. Balancing the interests of terrorism victims, foreign policy concerns, and the rule of law will continue to pose challenges. It remains to be seen how US policymakers will navigate these challenges and shape the evolving landscape of counterterrorism policy. Nonetheless, the story of the FSIA and its interaction with US counterterrorism policy underscores the importance of striking a delicate balance. Recognizing the rights of terrorism victims while considering the broader implications for foreign policy and international relations is a complex task. It highlights the ongoing need to reconcile competing interests and uphold the rule of law in the pursuit of effective counterterrorism measures.

## Chapter Three

### **JASTA and the infringement on US Executive Power in Foreign Affairs**

Foreign policy powers are an integral aspect of sovereign states' governance, which enable them to pursue their interests and protect their citizens, both domestically and abroad. The Justice Against Sponsors of Terrorism Act (JASTA) was passed by the US Congress in 2016, after a nearly unanimous vote in both the House of Representatives and the Senate, and was subsequently vetoed by President Obama only to be overridden by the Congress (Alfaro). Its purpose was to allow the families of 9/11 victims to sue foreign governments, specifically Saudi Arabia, for its alleged role in the attacks. The legislation enables American citizens to pursue legal claims against countries deemed to have supported acts of terrorism on US soil and would have a significant impact on the United States' relationship with Saudi Arabia, one of its closest allies in the Middle East (Riedel). Despite objections from the Obama administration, the bill passed with overwhelming support in both houses, despite warnings of the possible retaliatory effects against US soldiers and diplomats if other countries would adopt similar legislation. And indeed, JASTA has had unintended consequences such as retaliatory legislation by Saudi Arabia and the breakdown of relations between the two countries. The enactment of the Justice Against Sponsors of Terrorism Act in 2016 by the United States Congress incited a heated debate on the infringement of foreign policy powers by domestic legislation. JASTA aimed to grant the families and victims of the 9/11 attacks the right to sue foreign governments suspected of aiding and abetting terrorism on United States soil. While the move was widely supported by the general public, it sparked discontent among foreign governments and raised the question of whether domestic legislation could encroach on the sovereignty of other states (Cîrlig and Pawlak 7-8).

### 3.1. Key Provisions of the Act

The JASTA had several key provisions, one of which was the creation of a “private right of action” that allowed American citizens to sue foreign governments for their alleged involvement in terrorist acts on U.S. soil. The act also removed the existing immunity enjoyed by foreign officials from lawsuit in US courts. Furthermore, JASTA allowed the courts to hear cases from victims of terrorist acts against foreign governments (“Justice against Sponsors of Terrorism Act”), which might not have previously been possible. In theory, this would allow victims to secure financial compensation from foreign governments for damages incurred as a result of a terrorist attack. However, this provision also posed a challenge to US foreign policy, as it allowed individual citizens to bypass the diplomatic channels that the US government normally uses in its relations with foreign governments. Additionally, this provision has pushed foreign governments to retaliate against the US by stripping Americans of diplomatic immunity in their jurisdictions.

JASTA enlarges the FSIA's so-called "terrorism exception" to implicitly override this judicial interpretation when it comes to terrorist acts. Section 3 of the Act establishes a civil cause of action against foreign states (and their officials, employees, and agents) for torts committed anywhere in the world that contribute to a terrorist attack on US soil (“Justice against Sponsors of Terrorism Act”). JASTA eliminates the geographical limitation on tort liability established by the courts, allowing Americans to prosecute foreign states for tortious conduct that occurs abroad and causes injury or damage in the United States as a result of international terrorism. However, JASTA does not permit litigation against foreign states for war crimes or torts based on omissions or negligence. Section 4 of JASTA adds a new provision to the ATA, the Anti-Terrorism Act, that expressly authorizes ATA lawsuits against individuals and entities based on secondary liability theories. In particular, it recognizes liability for aiding and abetting or conspiring to commit an act of international terrorism that

is planned, authorized, or carried out by a foreign terrorist organization that has been designated as such (“Justice against Sponsors of Terrorism Act”).

