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Suits Against Terrorist States By Victims of Terrorism

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Summary

In 1996 Congress amended the Foreign Sovereign Immunities Act (FSIA) to allow U.S. victims of terrorism to sue certain States responsible for terrorist acts. The terrorist state defendants have refused to appear in court, the courts have handed down large default judgments, the Clinton and Bush Administrations have intervened to block collection on those judgments, and Congress has repeatedly enacted measures to facilitate payment. Further complexity has been added by attempts in one suit to abrogate an international agreement, the enactment of retaliatory legislation in some of the terrorist States, the occupation of Iraq and suspension of its status as a terrorist State, and a proposal to compensate victims through an administrative process. Recently, a court ruled that Congress has never created a cause of action against terrorist States themselves, but only against their officials, employees and agents, and only for their private conduct, not for their official acts.

The 107th Congress enacted as part of the Terrorism Risk Insurance Act of 2002 ("TRIA")(P.L. 107-297) a provision that overrides long-standing Administration objections and allows the blocked assets of terrorist States to be used to pay the compensatory damages portions of court judgments against such States; however, the meaning of "blocked asset" has become an issue. That statute also added several judgments against Iran to the ten that had previously been designated as compensable out of U.S. funds under § 2002 of the Victims of Trafficking and Violence Protection Act of 2000 ("VTVPA") (P.L. 106-386). In the 108th Congress, the Senate adopted several riders to appropriations bills to abrogate the provision in the Algiers Accords barring the Iranian hostages from bringing suit in the *Roeder* case, but in all three cases the riders were dropped in conference. On March 20, 2003, President Bush vested title to Iraq's frozen assets in this country and ordered that most of the proceeds be used for Iraq's reconstruction rather than to compensate victims of Iraqi terrorism. The Administration then intervened in a case against Iraq by a number of POWs from the first Gulf War to vacate their judgment and ensure that Iraq's frozen assets were not used to satisfy it. (*Acree v. Republic of Iraq*). In the meantime, Iran has asked the Supreme Court to review a decision allowing a judgment-holder to attach a judgment owed to its Ministry of Defense (MOD) by a U.S. company. (*MOD v. Elahi*).

This report provides an overview of this complex issue; gives background on the doctrine of state immunity and the FSIA; details the evolution of the terrorist State exception enacted in 1996 and the judicial decisions that have followed; describes the subsequent proposals and statutes that have been enacted to help claimants obtain satisfaction of their judgments; sets forth the legal and policy arguments that have been made for and against those legislative initiatives; describes the decision in the hostages' suit against Iran and Congress' efforts to vitiate the Algiers Accords; summarizes what has happened with Iraq's assets, and summarizes proposed legislation (H.R. 1321, H.R. 865 and H.Con.Res. 93). The report also contains two appendices: Appendix I lists the cases covered by § 2002 as amended, the amount of compensation that has been paid in each case, and the source of the compensation. Appendix II lists the amount of the assets of each terrorist state currently blocked by the United States. The report will be updated as events warrant.

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Suits Against Terrorist States by Victims of Terrorism

Overview

In 1996 Congress amended the Foreign Sovereign Immunities Act (FSIA)[1] to allow civil suits by U.S. victims of terrorism against certain States responsible for, or complicit in, such terrorist acts as torture, extrajudicial killing, aircraft sabotage, and hostage taking.[2] The amendment enjoyed broad support in Congress, but was initially resisted by the executive branch. President Clinton signed the amendment into law after the Cuban air force shot down a civilian plane over international waters, an incident that resulted in one of the first lawsuits under the new FSIA exception. After a court found that the waiver of sovereign immunity did not itself create a cause of action, Congress passed the Flatow Amendment to create a cause of action.[3] Numerous court judgments awarding plaintiffs substantial compensatory and punitive damages were to follow,[4] until the D.C. Circuit in 2004 interpreted the

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[1] 28 U.S.C. §§ 1602 *et seq.* The exception allows suit to be brought against the agencies and instrumentalities of such States as well.

[2] P.L. 104-132, Title II, §221 (April 23, 1996); 110 Stat. 1241; 28 U.S.C.A. § 1605(a)(7).

[3] "Civil Liability for Acts of State Sponsored Terrorism," P.L. 104-208, Title I, §101(c) [Title V, § 589] (Sept. 30, 1996), 110 Stat. 3009-172; codified at 28 U.S.C.A. § 1605 note, provides:

> (a) an official, employee, or agent of a foreign state designated as a state sponsor of terrorism designated under section 6(j) of the Export Administration Act of 1979 (50 App. U.S.C. 2405(j)) while acting within the scope of his or her office, employment, or agency shall be liable to a United States national or the national's legal representative for personal injury or death caused by acts of that official, employee, or agent for which the courts of the United States may maintain jurisdiction under section 1605(a)(7) of title 28, United States Code, for money damages which may include economic damages, solatium, pain, and suffering, and punitive damages if the acts were among those described in section 1605(a)(7).
>
> (b) Provisions related to statute of limitations and limitations on discovery that would apply to an action brought under 28 U.S.C. 1605(f) and (g) shall also apply to actions brought under this section. No action shall be maintained under this action if an official, employee, or agent of the United States, while acting within the scope of his or her office, employment, or agency would not be liable for such acts if carried out within the United States.

