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In Re Terrorist Attacks on September 11, 2001: Claims Against Saudi Defendants Under the Foreign Sovereign Immunities Act (FSIA)

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Summary

Practical and legal hurdles, including the difficulty of locating hidden Al Qaeda members and the infeasibility of enforcing judgments in terrorism cases, hinder victims' attempts to establish liability in U.S. courts against, and recover financially from, those they argue are directly responsible for the September 11 terrorist attacks. Instead, victims have sued numerous individuals and entities with only indirect ties to the attacks, including defendants who allegedly provided monetary support to Al Qaeda prior to September 11, 2001. Within the consolidated case *In re Terrorist Attacks of September 11, 2001*, one such group of defendants was the Kingdom of Saudi Arabia, several Saudi princes, a Saudi banker, and a Saudi charity. Plaintiffs argued that these Saudi defendants funded groups that, in turn, assisted the attackers.

A threshold question in *In re Terrorist Attacks* was whether U.S. courts have the power to try these Saudi defendants. In August 2008, the U.S. Court of Appeals for the Second Circuit affirmed dismissals of all claims against the Saudi defendants, holding that U.S. courts lack jurisdiction over the claims. Specifically, the court of appeals held that in this case, U.S. courts lack (1) subject matter jurisdiction over the Kingdom of Saudi Arabia, because the Kingdom is entitled to immunity under the Foreign Sovereign Immunities Act (the FSIA) and no statutory exception to immunity applies; (2) subject matter jurisdiction over the Saudi charity and Saudi princes acting in their official capacities, because they are "agents or instrumentalities" of the Kingdom and thus, under the FSIA, are entitled to immunity to the same extent as the Kingdom itself; and (3) personal jurisdiction over Saudi princes sued in their personal capacities, because the princes had insufficient interactions with the forum to satisfy the "minimum contacts" standard for personal jurisdiction under the Fifth Amendment due process clause.

In 2011, the Second Circuit reversed itself with respect to the immunity of non-terrorist states, finding that the tort exception under the FSIA does not exclude terrorist acts that take place within the United States. In 2013, the court ordered these claims against Saudi Arabia and its agencies or instrumentalities be reinstated in the interest of justice to determine whether the tort exception applies. The district court again dismissed the claims in 2015 on the basis that the "entire tort" defendants were alleged to have committed did not occur within the United States. This decision has been appealed to the U.S. Court of Appeals for the Second Circuit.

In a separate decision, the court of appeals affirmed the dismissal of claims against private Saudi banks on the basis that the Anti-Terrorism Act (ATA) does not permit secondary liability under an aiding-and-abetting theory. It also affirmed the dismissal of claims against these defendants brought under the Alien Tort Statute and the Torture Victims Protection Act, as well as claims brought as common law torts.

To address some issues related to the interpretation of the FSIA, among other related matters, Congress is considering the Justice Against Sponsors of Terrorism Act (S. 2040, H.R. 3815).This report summarizes the FSIA and jurisdiction in cases against foreign defendants, analyzes the court decisions, and reviews legislative efforts to revise the FSIA and the ATA.

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Numerous legal and practical obstacles, such as the infeasibility of locating Al Qaeda operatives, stand in the way of victims seeking to establish liability in U.S. courts against, and recover damages from, the terrorists who planned and carried out the September 11, 2001, attacks. Victims, however, have sued numerous individuals and groups with less direct ties to the attackers, including defendants who allegedly provided monetary support to Al Qaeda prior to September 11, 2001.

In re Terrorist Attacks on September 11, 2001, is a consolidated case that includes, among other claims, claims against the Kingdom of Saudi Arabia, several Saudi princes, a Saudi banker, and a Saudi charity.[1] Plaintiffs argued that these Saudi defendants played a "critical role" in the September 11 attacks by giving money to Muslim groups, which in turn funded Al Qaeda.[2] In August 2008, the U.S. Court of Appeals for the Second Circuit affirmed dismissals of the claims against the Saudi defendants.[3] However, part of the reasoning for the dismissals was later overturned, and the plaintiffs were permitted a second chance to bring their suit against the Saudi government and government-owned charity. This effort also failed on sovereign immunity grounds at the district court, however, and is once again on appeal at the U.S. Court of Appeals for the Second Circuit. This report explains the legal bases for the dismissals and provides an update to the status of the case.

To address some issues involving the interpretation of the FSIA, among other related matters, Congress is considering the Justice Against Sponsors of Terrorism Act (S. 2040, H.R. 3815).This report addresses relevant legislative developments in its final section.

Overview of the Foreign Sovereign Immunities Act

The Foreign Sovereign Immunities Act (the FSIA) applies to all foreign states and their "agencies and instrumentalities."[4] Immunity for sovereign nations against suits in U.S. courts has a long history and is based on the principle that conflicts with foreign nations are more effectively addressed through diplomatic efforts than through judicial proceedings.[5] Congress passed the FSIA to codify these long-standing principles and to clarify limitations on the scope of immunity that had emerged in international practice.[6]

The FSIA contains both a general, presumptive rule against litigation in U.S. courts and a number of exceptions permitting suits. As a general rule, foreign states, together with their agencies and instrumentalities, are "immune from the jurisdiction of the courts of the United States and from the states."[7] However, the FSIA authorizes jurisdiction over foreign nations in several exceptions.[8] Namely, a foreign state is not immune from U.S. courts' jurisdiction where (1) the

[1] *In re* Terrorist Attacks on September 11, 2001 (*Terrorist Attacks III*), 538 F.3d 71 (2d Cir. 2008), *cert. denied sub nom.* Federal Ins. Co. v. Kingdom of Saudi Arabia, 557 U.S. 935 (2009).

[2] 538 F.3d at 76.

[3] *Id*. at 75-76.

[4] Foreign Sovereign Immunities Act of 1976, P.L. 94-583; *codified at* 28 U.S.C. §1602 *et seq.*

[5] For more on the history of foreign sovereign immunity and the FSIA, see CRS Report RL31258, *Suits Against Terrorist States by Victims of Terrorism*, by Jennifer K. Elsea. *See also* Elizabeth L. Barh. *Is the Gavel Mightier Than the Sword? Fighting Terrorism in American Courts*. 15 GEO. MASON L. REV. 1115, 1125 (2008).

[6] *See* Permanent Mission of India to United Nations v. City of New York, 551 U.S. 193, 199 (2007) (discussing Congress's intention to codify an understanding of immunity as restricted to public acts and to codify the real property exception existing in international practice at the time).

[7] 28 U.S.C. §1604.

[8] 28 U.S.C. §1605.

foreign state has waived its immunity;[9] (2) the claim is a specific type of admiralty claim;[10] (3) the claim involves commercial activities;[11] (4) the claim implicates property rights connected with the United States;[12] (5) the claim arises from tortious conduct that occurred in the United States;[13] (6) the claim is made pursuant to an arbitration agreement;[14] or (7) the claim seeks money damages against a designated state sponsor of terrorism for injuries arising from a terrorist act.[15]

The exception for designated state sponsors of terrorism provides jurisdiction over cases involving designated "state sponsor[s] of terrorism" in suits involving "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."[16] However, the exception seems to apply only to countries designated by the U.S. Department of State as state sponsors of terrorism.[17] This list currently includes Iran, Sudan, and Syria.[18] At the time suit was brought in the *In re Terrorist Attacks* litigation, the previous terrorism exception remained in force.