This provision effectively overturns previous judicial rulings that the ATA does not include secondary liability. JASTA applies retroactively to injuries occurring before September 11, 2001. Section 5 of JASTA establishes a mechanism that allows the US government to request a stay of Section 3 proceedings against a foreign state (“Justice against Sponsors of Terrorism Act”). In other words, if a civil action is brought under Section 3 against a foreign state for acts of international terrorism, the US government can seek to temporarily halt or postpone those proceedings. The purpose of this provision is to provide the US government with a tool to address potential diplomatic or national security concerns that may arise from civil actions against foreign states. It recognizes that there may be situations where proceeding with the case could have adverse effects on US foreign relations or other strategic interests. Importantly, JASTA does not place any explicit limit on the number of times the U.S. government can seek extensions or stays of Section 3 proceedings. This means that the government can potentially request multiple extensions if it deems it necessary to protect national security or pursue diplomatic resolutions (Daugirdas and Mortenson).

### **3.2. Obama’s Veto Message and the Administration’s Concerns**

In the 23<sup>rd</sup> of September, 2016, after both houses of congress unanimously voted to pass the bill, President Obama issued a veto message to the US senate expressing his concerns:

First, JASTA threatens to reduce the effectiveness of our response to indications that a foreign government has taken steps outside our borders to provide support for terrorism, by taking such matters out of the hands of national security and foreign policy professionals and placing them in the hands of private litigants and courts...Second, JASTA would upset longstanding international principles regarding

sovereign immunity, putting in place rules that, if applied globally, could have serious implications for US national interests...Third, JASTA threatens to create complications in our relationships with even our closest partners. If JASTA were enacted, courts could potentially consider even minimal allegations accusing U.S. allies or partners of complicity in a particular terrorist attack in the United States to be sufficient to open the door to litigation and wide-ranging discovery against a foreign country...For these reasons, I must veto the bill (“Veto Message from the President”).

The first point of the administration’s disagreement with JASTA is that the bill places the responsibility of seeking justice in the hands of courts and private entities instead of experts in foreign policy and national security, which gives them the authority to label foreign countries as state sponsors of terror and could subsequently deny them their sovereign immunity. Therefore, JASTA departs from this longstanding principle based on allegations made by individuals.

Secondly, President Obama voiced his concern that undermining the principles of sovereign immunity on an international level would make the US subject to foreign litigation and retaliatory measures as he argued that reciprocity is a pillar of international relations. Another worry of the administration is that the bill damages relations with key allies by making them subject to litigation in the US courts. This could limit cooperation with these countries which negatively effects the American national security efforts. Despite the administration’s deep sympathy for the 9/11 victims and families as well as their continued efforts to seek justice for the tragedy, the president categorically opposed the message of the bill.



### **3.3. Constitutional Issues**

Constitutional issues arise with the passing of the JASTA, as the Act infringes on the separation of powers doctrine and the executive branch's authority over foreign policy. The foreign policy powers of the president include the authority to act as the primary representative of the United States in international relations and the authority to enter into treaties and negotiate with foreign governments (U.S. Const. art. II). The JASTA disregards this executive authority by allowing private citizens to bring lawsuits against foreign governments, effectively establishing a new foreign policy path. Moreover, the Act undermines the principle of sovereign immunity, which has been a universally recognized tenet of international law (Terry 1029). By holding foreign governments accountable for the actions of their citizens, JASTA violates international principles and norms, damaging the standing of the United States in the world arena. Therefore, constitutional issues arise with JASTA's passage, as it challenges established principles and undermines the inherent authority of the executive branch.

#### **3.3.1. Separation of Powers**

The concept of separation of powers plays a crucial role in the functioning of the American political system. The three branches of government, namely the legislative, executive, and judicial branches, are designed to be independent of each other, with each branch holding specific powers that act as a check on the other two branches (Beers). The Justice Against Sponsors of Terrorism Act infringed on foreign policy powers by allowing civil lawsuits against foreign entities accused of sponsoring terrorism. Consequently, JASTA has stripped away the degree of immunity that the executive branch could previously enjoy. This means that any foreign government or entity can now be sued in American courts for allegedly aiding or abetting terrorism, even if the evidence is questionable or circumstantial. The potential legal liabilities and diplomatic tensions that may arise from this law complicate the

executive branch's ability to conduct foreign affairs. This directly threatens the delicate balance between the branches of government, and effectively bypasses the executive branch's traditional role in foreign relations since the main role of congress is to act as checks and balances. This encroachment on foreign policy powers is a grave concern and undermines the fundamental principle of separation of powers (Johnson 249-251).