[4] The FSIA provides that States are not liable for punitive damages but that such damages may be awarded against their agencies and instrumentalities. *See* 28 U.S.C.A. § 1606. Although the D.C. Circuit has found that punitive damages do not apply to agencies of foreign governments that perform primarily governmental rather than commercial services because such agencies are considered to be the State itself rather than an agent, Roeder v. Islamic Republic of Iran, 333 F.3d 228, 234 (D.C. Cir. 2003), *cert. denied* 124 S.Ct. 2836

(continued...)

provisions in a way that will make further awards significantly more difficult for plaintiffs to win. Default judgments won against terrorist States have proved difficult to enforce, and efforts by plaintiffs to attach frozen assets and diplomatic or consular property, while receiving support from Congress, have met with opposition from the executive branch. The use of U.S. funds to pay portions of some judgments has drawn criticism. The Supreme Court has declined to review a case involving former prisoners of war who had won a judgment against Iraq, but may address the scope of the FSIA terrorism exception if it decides to grant certiorari in a challenge by Iran to one of the default judgments entered against it.[5] Congress may be asked to enact legislation to provide for more even compensation for victims of terrorism.

This report provides background on the international law doctrine of state immunity and the FSIA; summarizes the 1996 amendments creating an exception to state immunity under the FSIA for suits against terrorist States; details the subsequent cases and the legislative initiatives to assist claimants in efforts to collect on their judgments; sets forth the legal and policy arguments that were made for and against those efforts; summarizes the decision in *Roeder v. Islamic Republic of Iran* and efforts to help the plaintiffs and override the Algiers Accords; describes the Administration's actions vesting title to Iraq's frozen assets in the United States and making them unavailable to former POWs in *Acree v. Republic of Iraq* and other plaintiffs who have won judgments against Iraq; discusses an effort by Iran to void a judgment against it (*Ministry of Defense v. Elahi*); notes the laws in certain terrorist States that allow suits against the U.S. for similar acts; and analyzes options for creating an alternative scheme to provide compensation to victims of terrorism.

The report also contains two appendices: Appendix I lists the cases covered by § 2002 of the Victims of Trafficking and Violence Protection Act of 2000 (P.L. 106-386), the amount of compensation that has been paid in each case, and the source of the compensation. Appendix II lists the amount of the assets of each terrorist State currently blocked by the United States. The report will be updated as events warrant.

Background on State Immunity

Customary international law historically afforded States complete immunity from being sued in the courts of other States. In the words of Chief Justice Marshall, this immunity was rooted in the "perfect equality and absolute independence of sovereigns" and the need to maintain friendly relations. Although each nation has

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[4] (...continued)
(2004), some courts continue to award punitive damages against foreign military and intelligence agencies. Total punitive damages awarded under the terrorism exception to the FSIA now amount to more than $5.5 billion.

[5] Ministry of Defense and Support for Armed Forces of Islamic Republic of Iran v. Cubic Defense Systems, Inc., 385 F.3d 1206 (9th Cir. 2004), *petition for cert. filed sub nom* Ministry of Defense and Support for Armed Forces of Islamic Republic of Iran v. Elahi, 73 USLW 3498 (Feb 11, 2005)(NO. 04-1095)(enforcement of judgment by intervenor who had judgment against Iran based on FSIA terrorism exception).

"full and absolute" jurisdiction within its own territory, the Chief Justice stated, that jurisdiction, by common consent, does not extend to other sovereign States:

> One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to this independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.
>
> This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.[6]

During the last century, however, this principle of absolute state immunity gradually came to be limited after a number of States began engaging directly in commercial activities. To allow States to maintain their immunity in the courts of other States even while engaged in ordinary commerce, it was said, "gave States an unfair advantage in competition with private commercial enterprise" and denied the private parties in other nations with whom they dealt their normal recourse to the courts to settle disputes.[7] As a consequence, numerous States immediately before and after World War II adopted a restrictive principle of state immunity, which preserved state immunity for most cases but allowed domestic courts to exercise jurisdiction over suits against foreign States for claims arising out of their commercial activities.

The United States adopted this restrictive principle by administrative action in 1952,[8] and the State Department began advising courts on a case-by-case basis whether a foreign sovereign should be entitled to immunity from the court's jurisdiction based on the nature of the claim. In 1978 Congress codified the principle in the Foreign Sovereign Immunities Act (FSIA), so that the decision no longer

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[6] The Schooner Exchange, 11 U.S. (7 Cranch) 116, 137 (1812) (holding a French warship to be immune from the jurisdiction of a U.S. court). In Berizzi Bros. Co. v. S.S. Pesaro, 271 U.S. 562 (1926), the Court held this principle of immunity to apply as well to State-owned commercial ships.

[7] AMERICAN LAW INSTITUTE, 1 RESTATEMENT OF THE LAW THIRD: THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1987) 391.

[8] The Acting Legal Adviser of the Department of State, Jack B. Tate, stated in a letter to the Acting Attorney General that in future cases the Department would follow the restrictive principle. 26 *Department of State Bulletin* 984 (1952). Previously, when a case against a foreign state arose, the State Department routinely asked the Department of Justice to inform the court that the government favored the principle of absolute immunity; and the courts usually acceded to this advice. The Tate letter meant that the government would no longer make this suggestion in cases against foreign States involving commercial activity.

depended on a determination by the State Department.[9] The FSIA states the general principle that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States"[10] and then sets forth several exceptions. The primary exceptions are for cases in which "the foreign state has waived its immunity either expressly or by implication," cases in which "the action is based upon a commercial activity carried on in the United States by the foreign state," and suits against a foreign State for personal injury or death or damage to property occurring in the United States as a result of the tortious act of an official or employee of that State acting within the scope of his office or employment.[11] For most types of claims covered, the FSIA also provides that the commercial property of a foreign State in the United States may be attached in satisfaction of a judgment against that State regardless of whether the property was used for the activity on which the claim was based.[12] However, assets belonging to separate instrumentalities of a foreign government are not generally available to satisfy claims against the foreign government itself or against *other* agencies and instrumentalities in which that government has an interest.

