

## Report

### **The U.S. JASTA: An Asset or a Liability for America Abroad?**

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**Analysts warn Saudi Arabia could respond to the law by pulling billions of dollars out of the US economy [EPA]**

## Abstract

It seemed that groupthink reigned supreme when the majority of lawmakers [97/100 at the Senate and 348/435 at the House] decided to “dis” [in reference to disrespect] President’s veto of the S.2040 bill. The White House called it “the single most embarrassing thing that the United States has done, possibly since 1983.” This miscalculated move to sanction states sponsors of terrorism, alluding indirectly to Saudi Arabia the homeland of fifteen of the 9/11 nineteen hijackers, did not consider its “unintended consequences”.<sup>(1)</sup> Democrat Senator Chuck Schumer of New York and co-sponsor of JASTA said he’d be “open to fixes on the bill”.

This report analyzes the context and the factors behind this unprecedented vote, its legal significance in opening the door for domestic courts to rule in cases against sovereign states, and its ramifications on Americans abroad and foreign nationals who have been subjected to torture or other types of harm by Americans.

## Introduction

Since the 9/11 attacks, families of the victims and their ambitious lawyers have focused their lobbying efforts to secure a legal framework for their pursuit of some financial compensation similar to the outcome of the Lockerbie tragedy with Libya. The 9/11 Families & Survivors United for Justice Against Terrorism organization, which consists of over 9000 family members and survivors, claims to be “seeking the truth, accountability and justice against all perpetrators of the September 11, 2001 terrorist attack against our nation.”<sup>(2)</sup>

Consequently, the JASTA law has been in the works for the last ten years. Its driving-force team, led by Senator John Cornyn (R., Texas), claims it has been a painstaking legislation

involving close consultations with the Senate Foreign Relations Committee and the State Department.

As the Organization believes JASTA will ensure that “victims of terrorist attacks have the power to hold terrorist financiers accountable, to bring justice and to make our nation safer”, it defines three main objectives with an emphasis of clarity:

- a) Protecting Victims’ Rights:** making clear what Congress intended, which is that private citizens can take legal action against those who provide financial or material support toward acts of terrorism, extrajudicial killing and torture in the United States.
- b) Removing the Cover of Sovereign Immunity:** making clear that being a foreign state shall have no immunity for actions taken in support of terrorist acts occurring in the United States.
- c) Re-establishing Jurisdiction:** making clear that the law requires only that the injury occur in the United States, and that the U.S. Courts do have jurisdiction over actions carried out, in part, outside the U.S. that produce injury or damage inside the United States.<sup>(3)</sup>

With his spin on Beltway politics, Senator Schumer has positioned the maneuvering of JASTA as a political battle with some moralistic underpinnings. He argues that “the White House and the Executive Branch are far more interested in diplomatic considerations. We [legislators] are more interested in the families and in justice. I think our administration was just dead wrong on this issue.”<sup>(4)</sup>

As a result, the vote to override Obama’s veto was a political slam dunk: 97-1 in the Senate where Minority Leader Harry Reid was the sole dissenter, whereas Virginia’s Tim Kaine and Vermont’s Bernie Sanders missed the vote as they were campaigning for Clinton. The House vote was 348-77, with only 18 Republicans and 59 Democrats voting against while commemorating the fifteenth anniversary of the 9/11 attacks.

According to Senator Cornyn, “the result was a strong bill with a narrow focus that only allows suits against foreign governments—not individuals like diplomats or military troops, as critics claim.”<sup>(5)</sup> He argues that “JASTA is not a departure from our long-standing approach to sovereign immunity; it just fixes the loophole.”<sup>(6)</sup>

## The Victims' 'Day-In-Court' Frame

One of the selling points of JASTA was the semantics of 'justice' and 'having one's day in court'. These constructs are deeply-rooted in the American culture of democracy and separation of powers. They have helped open ears and soften hearts in the Congress, the media, as well as the public opinion; while stirring suspicion about in the 28-classified pages of the Congressional 9/11 inquiry commission. In this backdrop, the Organization sought to craftily design two uncontestable narratives:

### **a) Restorative Justice and Corrective Action of a 'legal loophole':**

JASTA would "correct a potential grievous error by a federal court ruling that no one can be held accountable for financing or supporting a terrorist attack inside our borders as long as they provided the money or support from outside the United States."<sup>(7)</sup>

For instance, Senator Bob Graham (D-Fla.) implied a moral duty to be fulfilled by legislators. He said "the Congress is called to render a final judgment on whether Americans will have their day in court and the opportunity to make the case before a jury of their peers that Saudi Arabia was a facilitator in the murders of 9/11. Let our legal system work. Let the truth be known."<sup>(8)</sup>

In a language compatible with the dominant security paradigm in Washington, former Senator Bob Kerrey and member of the 9/11 Commission argues that "signing this bill into law will be an act of justice and will help make the United States homeland a safer place to live."<sup>(9)</sup>

### **b) Moral Need for Accountability:**

JASTA makes clear that those who support terrorism against the United States "can be held accountable no matter where the money or support was given."<sup>(10)</sup> Some analysts perceive detractors of JASTA to justice as "slaveholders were to freedom. They deplore the statutory exposure of foreign governments to liability in United States courts for international terrorist murders or assassinations here."<sup>(11)</sup> However, such a precipitated legislative move did not weigh on some pitfalls missed by the majority of Congressmen.

## The Groupthink Dilemma: Shoot First, Aim Second!

JASTA resembles a sweet dish which soon turns very sour in one's mouth. Most of its proponents, who stampeded along behind Senators Cornyn and Schumer, have applauded passionately the first equation of the law [assertive accountability], which "would allow victims of terrorism on U.S. soil to sue foreign governments found responsible for those attacks."<sup>(12)</sup>

However, they did not reflect seriously on the second equation [due process] which would have negative legal ramifications on U.S. diplomats and soldiers abroad, or the

“unintended ramifications” to use Senate Majority Leader Mitch McConnell’s terminology. He acknowledged that “everybody was aware of who the potential beneficiaries were, but nobody had really focused on the potential downsides in terms of our international relationships.”(13)

Still, he did not shy away from putting the blame on President Obama because of what he considers “a failure to communicate on a piece of legislation that was obviously very popular.”(14) Ironically, Senator Cornyn sought to play out the same ‘lack-of-communication’ card, as he said “what’s so remarkable to me is the detachment of this White House from anything to do with the legislative process. They have very little contact or credibility, not just with Republicans but with Democrats.”(15) Still, Central Intelligence Agency Director had cautioned that “If we fail to uphold this standard for other countries, we place our own nation’s officials in danger.”(16)

In a somewhat spilled-milk reflection, nearly 30 senators sent a letter to Senators Cornyn and Schumer asking for “cooperation to alleviate potential unintended national security consequences of the legislation.”(17) For example, Senator Benjamin L. Cardin (D-Md.), ranking member on the Foreign Relations Committee, admitted that “this is a bill that should have been given a greater airing. It was not on my radar screen until after the train was leaving the station. The next thing I know, it’s on the president’s desk.”(18)

However, Obama has warned against “a dangerous precedent” considering the JASTA override “an example of why sometimes you have to do what’s hard. And, frankly, I wish Congress here had done what’s hard. If you’re perceived as voting against 9/11 families right before an election, not surprisingly, that’s a hard vote for people to take. But it would have been the right thing to do.”(19)

The Washington Post Editorial Board considered JASTA an act of “mob legislating by Congress”,(20) and called it “pathetic”, a step further from “embarrassing’ used by the White House in describing the override.

Ironically with this anti-Saudi sentiment, the Senate overcame a bid to block a \$1.15 billion sale of military equipment to the Saudi government the same week based on “concerns over its track record and intended use, most notably in connection with Saudi Arabia’s violent intervention in the civil war in neighboring Yemen.”(21) Yet arms sales, including this most recent one, have been no rarity under the Obama administration. One should consider that the U.S. government has sold \$48 billion worth of weapons to Riyadh since 2010, exceeding sales under the Bush administration three times over.(22)

Such a groupthink dilemma calls for a closer look to help deconstruct this anti-Saudi campaign, which has threatened to destabilize the bilateral relations and may lead to the

withdrawal of nearly 800 billion dollars' worth of Saudi investments from the United States, not to mention the possible cascade effect on various investments of the other five Gulf States.