Jurisdiction in Cases Against Foreign Defendants

Before asserting jurisdiction to accept a case, a federal court[19] must establish its authority over the dispute involved and the parties to the litigation. In other words, courts must assert both subject matter jurisdiction over each claim and personal jurisdiction over each defendant in a case. For

[9] 28 U.S.C. §1605(a).

[10] 28 U.S.C. §1605(b).

[11] The commercial activities exception applies if a foreign state (1) conducts the relevant commercial activity in the United States; (2) performs an act in the United States related to the commercial activity in question; or (3) conducts commercial activity that causes a "direct effect" in the United States. 28 U.S.C. §1605(a)(2).

[12] The expropriation exception applies if rights in property have been taken in violation of international law and the property at issue (or property exchanged for the property at issue) is present in the United States in connection with a commercial activity carried out by the foreign state, or the property at issue (or property exchanged for the property at issue) is owned or operated by the agency or instrumentality of a foreign state that is engaged in commercial activity in the United States. 28 U.S.C. §1605(a)(3). The property rights exception applies if "the property rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue." 28 U.S.C. §1605(a)(4).

[13] 28 U.S.C. §1605(a)(5).

[14] 28 U.S.C. §1605(a)(6).

[15] 28 U.S.C. §1605A.

[16] *Id.* Previously codified at 28 U.S.C. §1605(a)(7), the terrorist state exception has served as the basis for significant litigation since Congress added it to the FSIA in 1996. The exception has also spurred legal disputes over attachment of assets. As a result, it has been amended several times, most recently by Section 1083 of the National Defense Authorization Act for FY2008, which provided a new federal cause of action for lawsuits that rely on the exception and added provisions regarding attachment of foreign assets to facilitate satisfaction of money damages awards. P.L. 110-181. For information on suits against terrorist states, generally, see CRS Report RL31258, *Suits Against Terrorist States by Victims of Terrorism*, by Jennifer K. Elsea.

[17] 28 U.S.C. §1605A(a)(2)(i)(I) provides that a "claim under this section" shall be heard if "the foreign state was designated as a state sponsor of terrorism" at the relevant time. 28 U.S.C. §1605A(a)(1) seems to remove immunity more broadly.

[18] 22 C.F.R. §126.1(d).

[19] Although state courts occasionally hear cases involving foreign defendants, cases involving foreign states or foreign officials are usually removed to federal courts under 28 U.S.C. §1441(d). For this reason, this discussion focuses on jurisdiction in federal courts.

cases involving foreign defendants, the analyses for subject matter and personal jurisdiction differ according to whether the FSIA applies.

Subject Matter Jurisdiction

For claims by U.S. plaintiffs against foreign non-state defendants to whom the FSIA does not apply—for example, claims against individuals or non-government owned corporations—federal law authorizes subject matter jurisdiction as long as the "amount in controversy" exceeds $75,000.[20]

In contrast, for claims against foreign states and their instrumentalities, the FSIA is a jurisdictional gatekeeper. The FSIA denies subject matter jurisdiction over claims against foreign defendants entitled to immunity.[21] Conversely, the FSIA authorizes subject matter jurisdiction over claims in which a foreign state would be entitled to immunity under the FSIA but for the application of an exception.[22] Individual foreign officials are not covered by the FSIA if they are sued in their capacity as individuals, but may be immune from suit under the common law of foreign sovereign immunity.[23] One such defendant, the former president of two of the Saudi-run charities sued for alleged involvement in funding the 9/11 terrorist attacks, prevailed in a motion to dismiss the lawsuit against him on the basis of common-law foreign sovereign immunity.[24]

Personal Jurisdiction

Personal jurisdiction is the second threshold hurdle for assertion of judicial authority in cases involving foreign defendants. Whereas subject matter jurisdiction governs courts' power over particular claims, personal jurisdiction governs courts' power over particular defendants. Thus, even if a court establishes jurisdiction over the subject matter of a claim, it cannot exercise its authority over a defendant for whom it lacks personal jurisdiction.[25]

Personal jurisdiction requires both statutory authority and satisfaction of Fifth Amendment due process standards. As with subject matter jurisdiction, statutory authority for personal jurisdiction over foreign defendants follows one of two distinct routes according to the FSIA's application. If the defendant is a foreign state or its agency or instrumentality, personal jurisdiction is statutorily authorized under the FSIA if subject matter jurisdiction is established.[26] Alternatively, for a

[20] 28 U.S.C. §1332(a).

[21] 28 U.S.C. §1330(a).

[22] *See* Republic of Austria v. Altmann, 541 U.S. 677, 691 (2004) ("'At the threshold of every action in a district court against a foreign state, ... the court must satisfy itself that one of the [FSIA] exceptions applies,' as 'subject-matter jurisdiction in any such action depends' on that application" (quoting Verlinden v. Cent. Bank of Nigeria, 461 U.S. 480, 493-94 (1962)).

[23] Samantar v. Yousuf, 560 U.S. 305 (2010). For more information about foreign official immunity, see CRS Report R41379, *Samantar v. Yousef: The Foreign Sovereign Immunities Act (FSIA) and Foreign Officials*, by Jennifer K. Elsea.

[24] *In re* Terrorist Attacks on September 11, 2001, 122 F. Supp. 3d 181 (S.D.N.Y. 2015).

[25] *In rem* jurisdiction is an alternative jurisdictional basis permitting suits in some admiralty cases and in cases in involving immovable property. *In rem* jurisdiction does not authorize judicial power over particular defendants; rather, it provides jurisdiction over property located in the United States. As a practical matter, *in rem* jurisdiction is unlikely to serve as a basis for a defendant to which the FSIA applies, because the FSIA's exceptions effectively cover *in rem* jurisdiction. For this reason, in *Permanent Mission of India to the United Nations v. City of New York*, a case involving real property located in the United States, the Supreme Court essentially ignored any potential analysis of *in rem* jurisdiction and focused instead on the interpretation of the property exception under the FSIA. 551 U.S. 193 (2007).