The Anti-Terrorism and Effective Death Penalty Act of 1996: Civil Suits Against Terrorist States by Victims of Terrorism

In 1996 Congress added another exception to the FSIA to allow the federal and state courts to exercise jurisdiction over foreign States and their agencies and instrumentalities in civil suits by U.S. victims of terrorism.[13] The Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) amended the FSIA to provide that a foreign State is not immune from the jurisdiction of the federal and state courts in cases 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 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. . . .[14]

As predicates for such suits, the AEDPA amendment required that the foreign State be designated as a State sponsor of terrorism by the State Department at the time the act occurred or later so designated as a consequence of the act in question,[15] that

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[9] 28 U.S.C.A. §§ 1602 *et seq.*

[10] *Id.* § 1604.

[11] *Id.* § 1605.

[12] *Id.* § 1610.

[13] P.L. 104-132, Title II, § 221 (April 24, 1976); 110 Stat. 1241; 28 U.S.C.A. § 1605(a)(7).

[14] *Id.*

[15] The State Department identifies state sponsors of terrorism pursuant to § 6(j) of the Export Administration Act of 1979 (50 App. U.S.C.A. § 2405(j)), § 620A of the Foreign (continued...)

either the claimant or the victim of the act of terrorism be a U.S. national,[16] and that the defendant State be given a prior opportunity to arbitrate the claim if the act on which the claim is based occurred in that State. The act also provided that the terrorist States and their agencies and instrumentalities would be liable for compensatory damages, and the agencies and instrumentalities for punitive damages as well.[17] The act further allowed the commercial property of a foreign State in the United States to be attached in satisfaction of a judgment against that State under this amendment regardless of whether the property was involved in the act on which the

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[15] (...continued)
Assistance Act (22 U.S.C.A. § 2371), and § 40(d) of the Arms Export Control Act (22 U.S.C.A. § 2780(d)). The list, which is published annually, currently includes Cuba, Iran, Libya, North Korea, Sudan, and Syria. *See* 22 CFR §126.1(a) (2002). Iraq is no longer subject to sanctions applicable to terrorist States. *See infra* note 104 and accompanying text.

[16] As initially enacted, the statute provided that a terrorist State could not be sued if "either the claimant or victim was not a U.S. national." Concern that the provision could be read to require that both the claimant and victim be U.S. nationals and that, which would have excluded some of the families injured by the terrorist bombing of Pan Am 103 over Lockerbie, Scotland, led Congress to amend the language in 1997 to bar such suits only if "neither the claimant nor the victim was a national of the United States ...." *See* P.L. 105-11, 105th Cong., 1st Sess. (April 25, 1997) and H.R. REP. NO. 105-48 (April 10, 1997).

[17] 28 U.S.C.A. § 1605 note.

claim was based.[18] After previously opposing similar proposals, the Clinton Administration supported these changes in the FSIA.

After a court found that the waiver of sovereign immunity did not itself create a cause of action, Congress passed the Civil Liability for Acts of State Sponsored Terrorism (known as the "Flatow Amendment")[19] to clarify that a cause of action

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[18] *Id.* § 1610(b)(2). These amendments to the FSIA did not receive much debate or explanation during the AEDPA's consideration by the Senate and the House. Provisions similar to what was enacted were included in both the Senate and the House measures as introduced (S. 735, § 221 and H.R. 2703, § 803, respectively). But no committee report was filed on either bill; and the only change that appears to have been made during floor debate was a slight amendment by Rep. Hyde in a manager's amendment in the House imposing a 10-year statute of limitations on such suits and slightly modifying the provision concerning pre-trial arbitration. *See* 142 CONG. REC. H2166 (daily ed., March 13, 1996). The report of the conference committee simply stated as follows:

> Section 221 — House section 803 recedes to Senate section 206, with modifications. This subtitle provides that nations designated as state sponsors of terrorism under section 6(j) of the Export Administration Act of 1979 will be amenable to suit in U.S. courts for terrorist acts. It permits U.S. federal courts to hear claims seeking money damages for personal injury or death against such nations and arising from terrorist acts they commit, or direct to be committed, against American citizens or nationals outside of the foreign state's territory, and for such acts within the state's territory if the state involved has refused to arbitrate the claim.

H.R. CONF. REP. NO. 104-518 (1996).

However, the House had adopted a similar measure during the second session of the previous Congress (H.R. 934). The Department of State and the Department of Justice had opposed the legislation at that time. The House Judiciary Committee explained the rationale of the bill as follows:

> The difficulty U.S. citizens have had in obtaining remedies for torture and other injuries suffered abroad illustrates the need for remedial legislation. A foreign sovereign violates international law if it practices torture, summary execution, or genocide. Yet under current law a U.S. citizen who is tortured or killed abroad cannot sue the foreign sovereign in U.S. courts, even when the foreign country wrongly refuses to hear the citizen's case. Therefore, in some instances a U.S. citizen who was tortured (or the family of one who was murdered) will be without a remedy.
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> H.R. 934 stands for the principle that U.S. citizens who are grievously mistreated abroad should have an effective remedy for damages in some tribunal, either in the country where the mistreatment occurred or in the United States. To this end, the bill would add a new exception to the FSIA that would allow suits against foreign sovereigns that subject U.S. citizens to torture, extrajudicial killings or genocide and do not provide adequate remedies for those harms.