### **3.3.2. Federalism**

Federalism is the system that divides the power and responsibility between the federal government and the state. In the United States, federalism is enshrined in the Constitution, where it outlines the powers of both the federal government and the state (“Federalism in the United States”). The federal government has enumerated powers granted by the Constitution while the states have reserved powers and powers delegated to them by the federal government. This division of power ensures that neither the federal government nor the state government has too much power, and both can serve their citizens effectively (“U.S. Government and Politics in Principle and Practice”). The Justice Against Sponsors of Terrorism Act violated the principle of federalism because it infringed on the foreign policy powers of the federal government. It allowed individuals to sue foreign governments for suspected terrorism-related activities, which is traditionally a matter of foreign policy solely within the purview of the federal government. Thus, JASTA undermined the balance of power between the federal government and the state and would have intended serious consequences for the United States' foreign relations.

### **3.3.3. Foreign Affairs Preemption Doctrine**

The Foreign Affairs Preemption doctrine is a crucial principle in determining the boundary of power between the states and the federal government. It asserts that when areas of foreign relations and national security are involved, the federal government should have more

authority than the states. This doctrine is deemed necessary to maintain uniformity in foreign policy and to ensure that the United States speaks as a unified voice in the international arena. The preemption doctrine is grounded in the Supremacy Clause of the Constitution, which states that federal law overrides state law (Cruse 205-206). This doctrine was applied in the cases of *Puerto Rico v. Branstad* (“*Puerto Rico v. Branstad*, 483 U.S. 219 (1987)”) and *Danforth v. Minnesota* (“*Danforth v. Minnesota*”). JASTA interfered in the foreign policy powers of the executive branch as it allowed US citizens to sue other countries for damages caused by acts of terrorism, even if the country was not directly involved. This bill would have impacted diplomatic relations between the United States and foreign countries, as it would have encouraged lawsuits against foreign governments. Furthermore, the passing of JASTA sets a dangerous precedent for other countries to follow. Other countries may decide to pass similar laws, allowing their own citizens to sue US government officials or military personnel for alleged acts of terrorism. This could lead to a breakdown in international relations and hamper the United States' ability to conduct foreign policy (Watkins 161). The United States relies on the principle of sovereign immunity, which ensures that foreign governments cannot be sued in US courts without their consent (Murphy 583). By eliminating this principle, JASTA undermines the United States' ability to negotiate with other nations on important issues such as trade, defense, and human rights. In essence, JASTA's infringement on foreign policy powers is more than just a legal issue, it has significant ripple effects on the United States' international standing and ability to influence global affairs (Alfaro).

### **3.4. Domestic Implications**

The JASTA could also have serious domestic implications. The bill may harm the relationships between the United States and its allies. The law could provoke retaliatory measures, such as allowing foreign nationals to sue US military personnel for actions taken in other countries in pursuit of US national security objectives. This could have a chilling effect

on military and intelligence operations and potentially harm the national security of the United States (Fahmy 44). Moreover, the scope of the bill is so broad that it allows for all sorts of unforeseeable lawsuits, which could have a detrimental effect on various industries. It could lead to a proliferation of lawsuits, and result in a flood of litigation that could strain the legal system of the United States (Bellinger). The JASTA's lack of clear definitions and criteria will lead to trivial lawsuits and an increase in frivolous litigation (Ismail and Alheji). In summary, the JASTA's unintended consequences could have a detrimental effect not only on U.S. foreign policy and national security but also on its domestic legal and economic framework.

#### **3.4.1. Increased Vulnerability of American Entities to Foreign Lawsuits**

The Justice Against Sponsors of Terrorism Act has caused the increased vulnerability of American entities to foreign lawsuits due to the erosion of sovereign immunity. Prior to the passing of the JASTA, foreign governments and their entities were protected by sovereign immunity, which shields them from prosecution for their actions or inactions. However, the JASTA altered this protection, leaving foreign entities at risk of being sued in American courts (Bellinger). The most significant impact of this has been seen in the realm of finance. For instance, several American banks have been targeted by foreign governments and entities for their alleged role in financing terrorism. This increase in vulnerability to lawsuits has also affected multinational corporations, particularly those that have an extensive presence in countries with weak rule of law institutions (“Reflections on the Justice against Sponsors of Terrorism Act (JASTA)”). In some instances, the lawsuits brought against American entities have been politically motivated, and this has led to a further escalation of legal battles that affect the relationship between the American government and the governments of foreign countries (Bellinger). Therefore, the unintended consequence of the JASTA has created a

potential avenue for foreign entities to access the American legal system, which has put American entities at risk.