[26] 28 U.S.C. §§1330(b), 1608.

defendant who is not a foreign state or its agency or instrumentality, the ordinary procedure for obtaining statutory authority for personal jurisdiction applies; typically, a federal court must find statutory authority for personal jurisdiction in the laws of the state in which it sits.[27]

However, constitutional limits apply regardless of a statutory basis for personal jurisdiction. Under the due process clause, personal jurisdiction is constitutional if (1) defendants have had "certain minimum contacts with" the judicial forum attempting to assert jurisdiction, and (2) asserting such jurisdiction "does not offend traditional notions of fair play and substantial justice."[28] The type and quantity of contacts necessary to constitute "minimum contacts" differ according to the type of personal jurisdiction—general or specific—that applies. General jurisdiction, which allows a court to exercise jurisdiction over a foreign defendant for any claim, does not require contacts related to the specific claim in the case but instead requires "continuous and systematic" contacts with a forum.[29] Conversely, specific jurisdiction, which limits a court's jurisdiction over a defendant to claims in a particular case, involves no "continuous and systematic" requirement; instead, it requires that a defendant's contacts with the forum "relate to" or "arise out of" the claim at issue in the case.[30]

U.S. Court of Appeals Decision in *In Re Terrorist Attacks on September 11, 2001* (*"Terrorist Attacks III"*)

In August 2008, the U.S. Court of Appeals for the Second Circuit (Second Circuit) affirmed dismissals of claims against the Kingdom of Saudi Arabia, a Saudi charity, Saudi princes, and a Saudi banker in *In re Terrorist Attacks on September 11, 2001*.[31] Plaintiffs in the case were victims of the September 11 terrorist attacks. They alleged that the Saudi defendants had supported Al Qaeda's financial backers prior to the attacks and were therefore civilly liable for plaintiffs' injuries. However, the court of appeals did not reach the merits of these allegations.

Instead, the court held that U.S. courts lack jurisdiction over the claims against the Saudi defendants.[32] The legal bases for this holding were lack of subject matter jurisdiction under the FSIA and lack of personal jurisdiction. The most significant aspects of the court of appeals' opinion were interpretations of the FSIA, namely (1) its interpretation of "agency or instrumentality" under the FSIA as extending both to the Saudi charity and to individuals sued in their official capacities, and (2) its interpretation of the commercial activities and tort exceptions under the FSIA as having a narrower scope than plaintiffs had advocated.

The Supreme Court later abrogated the first of these holdings,[33] and the Second Circuit reversed its own position with respect to the tort exception to foreign sovereign immunity.[34] In December

[27] Fed. R. Civ. P. 4(k). However, most U.S. states' so-called "long-arm" statutes extend personal jurisdiction to the extent authorized under the U.S. Constitution. Thus, in many cases, identical statutory and constitutional analyses apply to personal jurisdiction questions.

[28] Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (internal quotations omitted).

[29] Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408, 416 (1984) (internal quotation marks omitted).

[30] *Id.* at 414 n.8.

[31] *Terrorist Attacks III*, 538 F.3d 71 (2d Cir. 2008).

[32] *Id.* at 75-76.

[33] The Supreme Court's 2010 decision in Samantar v. Yousuf, 560 U.S. 305 (2010), rejected the majority position among the judicial circuits holding that individual foreign officials are "agencies or instrumentalities" of the foreign (continued...)

2013, the Second Circuit ordered these claims against Saudi Arabia and its agencies or instrumentalities be reinstated in the interest of justice to determine whether the tort exception applies.[35] The district court again dismissed the claims based on foreign sovereign immunity,[36] and the case is on appeal at the U.S. Court of Appeals for the Second Circuit.

Background

In re Terrorist Attacks of September 11, 2001 (*In re Terrorist Attacks*) is a case consolidated for pre-trial purposes in the U.S. District Court for the Southern District of New York.[37] The Second Circuit Court of Appeals' opinion reviewed dismissals of only a subset of the claims at issue in the case.

Plaintiffs in *In re Terrorist Attacks* are individuals and businesses injured by the September 11 terrorist attacks. They brought claims based on state and federal tort law and various federal laws, including the Torture Victim Protection Act, for injuries suffered as a result of the attacks.[38]

The dismissed claims fall into four categories: (1) claims against the Kingdom of Saudi Arabia; (2) claims against four Saudi princes in their official capacities; (3) claims against the Saudi High Commission for Relief to Bosnia and Herzegovina (the SHC), a charitable organization operated in connection with the Saudi government; and (4) claims against a banker and Saudi princes in their personal capacities.[39] Underlying all of the claims was the allegation that defendants had "played a critical role in the September 11 attacks by funding Muslim charities that, in turn, funded al Qaeda."[40]

The appeals court in 2008 affirmed dismissals of the first three sets of claims for lack of subject matter jurisdiction under the FSIA. Because the FSIA precludes courts from asserting jurisdiction over claims against foreign states, one of the FSIA exceptions must apply before a U.S. court may assert jurisdiction over the Kingdom of Saudi Arabia or any of its "agencies or instrumentalities." As discussed below, the Second Circuit held that none of the FSIA exceptions applied.

The fourth set of claims (those brought against princes in their personal capacities) fell outside of the scope of the FSIA. Nonetheless, as discussed below, the court dismissed those claims for lack of personal jurisdiction.

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government. Instead, foreign officials are not covered by the FSIA but may be entitled to immunity under the common law. For more information about foreign official immunity, see CRS Report R41379, *Samantar v. Yousef: The Foreign Sovereign Immunities Act (FSIA) and Foreign Officials*, by Jennifer K. Elsea.

[34] Doe v. Bin Laden, 663 F. 3d 64 (2d Cir. 2011) (per curiam).

[35] *In re* Terrorist Attacks on September 11, 2001, 741 F.3d 353 (2d Cir. 2013), *cert denied*, 134 S. Ct. 2875 (2014). Before the court was the district court's denial of the plaintiffs' motion for relief from judgment pursuant to Rule 60(b) of the Federal Rules of Civil Procedure (Fed. R. Civ. Pro.). The appellate court found that relief was justified based on the fact that it had permitted similarly situated plaintiffs in the same set of cases to bring suit against a non-terrorist state after overturning its reasoning with respect to the tort exception to the FSIA.

[36] *In re* Terrorist Attacks on September 11, 2001 (*Terrorist Attacks*), 134 F. Supp. 3d 774 (S.D.N.Y. 2015).

[37] *Terrorist Attacks III*, 538 F.3d at 78.

[38] *Id*. at 75.

[39] *Id*. at 76-78.

[40] *Id* at 76.

Charity and Princes as "Agencies and Instrumentalities" of the Kingdom

Because a foreign state's "agency or instrumentality" is entitled to the same immunity to which the state itself is entitled under the FSIA, a key threshold question was whether the SHC and the princes sued in their official capacities qualified as agencies or instrumentalities under the FSIA. The FSIA defines "agency or instrumentality" as any entity which is (1) a "separate legal person, corporate or otherwise"; (2) "an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof"; and (3) not a U.S. citizen or created under the laws of a third country.[41]

The SHC Charity

Whether the SHC was an agency or instrumentality turned on whether it was an "organ" of the Kingdom of Saudi Arabia.[42] The court applied a multi-factor test, derived from a previous Second Circuit decision and from decisions from other circuits, to determine whether SHC was such an "organ."[43] Specifically, the court applied the following five criteria: "(1) whether the foreign state created the entity for a national purpose; (2) whether the foreign state actively supervises the entity, (3) whether the foreign state requires the hiring of public employees and pays their salaries, (4) whether the entity holds exclusive rights to some right in the [foreign] country; and (5) how the entity is treated under foreign state law."[44] Emphasizing that the Saudi government had formed SHC and paid its employees, the court held that the SHC was an organ, and thus was an agency or instrumentality of the Kingdom.[45]