H.R. REP. NO. 103-702, 103d Cong., 2d Sess. (Aug. 16, 1994), at 4.

[19] "Civil Liability for Acts of State Sponsored Terrorism," P.L. 104-208, Title I, §101(c) [Title V, § 589] (Sept. 30, 1996), 110 Stat. 3009-172; codified at 28 U.S.C.A. § 1605 note, provides:

> (a) an official, employee, or agent of a foreign state designated as a state sponsor of terrorism designated under section 6(j) of the Export Administration Act of 1979 (50

(continued...)

existed against the agencies and instrumentalities of States whose sovereign immunity was abrogated pursuant to the exception. The Flatow Amendment gives parties injured or killed by a terrorist act covered by the FSIA exception, or their legal representatives, a cause of action for suits against "an official, employee, or agent of a foreign state designated as a state sponsor of terrorism" who commits the terrorist act "while acting within the scope of his or her office, employment, or agency ...." if a U.S. government official would also be liable for such actions. This measure was adopted as part of the Omnibus Consolidated Appropriations Act for Fiscal 1997 without apparent debate.[20] The judge in the *Flatow* case held Iran liable under a theory of *respondeat superior*, and awarded punitive damages. Many courts followed the Flatow precedent, awarding both compensatory and punitive damages against a foreign State despite the textual limitations in the FSIA exception. However, the Court of Appeals for the District of Columbia held in 2004 that the amendment does not provide a cause of action against terrorist States themselves,[21] including governmental agencies that do not meet the definition of "agencies and instrumentalities" under the FSIA.[22]

105th Congress — Enactment of Section 117 of the Treasury and General Government Appropriations Act for Fiscal Year 1999

Several suits were quickly filed against Cuba and Iran pursuant to the new provisions. Neither State recognized the jurisdiction of the U.S. courts in such suits, however; and both refused to appear in court to mount a defense. The FSIA provides that a court may enter a judgment by default in such a situation if "the claimant establishes his claim or right to relief by evidence satisfactory to the court."[23] After making the proper finding, several federal trial courts entered default judgments

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[19] (...continued)

> App. U.S.C. 2405(j)) while acting within the scope of his or her office, employment, or agency shall be liable to a United States national or the national's legal representative for personal injury or death caused by acts of that official, employee, or agent for which the courts of the United States may maintain jurisdiction under section 1605(a)(7) of title 28, United States Code, for money damages which may include economic damages, solatium, pain, and suffering, and punitive damages if the acts were among those described in section 1605(a)(7).
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> (b) Provisions related to statute of limitations and limitations on discovery that would apply to an action brought under 28 U.S.C. 1605(f) and (g) shall also apply to actions brought under this section. No action shall be maintained under this action if an official, employee, or agent of the United States, while acting within the scope of his or her office, employment, or agency would not be liable for such acts if carried out within the United States.

[20] The provision appears to have first arisen in the House-Senate conference committee on H.R. 3610. *See* H.R. REP. NO. 104-863, 104th Cong., 2d Sess. (September 28, 1996).

[21] Cicippio-Puleo v. Iran, 353 F.3d 1024 (D.C. Cir. 2004), *followed in* Acree v. Republic of Iraq, 370 F.3d 41 (D.C. Cir. 2004), *cert. denied* __ U.S. __ (2005).

[22] 28 U.S.C. § 1603(b).

[23] 28 U.S.C.A. § 1608(e).

holding Iran and Cuba to be culpable for particular acts of terrorism and awarding the plaintiffs substantial amounts in compensatory and punitive damages.[24]

Neither Iran nor Cuba had any inclination to pay the damages that had been assessed in these cases. As a consequence, the plaintiffs and their attorneys sought to attach certain properties and other assets owned by the States in question that were located within the jurisdiction of the United States to satisfy the judgments.

In the case of *Flatow v. Islamic Republic of Iran, supra*, plaintiffs sought to attach the embassy and several diplomatic properties of Iran located in Washington, D.C., the proceeds that had accrued from the rental of those properties after diplomatic relations had been broken in 1979, and an award that had been rendered by the Iran-U.S. Claims Tribunal in favor of Iran and against the U.S. government but which had not yet been paid.[25] The Clinton Administration opposed these efforts, arguing that the diplomatic properties and the rental proceeds were essentially sovereign non-commercial property that remained immune to attachment pursuant to the FSIA. In addition, the Administration argued that it was obligated to protect Iran's diplomatic and consular properties under the Vienna Convention on Diplomatic Relations[26] and the Vienna Convention on Consular Relations[27] and that using such properties to satisfy court judgments would expose U.S. diplomatic and consular properties around the world to similar treatment by other countries. The Administration further argued that the funds set aside to pay an award to Iran by the decision of the Claims Tribunal were still U.S. property and, as such, were immune

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[24] *See* Alejandre v. Republic of Cuba, 996 F.Supp. 1239 (S.D. Fla. 1997) ($50 million in compensatory damages and $137.7 million in punitive damages awarded to the families of three of the four persons who were killed when Cuban aircraft shot down two Brothers to the Rescue planes in 1996); Flatow v. Islamic Republic of Iran, 999 F.Supp. 1 (D.D.C. 1998) ($27 million in compensatory damages and $225 million in punitive damages awarded to the father of Alisa Flatow, who was killed in 1995 by a car bombing in the Gaza Strip by Islamic Jihad, an organization which the court found to be funded by Iran); and Cicippio v. Islamic Republic of Iran, 18 F.Supp. 2d 62 (D.D.C. 1998) ($65 million awarded in compensatory damages to three persons (and two of their spouses) who were kidnaped, held hostage, and tortured in Lebanon in the mid-1980s by Hezbollah, an organization which the court found to be funded by Iran).