### **3.4.2. Targeting of US Military Personnel and Government Officials**

One of the biggest concerns with the JASTA is the retaliation from other countries. The targeting of US military personnel and government officials could become a reality if foreign countries decide to enact similar laws (“Reflections on the Justice against Sponsors of Terrorism Act (JASTA)”). This could put US citizens and assets at risk abroad. In addition, this could harm the relationship between the US and other countries. The US relies on strong relationships with other countries to maintain peace and stability around the world. Furthermore, the US may not be able to hold other countries accountable for their actions if they are retaliating against the US for the JASTA. This could lead to the US becoming a less influential country in the global community and could cause long-lasting ramifications for international relations. Therefore, the JASTA must be carefully considered to mitigate any potential negative consequences it may have on the US and its relationship with other countries.

### **3.4.3. Potential Strain on Diplomatic Relationships with Allies**

Another potential unintended consequence of JASTA is the strain it can put on diplomatic relationships with allies (Cherkaoui 8). Many countries, particularly those in the Middle East, have expressed concern over JASTA and its impact on their sovereign immunity. The UAE, for instance, has warned that it may have to reconsider its standing with the United States if JASTA becomes law (Daugirdas and Mortenson). The Saudi government has also expressed similar sentiments, stating that JASTA could lead to the undermining of the principle of sovereign immunity, which is a crucial component of international relations (Riedel). Moreover, JASTA has the potential to lead to a wave of dubious lawsuits targeting US allies,

thereby undermining the US's standing as a reliable ally. This could have severe repercussions for the US, as it relies on many of these allies for defense and other crucial matters. Overall, it is clear that the potential consequences of JASTA extend far beyond its intended purpose, and policymakers should have carefully weighed these unintended consequences before moving forward with this legislation.

In addition to potentially damaging relationships with foreign allies, the JASTA also faces potential constitutional challenges. The act allows for lawsuits against foreign governments, which could be viewed as infringing upon the Executive Branch's authority to conduct foreign affairs (Holcombe 380). This has been a concern raised by both the Obama and Trump administrations (Herb). Furthermore, the JASTA could set a dangerous precedent for other countries to enact similar legislation, which could lead to reciprocal lawsuits against the United States. Additionally, the act's ambiguous language regarding what constitutes "material support" for terrorism could lead to a flood of frivolous lawsuits, further clogging up US courts. Finally, it is unclear how effective the JASTA will be at achieving its stated goal of holding foreign governments accountable for terrorist attacks. Foreign governments may opt to ignore US courts and refuse to pay any judgments issued against them. Therefore, it is important for lawmakers to fully consider the potential unintended consequences of the JASTA before enacting it into law.

### **3.5. International Implications**

The JASTA could also have significant consequences in the international arena. It violates international law by enabling US citizens to sue foreign governments, thereby infringing upon the principles of state sovereignty and non-interventionism. By allowing plaintiffs to file claims against countries like Saudi Arabia, it opens up the possibility of reciprocal lawsuits against the US. This could put US courts at risk of being sued by foreign governments, potentially destabilizing diplomatic relations. Moreover, supporting JASTA undermines the

US's efforts to promote peaceful settlements of international disputes, which is a cornerstone of its foreign policy (“United States Strategy to Prevent Conflict and Promote Stability”). This could lead to a loss of credibility and influence for the US when advocating for international legal norms and compromises in conflict resolution. The implementation of JASTA could also lead to retaliatory legislative measures by other countries, further damaging bilateral and multilateral relations (Watkins 161-162). Hence, the unintended consequences of the JASTA extend beyond the US, posing a potential threat to international relations and the global legal order.