Officials

The plaintiffs sued four Saudi princes for actions taken within their official capacities.[46] All four princes held positions of power in the SHC; three of the princes were members of the country's "Supreme Council of Islamic Affairs," the body responsible for monitoring and approving "Islamic charitable giving both within and outside the Kingdom"; and the fourth prince was the SHC's president, in addition to his roles as a provincial governor and crown prince.[47]

Although several other federal courts of appeals had ruled on the extension of foreign sovereign immunity to foreign officials, treatment of officials under the FSIA was a question of first impression for the Second Circuit.[48] Raising a number of textual arguments and referencing the FSIA's legislative history, the court held that individuals acting within their official capacities were indeed "agencies" of their states and were therefore entitled to immunity under the FSIA to the same extent as their states.[49] The court noted that at the time the FSIA was enacted, Congress

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[41] 28 U.S.C. §1603(b).

[42] *Terrorist Attacks III*, 538 F.3d at 85 (citing 28 U.S.C. §1603(b)).

[43] *Id.* at 85-86 (citing Filler v. Hanvit Bank, 378 F.3d 213, 217 (2d Cir. 2004)).

[44] *Id.*

[45] *Id.* at 86.

[46] The four princes named were Prince Salman bin Abdulaziz al-Saud, Prince Sultan bin Abdulaziz al-Saud, Prince Naif bin Abdulaziz al-Saud, and Prince Turki al-Faisal bin Abdulaziz al-Saud. *Id*. at 77. Prince Salman has since become king.

[47] *Id.*

[48] *Id.* at 80-81.

[49] *Id.* at 84-85. The appeals court construed "agency" in the FSIA to mean "any thing or person through which action is (continued...)

expressed a desire to codify common law principles, one of which was that immunity extends to a state's officials.[50] The court also emphasized the potential erosion of immunity for foreign states if immunity extended only to government actions distinct from the actions of officials as individuals, noting that "the state cannot act except through individuals."[51]

The Second Circuit's holding was consistent with the conclusions of five of the six other federal courts of appeals that had considered whether an individual may be protected as an agent or instrumentality.[52] Only the U.S. Court of Appeals for the Seventh Circuit (Seventh Circuit) had reached the opposite conclusion.[53] In *Terrorist Attacks III*, the Second Circuit characterized the Seventh Circuit as an "outlier" on this issue.[54] However, after the Fourth Circuit also adopted the minority position,[55] the Supreme Court granted review and established the minority position as the correct one.[56] Consequently, jurisdiction over remaining Saudi officials is subject to the same inquiry that applies to other individuals and possibly a determination as to whether common law immunity applies.[57] Because the officials dismissed from this case were not part of the motion to vacate, plaintiffs did not have an opportunity to pursue their lawsuit against them on remand. Claims against them in their official capacity would likely be deemed to be claims against the state or its instrumentality in any event.

Relevant FSIA Exceptions

After holding that the FSIA applied not only to the Kingdom of Saudi Arabia but also to Saudi officials and the SHC as an agency or instrumentality of the Kingdom, the court of appeals next examined whether any FSIA exception applied. First, the court held that the terrorist state exception did not apply because the U.S. State Department has not designated the Kingdom of Saudi Arabia as a state sponsor of terrorism.[58] Next, although the court found two other exceptions—the commercial activity and tort exceptions—"potentially relevant,"[59] neither exception applied to the Saudi defendants.

(...continued)

accomplished." *Id.* at 83.

[50] *Id.* at 81-83.

[51] *Id.* at 84.

[52] The Fourth, Fifth, Sixth, Ninth, and the D.C. Circuits previously held that officials acting within their official capacities are "agents or instrumentalities" of their countries for the purpose of the FSIA. *See* Velasco v. Gov't of Indonesia, 370 F.3d 392, 399 (4th Cir. 2004); Keller v. Cent. Bank of Nigeria, 277 F.3d 811, 815 (6th Cir. 2002); Byrd v. Corporacion Forestal y Industrial de Olancho S.A., 182 F.3d 380, 388 (5th Cir. 1999); Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan, 115 F.3d 1020, 1027 (D.C. Cir. 1997); Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095, 1101-03 (9th Cir. 1990).

[53] In *Enahoro v. Abubakar*, the Seventh Circuit rejected a military junta general's immunity claim. 408 F.3d 877 (7th Cir. 2005). Focusing on the text of the FSIA, the *Enahoro* court held that the phrase "separate legal person, corporate or otherwise" within the "agency or instrumentality" definition in the statute, together with a lack of statutory references to individuals, suggested a lack of congressional intent to extend immunity to individuals. *Id*. at 881-82.

[54] *Terrorist Attacks III*, 538 F.3d at 81.

[55] Yousuf v. Samantar, 552 F.3d 371, 373 (4th Cir. 2008).

[56] Samantar v. Yousuf, 560 U.S. 305 (2010).

[57] *In re* Terrorist Attacks on September 11, 2001, 718 F. Supp. 2d 456, 466-67 (S.D.N.Y. 2010). The district court found, with respect to five foreign officials who were still defendants in the suit, that personal jurisdiction could not be established and that, therefore, there was no need to analyze whether common law immunity should be granted.

[58] *Terrorist Attacks III*, 538 F.3d at 75.

[59] *Id.* at 80.

Commercial Activities Exception

To support their argument that the commercial activities exception should apply to the Saudi defendants, the *In re Terrorist Attacks* plaintiffs characterized defendants' charitable contributions to Muslim groups as a form of money laundering.[60] The court rejected this characterization as incompatible with the Supreme Court's interpretation of the commercial activities exception.

The FSIA defines "commercial activity" as "a regular course of commercial conduct or a particular commercial transaction or act."[61] The court noted the "circularity" of this definition and relied upon the Supreme Court's definition of "commercial activity" (for the context of the FSIA exception) as "the *type* of actions by which a private party engages in 'trade and traffic or commerce.'"[62] Under this definition, the court noted that the appropriate focus in determining whether an action constitutes "commercial activity" is on an action's nature rather than its purpose. With this framework, the court upheld the district court's finding that defendants' "charitable contributions" fell outside the scope of the commercial activities exception by reason of their non-commercial nature, regardless of the contributions' alleged money laundering purpose.[63] This portion of the decision remains undisturbed.

Tort Exception

Finally, the court of appeals rejected the tort exception as inapplicable to claims against the Saudi defendants. Specifically, the court noted that Congress's purpose in enacting the tort exception was to create liability for incidents such as traffic accidents that occur in the United States.[64] Furthermore, the court was concerned about the effect that an expanded tort exception would have on the other FSIA exceptions. It emphasized that if the exception were expanded to include all conduct conceivably characterized as tortious, the tort exception would "vitiate" the terrorist state exception's limitation to designated terrorist states.[65] In a separate case, a later panel of the appellate court disagreed with this aspect of the decision, however, effectively overturning it for the Second Circuit.[66] In December 2013, the appellate court granted the plaintiffs relief from judgment[67] in the interests of justice, sending the case back to the district court to determine whether the tort exception applies or whether the defendants were entitled to immunity based on the discretionary nature of their actions.[68] The lower court was also asked to determine whether

[60] *Id.* at 90-91.