[25] The Iran-U.S. Claims Tribunal at the Hague was created pursuant to provisions in the Algiers Accords of 1981 that led to the release of the U.S. hostages. Claims by U.S. nationals against Iran that were outstanding at the time of the release of the hostages as well as claims by Iranian nationals against the United States and contractual claims between the two governments were made subject to case-by-case arbitration by the Tribunal. Most Iranian assets held by U.S. persons or entities at that time were transferred to the Federal Reserve Bank of New York and were either returned to Iran or were forwarded to an escrow account for use in satisfying judgments rendered against Iran by this Tribunal. *See* the various agreements between the U.S. and Iran relating to the release of the hostages (known as the Algiers Accords), 20 ILM 223-240 (Jan. 1981); Executive Orders 12276-12284, 46 Fed. Reg. 7913 (Jan. 19, 1981); and 31 CFR Part 535.

[26] 23 UST 3227 (1972).

[27] 21 UST 77 (1969).

from attachment due to U.S. sovereign immunity. The court agreed and quashed the writs of attachment.[28]

Efforts were also mounted in both the *Flatow* case and in *Alejandre v. Republic of Cuba*, *supra* (the Brothers to the Rescue case), to attach assets of Iran and Cuba in the United States that had been blocked by the U.S. government.[29] Iran's assets in the United States had been frozen under the authority of the International Emergency Economic Powers Act (IEEPA)[30] at the time of the hostage crisis in 1979.[31] However, under the Algiers Accords reached to resolve the crisis, most of those assets had either been returned to Iran or placed in an escrow account in England subject to the decisions of the Iran-U.S. Claims Tribunal, an arbitral body set up by the Algiers Accords to resolve remaining disputes between the two countries or their nationals. Cuba's assets in the United States, in turn, had been blocked since the early 1960s under the authority of the Trading with the Enemy Act (TWEA).[32] The Clinton Administration opposed the efforts to allow access to these blocked assets as well. It argued that such assets are useful, and historically have been used, as leverage in working out foreign policy disputes with other countries (as in the Iranian hostage situation) and that they will be useful in negotiating the possible future re-establishment of normal relations with Iran and Cuba. The Administration also contended that numerous other U.S. nationals had legitimate (and prior) claims against these countries that would be frustrated if the assets were used solely to compensate the recent victims of terrorism.[33] The Administration also

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[28] Flatow v. Islamic Republic of Iran, 74 F.Supp.2d 18 (D.D.C. 1999) (quashing a writ of attachment for U.S. Treasury funds) and Flatow v. Islamic Republic of Iran, 76 F.Supp.2d 16 (D.D.C. 1999) (quashing writs of attachment for Iran's embassy and chancery and two bank accounts holding proceeds from the rental of these properties). For a more detailed description of these proceedings, *see* Sean Murphy, *Satisfaction of U.S. Judgments Against State Sponsors of Terrorism*, 94 AM. J. INT'L L. 117 (2000).

[29] *See* Appendix II for a list of the amounts of the assets of each State on the terrorist list that are blocked in the U.S.

[30] 50 U.S.C.A. §§ 1701 *et seq.* IEEPA gives the President substantial authority to regulate economic transactions with foreign countries and nationals to deal with "any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such a threat."

[31] Executive Order 12170, 44 Fed. Reg. 65729 (Nov. 14, 1979).

[32] 50 U.S.C.A. App. § 5. TWEA, originally enacted in 1917, gives the President powers similar to those of IEEPA to regulate economic transactions with foreign countries and nationals in time of war. At the time it was used to freeze Cuba's assets in 1962, it also applied in times of national emergency; but that authority was eliminated when IEEPA was enacted in 1977. Sanctions previously imposed under that authority, however, were grandfathered. *See* 50 U.S.C.A. § 1708.

[33] In the 1960s, for instance, Congress directed the Foreign Claims Settlement Commission to determine the number and amount of legitimate claims against Cuba resulting from Fidel Castro's takeover of the government and subsequent expropriation of property from January 1, 1959, and October 16, 1964. P.L. 88-666, Title V (Oct. 16, 1964); 73 Stat. 1110; 22 U.S.C.A. § 1643. The program was completed in 1972 and found 5,911 claims totaling

(continued...)

argued that using frozen assets to compensate victims of State-sponsored terrorism exposes the United States to the risk of reciprocal actions against U.S. assets by other States.[34]

In an attempt to override these objections, the 105th Congress in 1998 further amended the FSIA to provide that any property of a terrorist State frozen pursuant to TWEA or IEEPA and any diplomatic property of such a State could be subject to execution or attachment in aid of a judgment against that State under the terrorism State exception to the FSIA.[35] Section 117 of the Treasury Department

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[33] (...continued)
$1,851,057,358 (in 1972 valuations) to be valid. Those claims remain pending.