### **3.5.1. Reciprocal Legislation by Foreign Governments**

One unintended outcome of the Justice Against Sponsors of Terrorism Act is the implementation of reciprocal legislation by foreign governments. This approach would involve enacting similar laws that provide a legal basis for foreign victims of terrorism to sue entities in their own courts that are located in JASTA signatory countries, including the United States. This would create a level playing field, preventing the United States from being singled out for litigation and potentially shielding US government entities from foreign lawsuits. Additionally, reciprocal legislation would address the problem of conflicting legal judgments by ensuring that victims have access to a consistent legal framework, regardless of where the alleged conduct took place. However, there are challenges associated with this approach, such as the potential for a race to the bottom in which countries compete to offer the most plaintiff-friendly laws, the risk of political manipulation of legal systems, and the potential for litigation tourism (Starr 372-374). Therefore, any reciprocal legislation would need to be carefully designed to avoid these pitfalls and ensure that fairness and justice are served for all parties.

### **3.5.2. Retribution against US Companies Operating Overseas**

Retribution against US companies operating overseas is not a desirable outcome of the Justice Against Sponsors of Terrorism Act. Such retaliation could negatively impact American businesses and workers, as well as harm the global economy. In addition, penalizing companies for the actions of their home country government may be seen as unfair and violate international trade laws. Moreover, the potential for other countries to enact similar legislation targeting American companies could create a dangerous cycle of tit-for-tat actions that would further damage international relations. While seeking justice for victims of terrorism is important, it should not be done at the expense of innocent companies and workers (“Saudi 9/11 Law Could Have Unintended Ramifications”). Therefore, it is important to carefully consider the unintended consequences of the JASTA and work towards a fair and balanced system of international justice that does not harm innocent parties. It is essential that any legislation or actions taken in response to terrorism reflect a comprehensive and nuanced understanding of the complex political and economic realities of international relations.

### **3.5.3. Damage to America's Reputation and Influence in the Global Arena**

Moreover, there is also a possibility for the bill to cause damage to America's reputation and influence in the global arena. The JASTA could potentially open the door for other countries to pass similar legislation that would allow victims of US drone strikes or military actions to sue American officials or soldiers. This could lead to an endless cycle of retaliation and legal battles that would undermine America's ability to conduct foreign affairs. Furthermore, the bill has already drawn criticism from traditional allies of the United States, such as the United Kingdom, who have expressed concern that the bill would make it difficult for them to cooperate with America on counterterrorism operations (Cîrlig and Pawlak 9). This type of alienation from allies could severely undermine America's ability to project its power abroad and could ultimately result in a weakened position on the global stage (Watkins



164). Overall, the JASTA bill's unintended consequences could outweigh its intended benefits and that it may not be the best way for the United States to pursue justice for victims of terrorism.

In addition to potentially harming US national security, the Justice Against Sponsors of Terrorism Act could also have negative impacts on international relations. The law's provision of allowing US citizens to sue foreign governments for alleged involvement in terrorist attacks on American soil could lead to diplomatic tensions and potential retaliation from those governments (Alfaro). This could have significant implications for US foreign policy and national security interests, as it may limit the ability of the US to work collaboratively with foreign governments on key issues such as counterterrorism efforts and addressing global threats. Additionally, this law may lead to an increase in American-based companies facing legal action in foreign courts, adding further pressure to an already complex global legal landscape. While the JASTA was intended to provide a means for justice for victims of terrorism and their families, the unintended consequences may ultimately outweigh any potential benefits, and further exacerbate issues related to international security and diplomacy in the process.

### **3.6. Political Implications**

In addition to potential economic and diplomatic consequences, the JASTA could have political implications, both domestically and internationally. Domestically, the passage of the JASTA could lead to increased tensions between the Executive and Legislative branches of government (Holcombe 380). President Obama has strongly opposed the bill, arguing that it would undermine the principle of sovereign immunity that is fundamental to international relations (“Veto Message from the President”). When the bill was passed in spite of the President's objections, it had the potential to create a precedent for Congress to override the President's veto on other important issues. At the same time, the JASTA could have

unintended consequences for the United States' relations with other countries. Saudi Arabia, which stands to be most affected by the bill, has warned that it may retaliate by selling off US assets (Riedel), which could cause economic disruptions. In addition, other countries may follow suit and pass similar laws targeting US citizens and companies, which would put pressure on the US government to protect the rights of its citizens abroad.