[61] 28 U.S.C. §1603(d).

[62] *Terrorist Attacks III*, 538 F.3d at 91 (citing Republic of Argentina v. Weltover, 504 U.S. 607 (1992)).

[63] Because it determined that the contributions fell outside of the scope of "commercial activities," the court did not decide whether money laundering or other criminal acts could constitute "commercial activities" under the FSIA. *Id.* at n.17.

[64] *Id.* at 87.

[65] *Id.* at 88.

[66] Doe v. Bin Laden, 663 F.3d 64 (2d Cir. 2011) (per curiam) (FSIA non-commercial tort exception could be a basis for suit against Afghanistan arising from terrorist acts of September 11, 2001).

[67] *In re* Terrorist Attacks on September 11, 2001, 741 F.3d 353 (2d Cir. 2013), *cert denied*, 134 S. Ct. 2875 (2014).

[68] 28 U.S.C. Section 1605(a)(5)(A) provides an exception to the tort exception for "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." The district court had earlier held in the alternative that the tort exception to immunity did not apply on the basis of the discretionary function limitation, a finding the appellate court did not address because it held the tort exception inapplicable at any rate.

the "entire tort" rule would apply, in which case the fact that the relevant Saudi government activity took place outside the United States would make the tort exception inapplicable.[69]

Princes Sued in Their Personal Capacities

For claims made against a Saudi banker and against several Saudi princes for actions taken in their personal capacities, subject matter jurisdiction was not precluded by the FSIA. However, the appeals court upheld the district court's determination that it lacked personal jurisdiction over the Saudi defendants sued in their personal capacities.[70]

Specifically, the court concurred with the district court's finding that the princes sued in their personal capacities lacked sufficient contacts with the forum to permit personal jurisdiction under the constitutional "minimum contacts" standard. Plaintiffs argued that the minimum contacts test was satisfied because the defendants had purposefully directed activity at the judicial forum by supporting the attacks.[71] The court rejected this argument, acknowledging that it had been a successful argument in cases where defendants were "primary participants" in the terrorist acts but holding that the banker and princes' activities were too attenuated from the actual attacks to satisfy due process requirements.[72] Similarly, the court rejected the plaintiff's argument that potential foreseeability of the terrorist attacks was a sufficient basis for establishing minimum contacts.[73] It noted that foreseeability alone is insufficient to pass constitutional muster for personal jurisdiction; instead, the constitutional standard requires "intentional" conduct, "expressly aimed" at residents in the forum.[74]

In Re Terrorist Attacks on Remand to the District Court

On remand to the district court, Judge Daniels of the U.S. District Court for the Southern District of New York dismissed the claims against the Kingdom of Saudi Arabia and the SHC, holding the FSIA tort exception does not apply because of the "entire tort" rule, and suggested that the discretionary act exception to the tort exception might otherwise apply to preclude jurisdiction.[75]

The "Entire Tort" Rule

The Second Circuit applies the so-called "entire tort" rule to determine whether the conduct of a foreign government or its instrumentality is subject to the FSIA tort exception.[76] The Supreme Court has described the tort exception as "cover[ing] only torts occurring within the territorial

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[69] The Second Circuit subsequently affirmed the dismissal of a related suit against two Saudi charities on the basis that the alleged torts they committed had occurred outside the United States. *In re* Terrorist Attacks on September 11, 2001, 714 F.3d 109 (2d Cir. 2013). For a discussion of the territorial requirements of the tort exception, see generally VED P. NANDA AND DAVID K. PANSIUS, 1 LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS §3:21.

[70] *Terrorist Attacks III*, 538 F.3d at 96.

[71] *Id.* at 79 (describing lower court's rejection of plaintiffs' allegation that "Prince Sultan purposefully directed his activities at this forum by donating to charities that he knew at the time supported international terrorism").

[72] *Id.* at 93-95.

[73] *Id.* at 94-95.

[74] *Id.*

[75] *In re* Terrorist Attacks on September 11, 2001, 134 F. Supp. 3d 774, 781 (S.D.N.Y. 2015).

[76] *See In re* Terrorist Attacks on September 11, 2001, 714 F.3d 109, 115 (2d Cir. 2013).

jurisdiction of the United States."[77] Consequently, it is insufficient to overcome immunity to allege that an injury or damage occurred within the United States; it must also be demonstrated that the defendant's tortious conduct occurred within the United States.[78] In affirming the dismissal with respect to the Saudi Joint Relief Committee (SJRC) and the Saudi Red Crescent Society (SRC), the appellate court did not appear to foreclose a finding of jurisdiction unless *all* conduct associated with the injury occurs wholly within the United States, but rather only that *some* tortious act must be committed by the defendant in the United States. In the case of the Saudi charities, the appellate court stated that all of the defendants' conduct had occurred abroad, and noted in a footnote that

> Although the September 11, 2001 attacks constitute a "tort," the SJRC and the SRC are not alleged to have participated in that "tort." Instead, the "torts" allegedly committed by the SJRC and the SRC only involve giving money and aid to purported charities that supported al Qaeda. … The September 11, 2001 attacks thus are distinct and separate from the "torts" allegedly committed by the SJRC and the SRC.[79]

Consequently, it is possible that the indirect nature of the defendants' alleged support for the terrorist attacks has some bearing on the application of the "entire tort" rule, so that a more direct role in orchestrating from abroad a terrorist attack that takes place in the United States would nevertheless qualify for jurisdiction under the tort exception.[80]

The district court found that the same considerations that applied to the charities also commanded immunity for the Kingdom and the SHC. The plaintiffs, recognizing that their allegations about indirect funding for the attacks would not satisfy the tort exception, sought to allege that the activities of certain "operational level agents and alter-egos" of Saudi Arabia within the United States in connection with the attacks are attributable to Saudi Arabia.[81] The court found that there was an insufficient factual basis to conclude that any of these individuals were employees of Saudi Arabia acting within the scope of their employment when they carried out the allegedly tortious activities in the United States.[82]

The Discretionary Act Exclusion

Neither the appellate court nor the district judge had occasion to determine whether the discretionary function exclusion to the FSIA tort exception would apply to the Saudi government and the SHC, since immunity was already protected under the "entire tort" rule. However, the district judge set forth the applicable two-part rule for determining whether immunity is retained for otherwise tortious conduct:

> (1) the acts alleged to be negligent must be discretionary, in that they involve an element of judgment or choice and are not compelled by statute or regulation, and

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[77] *Id.* at 116 (citing Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 441 (1989).

[78] *Id.* at 117 (finding allegations of personal injury, death, or property damage occurring in the United States insufficient where plaintiffs do not allege that the defendants themselves committed a single tortious act in the United States).