In the Iran Claims Settlement Act of 1985, Congress directed the Foreign Claims Settlement Commission to determine the validity and amount of small claims against Iran (those for less than $250,000) pending at the time of the hostage crisis and to distribute to such claimants the proceeds of any *en bloc* settlement concluded by the U.S. and Iran. *See* P.L. 99-93, Title V, §§ 505-505 (Aug. 16, 1985); 99 Stat. 437; 50 U.S.C.A. § 1701 note. In 1990 the U.S. and Iran concluded such an agreement. *See* State Department Office of the Legal Adviser, *Cumulative Digest of United States Practice in International Law 1981-1988* (Book III) (1995), at 3201. All other pre-1981 claims against Iran (and against the United States by Iran and Iranian nationals) remained subject to case-by-case arbitration by the Iran-U.S. Claims Tribunal.

[34] Both Cuba and Iran have reportedly enacted statutes allowing suits against the United States for acts of terrorism or "interference," and substantial judgments against the U.S. have been handed down pursuant to those statutes. *See* Law Library of Congress, *Suits Against Terrorist States: Cuba* (Feb. 2002) (Rept No. 2002-11904); Law Library of Congress, *Iran: Suits Against Americans for Acts of Terrorism* (July 2003) (Rept. No. 2003-14887); *Tehran Court Rules Against U.S.*, CHRISTIAN SCIENCE MONITOR, Feb. 3, 2003, at 6; Sean Murphy, *Contemporary Practice of the United States Relating to International Law: U.S. Judgments Against Terrorist States*, 95 AM. J. INT'L L 134 (2001); Richard M. Mosk, *Picking our Own Pocket*, NAT'L L.J., Sep. 17, 2001, at A20; and *Iran Charges Court to Hear Cases Against Foreign Countries, Notably US*, AGENCE FRANCE PRESSE, July 10, 2001.

[35] P.L. 105-277, Div. A, Title I, § 117 (Oct. 21, 1998), 112 Stat. 2681-491, *codified at* 28 U.S.C.A. § 1610(f)(1)(A). This section was added to the FSIA by § 117 of the Treasury and General Government Appropriations Act for Fiscal Year 1999, as contained in the Omnibus Consolidated and Emergency Supplemental Appropriations Act for Fiscal Year 1999, P.L. 105-277 (1998), 112 Stat. 2681. The provision, without the waiver authority, had originated in the Senate version of the Treasury appropriations bill; but the Senate Appropriations Committee had offered no explanation. *See* S. 2312 and S. REP. NO. 105-251(1998). It had also been offered during House floor debate on the House version of the Treasury appropriations bill by Rep. Saxton but had been subject to a point of order as legislation on an appropriations bill. 144 CONG. REC. H5710 (July 16, 1998). In conference with the House, the provision was retained, but waiver authority for the President was added. The conference reports offered no further explanation. *See* H.R. 4104, H.R. CONF. REP. NO. 105-560 (1998), and H.R. CONF. REP. NO. 105-789 (1998). H.R. 4104 was not enacted but its provisions were folded into the omnibus act. Both immediately prior and after the enactment of the omnibus act, several members of the House and Senate expressed the view that the waiver authority of § 117 should be read to apply only to the requirement that the State and Justice Departments assist judgment creditors in locating the assets of terrorist
(continued...)

Appropriations Act for Fiscal Year 1999 also mandated that the State and Treasury Departments "shall fully, promptly, and effectively assist" any judgment creditor or court issuing a judgment against a terrorist State "in identifying, locating, and executing against the property of that foreign state. . . ."[36] Because of the Administration's continuing objections, however, section 117 also gave the President authority to "waive the requirements of this section in the interest of national security." On October 21, 1998, President Clinton signed the legislation into law and immediately executed the waiver.[37] The President subsequently explained his reasons in the signing statement for the bill as follows:

> I am concerned about section 117 of the Treasury/General Government appropriations section of the act, which amends the Foreign Sovereign Immunities Act. If this section were to result in attachment and execution against foreign embassy properties, it would encroach on my authority under the Constitution to "receive Ambassadors and other public ministers." Moreover, if applied to foreign diplomatic or consular property, section 117 would place the United States in breach of its international treaty obligations. It would put at risk the protection we enjoy at every embassy and consulate throughout the world by eroding the principle that diplomatic property must be protected regardless of bilateral relations. Absent my authority to waive section 117's attachment provision, it would also effectively eliminate use of blocked assets of terrorist States in the national security interests of the United States, including denying an important source of leverage. In addition, section 117 could seriously impair our ability to enter into global claims settlements that are fair to all U.S. claimants, and could result in U.S. taxpayer liability in the event of a contrary claims tribunal judgment. To the extent possible, I shall construe section 117 in

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[35] (...continued)
States. *See*, e.g., 144 CONG. REC. S12696, 12705-06 (daily ed. October 29, 1998) and E 2314 (daily ed. Nov. 12, 1998). But a couple of House members also expressed the view that the waiver authority applied to the whole of § 117. *See* 144 CONG. REC. H11647 (daily ed. Oct. 29, 1998).

[36] 28 U.S.C.A. § 1610(f)(1)(A).

[37] Presidential Determination 99-1 (Oct. 21, 1998), *reprinted in* 34 WEEKLY COMP. PRES. DOC. 2088 (Oct. 26, 1998). On the day the President exercised the waiver authority, the White House Office of the Press Secretary issued the following explanatory statement:

> ...[T]he struggle to defeat terrorism would be weakened, not strengthened, by putting into effect a provision of the Omnibus Appropriations Act for FY 1999. It would permit individuals who win court judgments against nations on the State Department's terrorist list to attach embassies and certain other properties of foreign nations, despite U.S. laws and treaty obligations barring such attachment.
>
> The new law allows the President to waive the provision in the national security interest of the United States. President Clinton has signed the bill and, in the interests of protecting America's security, has exercised the waiver authority. If the U.S. permitted attachment of diplomatic properties, then other countries could retaliate, placing our embassies and citizens overseas at grave risk. Our ability to use foreign properties as leverage in foreign policy disputes would also be undermined.