## **Political Maneuvering Inside the Congress**

The main drivers of the JASTA override can be summarized in four main points:

### **1. The Fog of Interpretations**

Despite the findings of the 9/11 Commission and other inquiry teams, a sizable segment of the American public opinion still believes in a Saudi 'involvement'. CIA Director John Brennan has repeatedly affirmed that "there was no evidence to indicate that the Saudi government as an institution, or senior Saudi officials individually, had supported the 9/11 attacks."[\(23\)](#)

Yet, former Senator Bob Kerrey argues that it is true that "the Commission did not conclude that the Saudis were guilty but we most definitely did not conclude that they were not involved. In fact, there was considerable evidence suggesting just the opposite."[\(24\)](#) This open-ended allusion has bred a new life into the conspiracy-theory-based interpretations.

### **2. The John Wayne Pursuit of Justice**

Since 2001, the American political discourse has embraced a powerful narrative: "We'll follow terrorists to the gates of hell!". George W. Bush stated before Congress, "We will not tire, we will not falter and we will not fail." This heroic image of pursuing justice can be traced back to the last century when John Wayne portrayed the White American hunting gangsters in the Wild West. In the backdrop of this moral, legal, and patriotic image, JASTA proponents were effective in mobilizing support and capitalizing on its romanticized and symbolic dimensions.

Senator Cornyn has skillfully embedded that imperative in the JASTA bill, "it's important for us to send a message that that evil shall not prevail. Americans from all backgrounds came together in a beautiful display of patriotism and fraternity following that terrible day of September 11th, 2001."[\(25\)](#)

### **3. Schumer's Leadership Ambition**

As the dictum goes 'all politics is local', JASTA has been positioned as a double jeopardy for Senator Schumer while serving his New York community, including the survivors and victim's families, as well as maximizing his chances to assume a senior position in the rankings of his party. His direction on JASTA can be seen as a springboard and apprenticeship for taking over Democratic leadership in the Senate once Harry Reid steps down next year.[\(26\)](#)

His colleague Senator Blumenthal considers him a “consensus builder” and argues “he’s done masterfully on this bill.” In short, Schumer has strategized this legislative triumph to help himself become the first Jewish Senate majority leader in history.

#### **4. The Political Economy of JASTA**

Ironically, there seems to be a ‘Gadhafi curse’ hunting Saudi Arabia even after his death. The \$2.7 billion compensation (\$10 million for each victim), which was diplomatically and militarily secured from Libya for its role in the Pan Am 103 explosion over Lockerbie, has been an inspiring precedent for the 9/11 victims and their lawyers.

Law professor Ingrid Wuerth underscores the financial incentive in “trying to link any such attack to the reckless or intentional actions of a foreign state, even when those actions occur in other countries.”<sup>(27)</sup> Former Senator Bob Graham considers the would-be compensation a relief of medical expenses for the American taxpayers; “As just one example, legislation passed in 2016 provides free life time medical service to responders and survivors. This year the cost will be \$330 million. In 2025 it is estimated to be \$570 million.”<sup>(28)</sup>

#### **International Denunciation**

In addition to the Saudi contestation of JASTA, The Gulf Cooperation Council and the Organization of Islamic Cooperation have voiced their concerns over future violation of sovereign immunity as a fundamental tenet of international law.