[79] *Id.* at 117 n.10.

[80] *See* NANDA AND PANSIUS, *supra* footnote 69 (explaining the approaches courts have taken and concluding that a plain text reading of the statute together with legislative history supports a requirement that "at most 'some' tortious act in the United States").

[81] *Terrorist Attacks*, 134 F. Supp. 3d 774 at 784.

[82] *Id.* at 786.

> (2) the judgment or choice in question must be grounded in considerations of public policy or susceptible to policy analysis. [83]

He noted the 2005 district court decision in *Terrorist Attacks I* granting the defendants immunity for decisions involving which charities to fund, specifically, the holding that "Saudi Arabia's treatment of and decisions to support Islamic charities are purely planning level 'decisions grounded in social, economic, and political policy."[84] With respect to the SHC, the previous judge had explained that "SHC's alleged misuse of funds and/or inadequate record-keeping—even if it resulted in the funds going to terrorists—was the result of a discretionary function and cannot be the basis for overcoming SHC's immunity."[85]

Courts have regarded the FSIA discretionary act exclusion as analogous to the similar exclusion for U.S. sovereign immunity in the Federal Tort Claims Act.[86] Accordingly, some courts have found the discretionary act exclusion inapplicable to tortious acts in the United States that amounted to illegal conduct.[87] A district court in the D.C. Circuit found in *Letelier v. Republic of Chile*[88] that an assassination occurring on U.S. soil under the direction of a foreign government was not a discretionary act within the meaning of the FSIA tort exception, stating the following:

> While it seems apparent that a decision calculated to result in injury or death to a particular individual or individuals, made for whatever reason, would be one most assuredly involving policy judgment and decision and thus exempt as a discretionary act under section 1605(a)(5)(A), that exception is not applicable to bar this suit. As it has been recognized, there is no discretion to commit, or to have one's officers or agents commit, an illegal act.... Whatever policy options may exist for a foreign country, it has no "discretion" to perpetrate conduct designed to result in the assassination of an individual or individuals, action that is clearly contrary to the precepts of humanity as recognized in both national and international law. Accordingly there would be no "discretion" within the meaning of section 1605(a)(5)(A) to order or to aid in an assassination and were it to be demonstrated that a foreign state has undertaken any such act in this country, that foreign state could not be accorded sovereign immunity … for any tort claims resulting from its conduct.[89]

Similarly, the Ninth Circuit has held that the discretionary act exclusion does not apply in the case of a foreign official who, while acting in his home country, orders a killing in the United States that would be a violation of the domestic law of that country.[90] Both of these cases applied the tort exception to injuries in the United States orchestrated from abroad, suggesting that the "entire tort" rule either is not in use in these appellate circuits or that it is not to be taken literally. That is, courts may tend to view direct involvement on the part of a foreign official overseas in tortious activity that takes place on U.S. territory as included in the same tort, while indirect contribution by means of lawful conduct could be viewed as at most a separate tort or as a discretionary act.

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[83] *Id.* at 781 (citing USAA Cas. Ins. Co. v. Permanent Mission of Republic of Namibia, 681 F.3d 103, 111–12 (2d Cir.2012)).

[84] *Id.* at 782 (citing *In re* Terrorist Attacks on Sept. 11, 2001 (*Terrorist Attacks I*), 349 F. Supp. 2d at 804).

[85] *Id. (*citing *In re* Terrorist Attacks on Sept. 11, 2001 (*Terrorist Attacks II*), 392 F. Supp. 2d 539, 555 (S.D.N.Y. 2005)).

[86] 28 U.S.C. §2680. *See* NANDA AND PANSIUS, *supra* footnote 69, at §3:23.

[87] NANDA AND PANSIUS, *supra* footnote 69, at §3:23.

[88] 488 F. Supp. 665 (D.D.C. 1980).

[89] *Letelier*, 488 F. Supp. at 673 (citations omitted).

[90] Liu v. Republic of China, 892 F.2d 1419, 1431 (9th Cir. 1989) (holding that the "discretionary function exception is inapplicable when an employee of a foreign government violates its own internal law").

If the appellate court reverses the district court's dismissal of the suit on "entire tort" grounds, the case will likely return to the district court for a determination of whether the suit is precluded on grounds that the alleged tortious acts retain immunity as discretionary functions.

U.S. Court of Appeals' Dismissal of Claims Against Private Banks

In a separate decision in *In re Terrorist Attacks on September 11, 2001*,[91] the U.S. Court of Appeals for the Second Circuit affirmed the dismissal of claims against five defendants whose cases had been dismissed by the district court for failure to state a claim on which relief could be granted. These defendants were (1) Al Rajhi Bank, (2) Saudi American Bank, (3) Saleh Abdullah Kamel, (4) Dallah al Baraka Group LLC, and (5) Dar Al–Maal Al–Islami ("DMI") Trust. Plaintiffs brought claims against these defendants under a common-law tort theory as well as the Anti-Terrorism Act (ATA),[92] the Alien Tort Statute (ATS),[93] and the Torture Victims' Protection Act (TVPA).[94]

The Anti-Terrorism Act

The ATA provides in 18 U.S.C. §2333 that U.S. nationals injured in their person, property, or business "by reason of an act of international terrorism" can recover treble damages, plus costs, but does not describe who can be held liable. The plaintiffs in this case alleged that the defendants were liable for knowingly providing financial support and services to charities that supported Al Qaeda, but did not identify any actions on the part of the defendants that proximately caused their injuries. Citing its recent holding in *Rothstein v. UBS AG*,[95] the appellate court held that the ATA does not encompass liability on an aiding-and-abetting theory,[96] but, rather, based on the Supreme Court's interpretation of the phrase "by reason of," requires a showing of proximate cause.[97]

The Alien Tort Statute and Other Causes of Action

The Alien Tort Statute[98] provides federal jurisdiction for tort claims brought by non-U.S. citizens seeking damages for conduct that violates the "law of nations or a treaty of the United States." While the Supreme Court in 2004 held that the statute does not provide a cause of action for such lawsuits, it permitted courts to give effect to the statute for civil actions arising from the violation of a very narrow class of international norms "defined with a specificity comparable to the features of the 18th century paradigms" that were understood to govern at the time of the ATS's drafting in 1789.[99] The Second Circuit concluded that international terrorism did not meet this

[91] 714 F.3d 118 (2013).

[92] P.L. 102-572 §1003, *codified at* chapter 113B of title 18, U.S. Code.

[93] 28 U.S.C. §1350.

[94] P.L. 102-256, *codified at* 28 U.S.C. §1350 note.

[95] 708 F.3d 82 (2d Cir. 2013).

[96] 714 F.3d at 123 (citing *Rothstein*, 708 F.3d at 97; Boim v. Holy Land Found. for Relief & Dev., 549 F.3d 685, 689 (7th Cir.2008) (en banc) (holding that "statutory silence on the subject of secondary liability means there is none")).

[97] *Id.* (citing *Rothstein*, 708 F.3d at 95; Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 267(1992) (interpreting "by reason of" in the civil RICO statute as incorporating common law proximate causation)).