Statement by the Press Secretary (October 21, 1998).

> a manner consistent with my constitutional authority and with U.S. international legal obligations, and for the above reasons, I have exercised the waiver authority in the national security interest of the United States.[38]

106th Congress — Enactment of Section 2002 of the Victims of Trafficking and Violence Protection Act of 2000

President Clinton's exercise of the waiver authority conferred by section 117 blocked those with default judgments against Cuba and Iran from attaching the diplomatic property and frozen assets of those States to satisfy the judgments.[39] In response, various Members during the 106th Congress pressed for additional amendments to the FSIA that would override the President's waiver of section 117 and allow the judgments against terrorist States to be satisfied out of the States' frozen assets. Congress held hearings to consider the Justice for Victims of Terrorism Act,[40] which was adopted as revised by the House and reported in the Senate. The Clinton Administration opposed the measure, and it was not enacted into law. Instead, negotiations with the Administration led by Senators Lautenberg and Mack resulted in the enactment of section 2002 of the Victims of Trafficking and Violence Against Women Act of 2000,[41] which created an alternative compensation system for some judgment holders. It mandated the payment of a portion of the damages awarded in the *Alejandre* judgment out of Cuba's frozen assets and a portion of ten designated judgments against Iran out of U.S. appropriated funds "not otherwise obligated." In the meantime, additional and substantial default judgments

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[38] Statement by President William J. Clinton Upon Signing H.R. 4328, 34 WEEKLY COMP. PRES. DOC. 2108 (Nov. 2, 1998), *reprinted in* 1998 U.S.C.C.A.N. 576.

[39] The parties in both the Alejandre and the Flatow suits sought to persuade the courts that the President's waiver authority did not extend to the diplomatic properties and blocked assets of Cuba and Iran, but those efforts ultimately proved unavailing. *See* Alejandre v. Republic of Cuba, 42 F.Supp.2d 1317 (S.D. Fla. 1999) (Presidential waiver authority held to apply only to the requirement that the Departments of State and Treasury assist judgment creditors and not to the provision subjecting blocked assets, including diplomatic property, to attachment). This decision was eventually reversed on other grounds by the U.S. Court of Appeals for the Eleventh Circuit — Alejandre v. Telefonica Larga Distancia de Puerto Rico, 183 F.3d 1277 (11th Cir. 1999). A decision by a federal district court in the Flatow litigation construed the President's waiver authority broadly. *See* Flatow v. Islamic Republic of Iran, 76 F.Supp.2d 16 (D.D.C. 1999).

[40] *See Hearing Before the Senate Judiciary Committee on Terrorism: Victims' Access to Terrorists' Assets,* 106th Congress, 1st Sess. (October 27, 1999) and *Hearing Before the Subcommittee on Immigration and Claims of the House Judiciary Committee on H.R. 3485, the "Justice for Victims of Terrorists Act,"* 106th Congress, 2d Sess. (April 13, 2000).

[41] P.L. 106-386, § 2002 (Oct. 28, 2000), 114 Stat. 1541.

continued to be handed down in other suits against Iran[42]; and a number of new suits against terrorist States were filed.[43]

Like § 117 of the Fiscal 1999 Appropriations Act for the Treasury Department, the Justice for Victims of Terrorism Act would have amended the FSIA to allow the attachment of all of the assets of a terrorist State, including its blocked assets, its diplomatic and consular properties, and moneys due from or payable by the United States. To that end it would have repealed the waiver authority granted in § 117 and allowed the President to waive the authorization to attach assets only with respect to the premises of a foreign diplomatic or consular mission.

In hearings on the measure, the Clinton Administration was repeatedly criticized for its opposition to the efforts of victims of terrorism to collect on the judgments they had obtained. Senator Mack, cosponsor of the Justice for Victims of Terrorism Act in the Senate, stated:

> ....Mr. Chairman, the President made promises to the families, encouraged them to seek justice, calling their efforts brave and courageous. He pledged to fight terrorism and signed several laws supporting the rights of victims to take terrorists to court. But ultimately, he has chosen to protect terrorist assets over the rights of American citizens seeking justice. This is simply not what America stands for. Victims' families must know that the U.S. Government stands with them in actions, as well as words.[44]

Stephen Flatow, awarded $247.5 million in a suit against Iran for the terrorist murder of his daughter, asserted:

> The memory of Americans killed by terrorists requires us to continue to protest against administration attempts to stifle our efforts to collect that which has been awarded to us. If the administration will not help us, then, at least, let it get out of our way and stop sending lawyers to court at taxpayer expense to defend the interests of state sponsors of terrorism.[45]

The sister of one of the Brothers to the Rescue pilots shot down by Cuba stated:

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[42] *See* Anderson v. Islamic Republic of Iran, 90 F.Supp.2d 107 (D.D.C. March 24, 2000) ($41.2 million in compensatory damages and $300 million in punitive damages awarded to a journalist who was kidnaped and held in deplorable conditions for seven years by Hezbollah, which the court found to be funded by Iran) and Eisenfeld v. Islamic Republic of Iran, 172 F.Supp.2d 1 (D.D.C. July 11, 2000) ($24.7 million in compensatory damages and $300 million in punitive damages awarded to the families of two young Americans who were killed when a bomb placed by Hamas operatives exploded on the bus on which they were riding in Israel).