### **3.6.1. Partisan Division over the Implementation and Modification of JASTA**

The partisan division over the implementation and modification of the JASTA is a clear indication of how political interests often overrule common sense and the greater good. The Republicans supported the bill's original version and opposed any modifications, while the Democrats favored making changes to the bill to address its unintended consequences. It is evident that political considerations played a primary role in determining each party's stance, with Republicans supporting the JASTA to demonstrate their "tough on terrorism" stance, while Democrats were worried about the potential for JASTA to harm US foreign policy goals. The divergent views reflected the polarized state of American politics, which often clouds lawmakers' judgment when it comes to objectively assessing the impact of legislation on both domestic and international fronts (Cîrlig and Pawlak 7-8). Consequently, the partisan divide over the JASTA has hindered its successful implementation, and the US government must find a way to balance national security interests with the concerns of international actors and victims' families to prevent unintended consequences.

### **3.6.2. Criticism on the Legality and Constitutionality of JASTA**

Criticism on the legality and constitutionality of JASTA has been strongly voiced by various legal experts and organizations. The legislation has been described as an overt violation of international law and the sovereignty of other states (Cîrlig and Pawlak 7). Critics argue that the immunity afforded to foreign governments has been the traditional state

practice based on sovereign immunity, which shields nations from legal action in foreign courts (Murphy 583). The principle, which is recognized under international law, is intended to safeguard the sovereign equality of states. The congressional override of presidential veto to enact JASTA is also seen as a violation of the separation of powers doctrine since the executive branch over the decades negotiated and established relationships with foreign governments (Johnson 249). The act, which allows American terror victims to sue foreign entities for damages in US courts, could potentially lead to retaliatory measures against American entities and military personnel serving overseas. Furthermore, legal observers contend that JASTA could encourage rampant litigation due to broad causes of action, and as a result, cause a strain on the US legal system with negative implications for American businesses and the economy (Fahmy 44).

### **3.6.3. The Impact of JASTA on the US Presidency and its Leadership Role in the World**

The JASTA has significantly contributed to undermining the United States' position as the world's leader in the fight against terrorism. The Act has turned the spotlight on the United States' foreign policy, and the country is increasingly viewed as a nation that prioritizes domestic interests at the expense of its allies. The move has been met with concern from countries that have historically been staunch allies, such as the United Kingdom, who argue that the legislation could ultimately harm its relations with the United States. Moreover, the law could serve as a roadmap for other countries to file similar lawsuits against the United States, which could result in foreigners deposing US officials. This outcome could significantly affect how the government conducts national security matters, as government officials would be understandably reluctant to pursue counterterrorism initiatives that could lead to costly lawsuits and personal liability. Consequently, JASTA has weakened the United

States' courage to engage in foreign affairs and will undoubtedly impact future presidential decision-making.

Another unintended consequence of the JASTA is its impact on diplomatic relations between the United States and foreign nations. The act potentially exposes foreign governments to legal liabilities, which could affect the way they interact with the United States (Watkins 163). This could, in turn, damage bilateral relations and trigger retaliatory actions against American interests abroad. Diplomatic shield is an essential principle of international relations, and JASTA could undermine the trust and cooperation between nations. Furthermore, JASTA would lower the bar for other countries to legislate similar laws, thus setting a dangerous precedent in international law. The bill could encourage other nations to follow suit and pass their own version of JASTA, which would lead to a proliferation of lawsuits worldwide and further undermine global peace and stability. In conclusion, JASTA's far-reaching and unintended consequences have created a complex web of legal, diplomatic, and geopolitical implications, highlighting the importance of considering all the possible ramifications of legislation before passing it into law.

The Justice Against Sponsors of Terrorism Act, or JASTA, infringed on foreign policy powers. The act undermines the role of the executive branch by encroaching on its power to conduct foreign policy. Historically, the executive branch has had the authority to engage in diplomatic negotiations with foreign governments, including the ability to grant or withhold sovereign immunity. The JASTA strips the executive branch of this authority by allowing private US citizens to sue foreign governments for terrorist acts committed on US soil. Furthermore, it is possible that the JASTA may lead to retaliatory measures from foreign governments, as they may see the law as an attack on their sovereignty. Consequently, the JASTA poses a significant threat to the stability of foreign relations and may hinder the