[98] 28 U.S.C. §1350.

[99] Sosa v. Alvarez-Machain, 542 U.S. 692, 725 (2004). For background on the Alien Tort Statute, see CRS Report (continued...)

standard as of September 11, 2001.[100] Quoting its 2003 opinion in *United States v. Yousef*, the court stated the following:

> We regrettably are no closer now ... to an international consensus on the definition of terrorism or even its proscription; the mere existence of the phrase "state-sponsored terrorism" proves the absence of agreement on basic terms among a large number of States that terrorism violates [customary] international law. Moreover, there continues to be strenuous disagreement among States about what actions do or do not constitute terrorism, nor have we shaken ourselves free of the cliché that "one man's terrorist is another man's freedom fighter." We thus conclude ... that terrorism—unlike piracy, war crimes, and crimes against humanity—does not provide a basis for universal jurisdiction [under customary international law].[101]

The court also rejected the plaintiffs' reliance on the Torture Victim Protection Act[102] for a cause of action, following the Supreme Court's interpretation of that law as providing for a right of action only against natural persons who act under color of foreign law.[103] Finally, the court rejected the plaintiffs' complaints based on common law tort theories, holding that they did not demonstrate that the defendants breached any duty of care owed to the plaintiffs or that their actions proximately caused the plaintiffs' injuries.[104]

Legislative Developments

In *Terrorist Attacks III*, the U.S. Court of Appeals for the Second Circuit adopted narrow interpretations of the commercial activities and tort exceptions under the FSIA, appearing to preclude efforts by September 11 victims and other plaintiffs seeking recovery in U.S. courts against foreign officials and government-controlled entities like the Saudi charity. Plaintiffs' efforts to hold non-government financial institutions liable for providing material to terrorist organizations have also seemingly been stymied by the courts' interpretations of the ATA as precluding secondary liability for terrorist acts and requiring that plaintiffs demonstrate that the support alleged was a proximate cause of their injuries or losses. Several bills have been introduced in Congress that would broaden the FSIA tort exception explicitly to cover terrorist acts that occur within the United States and make other changes that could boost plaintiffs' efforts against some of the Saudi defendants.

(...continued)

R42925, *Kiobel v. Royal Dutch Petroleum Co.: Extraterritorial Jurisdiction Under the Alien Tort Statute*, by Richard M. Thompson II.

[100] *Terrorist Attacks*, 714 F.3d at 125.

[101] *Id.* (quoting United States v. Yousef, 327 F.3d 56, 106–08 (2d Cir. 2003)).

[102] P.L. 102-256 §2(a), 106 Stat. 73 (1992), *codified at* 28 U.S.C. §1350 note. The Torture Victim Protection Act provides a cause of action against "[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation" subjects an individual to torture or extrajudicial killing.

[103] *Terrorist Attacks*, 714 F.3d at 126 (citing Mohamad v. Palestinian Authority, —— U.S. ——, 132 S. Ct. 1702, 1710–11 (2012)).

[104] *Id.*

Previous Legislative Activity

The 111th Congress held a hearing to consider S. 2930, the Justice Against Sponsors of Terrorism Act,[105] which, among other measures, would have amended the tort exception to the FSIA specifically to cover terrorist attacks within the United States.

In the 112th Congress, new legislation was introduced to reduce some of the burdens faced by victims of state-sponsored terrorism in the United States who seek to bring lawsuits against foreign officials. S. 1894, the Justice Against Sponsors of Terrorism Act,[106] was ordered to be reported favorably out of the Senate Judiciary Committee in September 2012. A companion bill, H.R. 5904, did not receive further action.

Identical versions of the Justice Against Sponsors of Terrorism Act were introduced in the 113th Congress as S. 1535 and H.R. 3143. S. 1535 was reported favorably out of the Senate Judiciary Committee with some amendments to the findings and provisions addressing aiding and abetting liability under the Anti-Terrorism Act,[107] and was passed by the Senate in December 2014. The House did not vote on either version of the bill.

The bills would have amended the tort exception to the FSIA expressly to include "any statutory or common law tort claim arising out of an act of extrajudicial killing, aircraft sabotage, hostage taking, terrorism, or the provision of material support or resources for such an act.... " Although the aspect of the *Terrorist Attacks III* decision interpreting the tort exception as inapplicable to terrorist acts occurring in the United States was effectively overruled by another panel of judges,[108] it is possible that other courts could read the terrorism exception as foreclosing suits against states not designated as sponsors of terrorism. The tort exception would also have been amended to clarify that there is no rule holding that the "entire tort" must occur within the United States, but rather that such claims are covered "regardless of where the underlying tortious act or omission occurs."[109]

Additionally, the bills would have expanded liability for foreign government officials in civil actions for terrorist acts no matter where they occur by amending 18 U.S.C. Section 2337, which currently exempts all government officials. The amended version of Section 2337 would have exempted only U.S. officials. H.R. 3143would have included the provision of material support for

[105] Evaluating the Justice Against Sponsors of Terrorism Act, S. 2930: Hearing of the Crime and Drugs Subcommittee of The Senate Judiciary Committee, 111th Cong. (2010).

[106] For more analysis of H.R. 3143 and S. 1535, see CRS Report R41379, *Samantar v. Yousef: The Foreign Sovereign Immunities Act (FSIA) and Foreign Officials*, by Jennifer K. Elsea.

[107] 18 U.S.C. Sections 2331 *et seq*. provide for treble damages for injuries caused by certain acts of international terrorism. The U.S. Court of Appeals for the Second Circuit dismissed actions against banks accused of providing support to the perpetrators of the 9/11 terrorist attacks on the basis that the ATA does not encompass liability for aiding and abetting acts of international terrorism. *In re* Terrorist Attacks on September 11, 2001, 714 F.3d 118 (2d Cir. 2013), *cert. denied sub nom.* O'Neill v. Al Rajhi Bank, 134 S. Ct. 2870 (2014). For more information about aiding and abetting liability and the Justice Against Sponsors of Terrorism Act (as reported out of the Judiciary Committee, 112th Congress), including proposed revisions to the ATA, see CRS Legal Sidebar WSLG250, *Who is Liable to Pay Damages to Victims of Terrorism?*, by Jennifer K. Elsea; CRS Report R41379, *Samantar v. Yousef: The Foreign Sovereign Immunities Act (FSIA) and Foreign Officials*, by Jennifer K. Elsea.

[108] Doe v. Bin Laden, 663 F. 3d 64 & n. 10 (2d Cir. 2011) ("mini-en banc" procedure employed by circulating draft opinion to other circuit judges, which did not draw objections from any of them).

[109] S. 1535 (as passed by the Senate, 113th Cong.), §3; H.R. 3143 (113th Cong.) §3.

terrorism in the jurisdiction provision, although its revision of the ATA cause of action did not expressly include liability for material support.[110]

114th Congress, Justice Against Sponsors of Terrorism Act

The Justice Against Sponsors of Terrorism Act (JASTA) has returned to the 114th Congress as S. 2040, which the Senate passed by voice vote on May 17, 2016, after accepting an amendment in the nature of a substitute offered by Senator Cornyn, and H.R. 3815, which was introduced late in 2015 and referred to the House Judiciary Subcommittee on Constitution and Civil Justice.