In Europe, the Dutch parliament told the Congress that it considers JASTA to be a “gross unwarranted breach of Dutch sovereignty, which could result in “astronomical damages.”<sup>(29)</sup> Member of the French Parliament Pierre Lellouche cautioned that it would “cause a legal revolution in international law with major political consequences.”<sup>(30)</sup>

A number of international lawyers foresee an upcoming crisis which could set “a precedent for a panoply of lawsuits unrelated to 9/11 against foreign countries in U.S. courts and against the United States in foreign courts.”<sup>(31)</sup> It would also sabotage the US-led coalition for counterterrorism, and “will ignite a firestorm of legal warfare that will directly undermine relationships at a time when robust ties to fight terrorism is required.”<sup>(32)</sup>

Jack Goldsmith, Harvard Law professor and former advisor to General Counsel of the Department of Defense, points to another problem since JASTA assigns a task to U.S. federal courts for which they are ill-suited. He says “the costs of the law will be borne by courts, which are an awkward place to ascertain Saudi responsibility for 9/11, and especially the president, who will have to deal with the diplomatic fallout with Saudi Arabia and other nations.”<sup>(33)</sup>



## Conclusion: U.S. Strategic Interests at Limbo

Now, the stakes are high and JASTA will lead to serious legal and political ramifications for the United States. Most observers have cautioned against a subsequent “geopolitical disaster”, and the horror expressed by President Obama that JASTA might provoke foreign nations “to expose the United States to civil litigation in their courts for complicity in international terrorism in their countries.”(34)

Republican Senator Bob Corker of Tennessee cautioned that the bill will be essentially “exporting your foreign policy to trial lawyers.”(35) He also highlighted the possibility of the United States being sued by other nations for its drone strikes in Afghanistan and Pakistan, or even for its strong support of Israel.

Unlike other nations, Americans are quite familiar with the destructive power of lawsuits and lawyers’ greed. Ambrose Bierce’s Devil’s Dictionary defined a lawsuit as “a machine which you go into as a pig and come out of as a sausage.” Recent history also showcases the eventuality of prosecuting American politicians and military officials in foreign courts.

Americans still recall the Transatlantic Crisis of 1999 when an amended law in Belgium created jurisdiction in Belgium courts for crimes against humanity, genocide or war crimes occurring anywhere in the world. Under the law, complaints were filed against former President George H.W. Bush, former Secretary of Defense and Vice President Dick Cheney, former Chairman of the Joint Chiefs of Staff Colin Powell, and Gen. Tommy Franks. Then-Secretary of Defense Donald Rumsfeld promptly journeyed to Brussels to threaten withdrawal of NATO headquarters if Belgium tarried in repealing the law.(36) However, this memory has been overshadowed by the untraditional election year to select a new president, 435 members of the House, and one third of the one-hundred-member Senate.

Laura Donohue, Georgetown law professor and head of the Center on National Security and the Law, asserts that the United States has more to lose than other countries by having sovereign immunity eroded; “this is very dangerous—and some would argue even more dangerous—than the risk to other countries because the United States has such a global presence that if we then are no longer protected by sovereign immunity elsewhere, then it raises a lot a much more difficult situation for us than it would for any other country,” she said. “So at some level, this is a huge mistake for us.”(37)

Americans are now faced by a hard choice between counterterrorism and sovereign immunity. JASTA remains a tough equation with two incompatible clauses: a domestic victory versus an international hindrance. It has become a red flag of a misguided and emotional reaction to the 9/11 victims’ families’ appeal. If it goes into effect without amendments, it will lead to Washington’s losses overseas in various legal, strategic, political, moral, and economic proportions. It will also harden the rift with America’s allies,



like Saudi Arabia and other Gulf States, amidst their disappointment in Obama's policy toward Syria and his rapprochement with Iran after reaching the new Nuclear Deal in June 2015.

JASTA has certainly destabilized US-Saudi relations at a time when a closer collaboration and stronger partnership are needed. As the Saudi Vision 2020 and the National Transformation Program 2030 mark an opportunity for deeper economic investment and cooperation, JASTA will make the United States a riskier environment to invest in. Russia, China, the UK, and the European Union may become the main beneficiaries.(38)

Critics of the bill are now focusing on how to scale back the measure once it becomes law. Approximately 20 senators have signed a letter expressing their intention to return to the issue during the lame duck session if the new law generates negative consequences.(39)

In short as one analyst eloquently put it, JASTA is "little more than congressional grandstanding at best pointless, and at worst damaging to American interests."(40)

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