executive branch's ability to conduct foreign policy effectively. The law created an exception to sovereign immunity, which is the principle that governments cannot be sued in the courts of another country. JASTA allowed US citizens to sue foreign governments for their alleged role in terrorist attacks, even if those governments had not been designated as state sponsors of terrorism by the US government. This threatened to strain diplomatic relations with countries that were not directly involved in 9/11 but could still be implicated in the lawsuits. Additionally, JASTA exposed US assets to similar legal action by foreign countries, which undermined the effectiveness of US foreign policy. While the desire to hold foreign governments accountable for terrorist acts committed on US soil is understandable, JASTA was not an appropriate solution and infringed on foreign policy powers. In addition to damaging US foreign policy, the passage of the Justice Against Sponsors of Terrorism Act also undermines international relations and cooperation. At its core, JASTA is a piece of legislation that seeks to hold foreign actors accountable for their role in terrorist attacks on US soil. However, its far-reaching implications have the potential to erode the mutual trust and respect that underpin diplomatic relations between nations. By allowing US citizens to sue foreign states over perceived involvement in terrorist acts, countries may become hesitant to collaborate with the United States on counterterrorism efforts or other security initiatives. Furthermore, the broad and vague language of the law could be interpreted to extend extraterritorial jurisdiction to US courts, which would greatly expand the power of the US legal system beyond its borders. This, in turn, could cause tension with other countries who may feel that their sovereignty is being infringed upon by US legislation.

## Conclusion

The passing of the Justice Against Sponsors of Terrorism Act (JASTA) prompted substantial discussions and considerations, and raised significant concerns regarding its implications. While proponents of the act argued that it was a step towards seeking justice for the victims of the tragic 9/11 attacks, the manner in which it was enacted undermined executive authority and disregarded important legal principles.

One of the most contentious aspects of JASTA was its override of President Obama's veto, which represented a significant encroachment upon the powers vested in the executive branch. The act effectively disregarded the President's judgment and undermined the principles of checks and balances that are crucial to the functioning of a democratic government.

Furthermore, despite its intentions, JASTA's effectiveness in combatting terrorism and seeking justice for the victims of 9/11 is questionable at best. The act focuses on allowing private lawsuits against foreign states alleged to have sponsored terrorism, but it fails to address the complex and multifaceted nature of international terrorism. The more effective approach to combating terrorism requires a comprehensive strategy that involves intelligence cooperation, diplomatic efforts, and international collaboration rather than solely relying on litigation.

In addition, JASTA's violation of the principle of foreign state sovereign immunity has raised significant concerns within the international community. Sovereign immunity is a long-standing legal principle that protects foreign governments from being subjected to the jurisdiction of other countries' courts. By allowing private citizens to sue foreign states, JASTA undermines this principle and potentially opens the door to reciprocal actions against

the United States in foreign jurisdictions, which could have serious implications for international relations.

Moreover, JASTA's enactment raises constitutional law concerns as it infringes upon the separation of powers, federalism, and the foreign affairs preemption doctrine. The act encroaches on the authority of the executive branch, disrupts the delicate balance of powers between the three branches of government, and interferes with the federal government's ability to conduct foreign affairs. These constitutional principles are vital for the proper functioning of the U.S. government and maintaining a harmonious system of governance.

The Justice Against Sponsors of Terrorism Act (JASTA) has significantly undermined the role of the executive branch in foreign policy. The passing of this act has opened up the possibility of private individuals suing foreign governments for alleged involvement in terrorism, thereby potentially undermining relationships and agreements between nations. This has in turn jeopardized the executive branch's ability to maintain stable foreign relations and conduct diplomacy. While there is no doubt that victims of terrorism deserve justice and compensation, the execution of this act cannot be taken lightly. It is crucial that the balance of powers between the executive, legislative, and judicial branches of the United States government is maintained, and the passing of this act calls into question the ability of the executive branch to effectively conduct foreign policy

While the desire to seek justice for the victims of terrorism is understandable and commendable, it is important to critically evaluate the means by which we pursue this objective. JASTA's passage, while motivated by a noble cause, has proven to be a contentious and problematic approach. In order to effectively combat terrorism and seek justice for victims, it is crucial to employ comprehensive strategies that prioritize international cooperation, intelligence sharing, and diplomatic efforts. By doing so, we can strike a balance

between justice, the protection of constitutional principles, and the maintenance of sound foreign relations.



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