Amendments to the FSIA

H.R. 3815 would amend the FSIA tort exception in 28 U.S.C. §1605(a)(5) by limiting the type of injury to "physical injury" rather than "personal injury," and specifically excluding "any claim for emotional distress or derivative injury suffered as a result of an event or injury to another person that occurs outside of the United States." It would include "any statutory or common law tort claim arising out of an act of extrajudicial killing, aircraft sabotage, hostage taking, terrorism, or the provision of material support or resources for such an act, or any claim for contribution or indemnity relating to a claim arising out of such an act" to the tortious acts or omissions for which foreign sovereign immunity may be abrogated.[111] It would also eliminate the "entire tort" rule by providing that the non-commercial tort exception covers physical injuries, deaths, and property damage or loss occurring in the United States "regardless of where the underlying tortious act or omission occurs."

The discretionary function exclusion would remain unchanged; however, the bill would include among congressional findings that "no country has the discretion to engage knowingly in the financing or sponsorship of terrorism, whether directly or indirectly."[112]

S. 2040 (as passed by the Senate) would create a new exception to the FSIA for acts of international terrorism that occur on U.S. territory, to be codified as 28 U.S.C. §1605B. "International terrorism" is defined with reference to the ATA, including the exclusion for "acts of war."[113] The amendment would dispense with the "entire tort" rule and the statutory discretionary act exclusion for such cases only, leaving current law intact with respect to the FSIA non-commercial tort exception in other cases. Under the bill, a plaintiff could seek money damages from a foreign state for physical injury to person or property or death caused by both (1) an act of international terrorism in the United States, and (2) a tortious act or acts on the part of the foreign state or official, employee, or agent of that foreign state acting within the scope of his or her employment, regardless of where the tortious conduct took place. The bill would also clarify that a tortious act or omission would not give rise to jurisdiction where it constitutes "mere negligence." Finally, it would clarify the relationship between the FSIA exception and the ATA's

[110] H.R. 3143 (113th Cong.) §4 (proposed amendment to 18 U.S.C. §2333 to enable claims against those accused of aiding and abetting acts of international terrorism or conspired with perpetrators). Section 4 of S. 1535 was amended to limit the cause of action to injuries arising from acts of international terrorism committed, planned, or authorized by a designated terrorist organization.

[111] The bill adopts the definitions from the terrorism exception in 28 U.S.C. §1605A(h) to the terms "aircraft sabotage," "extrajudicial killing," "hostage taking," and "material support or resources."

[112] H.R. 3815 §2(a)(8).

[113] 18 U.S.C. §2331.

civil liability exception precluding suits against foreign officials.[114] If the new FSIA exception applies, a U.S. national could pursue an ATA lawsuit against the foreign state.

S. 2040 would provide for exclusive federal court jurisdiction over foreign states under the new FSIA provision, and would authorize the Attorney General to intervene in such cases to seek a stay of the civil action if the Secretary of State certifies that the United States is engaged in good faith discussions with the defendant state to resolve the claims.[115] The court would be authorized to issue a stay for 180 days, which could be renewed for additional 180-day periods if the Secretary of State certifies that such negotiations remain ongoing.

Civil Liability Under the Anti-Terrorism Act

All current versions of JASTA include a finding by Congress that expresses approval in the context of civil liability under the ATA for the test established by the D.C. Circuit for aiding and abetting and conspiracy liability. The D.C. Circuit defined aiding and abetting as including the following elements:

> (1) the party whom the defendant aids must perform a wrongful act that causes an injury;
>
> (2) the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance;
>
> (3) the defendant must knowingly and substantially assist the principal violation.[116]

Conspiracy, according to the D.C. Circuit, gives rise to civil liability when it consists of

> (1) an agreement between two or more persons;
>
> (2) to participate in an unlawful act, or a lawful act in an unlawful manner;
>
> (3) an injury caused by an unlawful overt act performed by one of the parties to the agreement;
>
> (4) which overt act was done pursuant to and in furtherance of the common scheme.[117]

The bills would implement secondary liability in somewhat different ways. S. 2040 (as passed by the Senate) and H.R. 3815 would amend the ATA to provide for secondary liability in the case of an act of international terrorism planned, committed, or authorized by an entity designated as a foreign terrorist organization at the time of the planning, commission, or authorization of the attack. The House bill would also apply liability in the case of an entity designated as a foreign terrorist organization as a result of the attack that gives rise to the lawsuit. Secondary liability would attach under the Senate bill to any person who "aids and abets, by knowingly providing substantial assistance, or who conspires" with the perpetrator;[118] it also expressly adopts the definition for "person" from Section 1 of Title 1 to define who may be held secondarily liable.[119] The House bill would authorize secondary liability against anyone who aided, abetted, or conspired with the perpetrator, without clarifying what type of intent or knowledge would be

[114] 18 U.S.C. §2337(2).

[115] S. 2040 §5.

[116] Halberstam v. Welch, 705 F.2d 472, 477 (D.C. Cir. 1983).

[117] *Id.*

[118] S. 2040 §4.

[119] 1 U.S.C. §1 defines "person" to include "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." It does not appear to include foreign states.

necessary to establish liability.[120] Neither bill would explicitly elucidate whether criminal liability under the material support provisions of the ATA would also establish civil liability, as some courts have found,[121] but language in the findings section suggest the intent that the knowing or reckless provision of material support or resources to a foreign terrorist organization, whether directly or indirectly, should give rise to liability.[122]

H.R. 3815 would amend the ATA to remove the immunity of foreign officials from lawsuits as currently provided in 18 U.S.C. §2337(2). It would also add a provision to the ATA to address issues plaintiffs have confronted in establishing personal jurisdiction over foreign nationals. H.R. 3815 would declare that

> The district courts shall have personal jurisdiction, to the maximum extent permissible under the 5th Amendment to the Constitution of the United States, over any person who commits or aids and abets an act of international terrorism or otherwise sponsors such act or the person who committed such act, for acts of international terrorism in which any national of the United States suffers injury in his or her person, property, or business by reason of such an act in violation of section 2333.[123]

S. 2040 (as passed by the Senate) would leave the foreign official exclusion under the ATA intact, but, as noted above, would permit lawsuits by U.S. nationals against the foreign state itself if the new FSIA exception is triggered. Aliens as well as U.S. nationals would likely be able to bring lawsuits under causes of action other than the ATA if jurisdiction is available under the new FSIA exception.

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[120] H.R. 3815 §4.

[121] CRS Legal Sidebar WSLG250, *Who is Liable to Pay Damages to Victims of Terrorism?*, by Jennifer K. Elsea.

[122] H.R. 3815 §2(a)(9)-(10); S. 2040 §2(a)(6)-(7).

[123] H.R. 3815 §5.