[43] *See* Murphy, *supra* note34 .

[44] *Terrorism: Victims' Access to Terrorist Assets — Hearing Before the Senate Committee on the Judiciary*, 106th Cong., 1st Sess. (Oct. 27, 1999) (S. 106-941) (statement of Sen. Mack).

[45] *Id.* (statement of Stephen Flatow).

> No words can possibly explain our shock when we went to court and found U.S. attorneys sitting down at the same table as Cuba's attorneys. How can you explain to a mother who has lost her son, to a wife who has lost her husband, to a daughter who has lost her father, that their own government is taking the murderers's side? How can one understand the claim by the U.S. that the frozen funds are needed to promote civil society and democracy in Cuba, and then have our country not take into account basic human rights and justice? What message are we, the United States, sending the Cuban people and its government when we allow a violation of the right to life to remain unpunished? The Clinton Administration has shut its doors to us.[46]

Representative McCollum, sponsor of the House bill, said:

> Today, the subcommittee seeks to answer why the President said one thing and his administration insists upon doing another. It is my hope that our panel of witnesses will help us understand why the President and administration officials encourage victims to take terrorists to court under the 1996 Anti-Terrorism Act yet now, in contradiction to the President's words, the administration refuses to allow compensation out of the frozen assets of terrorist States against whom judgments have been rendered. Rather than waging a war on terrorism, it appears the administration is fighting the victims of terrorism.
> ...
> I am concerned that the President has exercised what was intended to be a narrow national security waiver too broadly, and as a consequence, those who have committed acts of terror resulting in the death of American citizens are effectively going unpunished, and Americans are not receiving just compensation after favorable court verdicts. This is contrary to the clear intention of Congress both in the 1996 Anti-Terrorism Act and in the fiscal year 1999 Treasury Department appropriations bill.[47]

Treasury Deputy Secretary Stuart E. Eizenstat, Defense Department Under Secretary for Policy Walter Slocombe, and State Department Under Secretary for Policy Thomas Pickering responded for the Administration in a joint statement.[48] While expressing support for the goal of "finding fair and just compensation for [the] grievous losses and unimaginable experiences" of the victims of terrorism, they said that the Victims of Terrorism Act was "fundamentally flawed" and had "five principal negative effects," as follows:

> First, blocking of assets of terrorist States is one of the most significant economic sanctions tools available to the President. The proposed legislation would undermine the President's ability to combat international terrorism and other threats to national security by permitting the wholesale attachment of

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[46] *Id.* (statement of Maggie Alejandre Khuly).

[47] *Justice for Victims of Terrorism Act: Hearing Before the Subcommittee on Immigration and Claims of the House Committee on the Judiciary*, 106th Cong., 2d Sess. (April 13, 2000) (statement of Rep. McCollum). The transcript of the hearing is available on the subcommittee's website.

[48] *Id.* (statement submitted by Treasury Deputy Secretary Eizenstat, Defense Under Secretary for Policy Slocombe, and State Under Secretary Pickering). Deputy Secretary Eizenstat had given similar testimony in the Senate hearing as well.

> blocked property, thereby depleting the pool of blocked assets and depriving the U.S. of a source of leverage in ongoing and office (*sic*) sanctions programs, such as was used to gain the release of our citizens held hostage in Iran in 1981 or in gaining information about POW's and MIA's as part of the normalization process with Vietnam.
>
> Second, it would cause the U.S. to violate its international treaty obligations to protect and respect the immunity of diplomatic and consular property of other nations, and would put our own diplomatic and consular property around the world at risk of copycat attachment, with all that such implies for the ability of the United States to conduct diplomatic and consular relations and protect personnel and facilities.
>
> Third, it would create a race to the courthouse benefiting one small, though deserving, group of Americans over a far larger group of deserving Americans. For example, in the case of Cuba, many Americans have waited decades to be compensated for both the loss of property and the loss of the lives of their loved ones. This would leave no assets for their claims and others that may follow. Even with regard to current judgment holders, it would result in their competing for the same limited pool of assets, which would be exhausted very quickly and might not be sufficient to satisfy all judgments.
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> Fourth, it would breach the long-standing principle that the United States Government has sovereign immunity from attachment, thereby preventing the U.S. Government from making good on its debts and international obligations and potentially causing the U.S. taxpayer to incur substantial financial liability, rather than achieving the stated goal of forcing Iran to bear the burden of paying these judgments. The Congressional Budget Office ("CBO") has recognized this by scoring the legislation at $420 million, the bulk of which is associated with the Foreign Military Sales ("FMS") Trust Fund. Such a waiver of sovereign immunity would expose the Trust Fund to writs of attachment, which would inject an unprecedented and major element of uncertainty and unreliability into the FMS program by creating an exception to the processes and principles under which the program operates.
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> Fifth, it would direct courts to ignore the separate legal status of States and their agencies and instrumentalities, overturning Supreme Court precedent and basic principles of corporate law and international practice by making state majority-owned corporations liable for the debts of the state and establishing a dangerous precedent for government owned enterprises like the U.S. Overseas Private Investment Corporation ("OPIC").

Notwithstanding these contentions, the Senate and House Judiciary Committees reported, and the House passed, a slightly amended version of the Justice for Victims of Terrorism Act. The bill in the Senate was reported without a committee report. The House Judiciary Committee stated in its report:

> The President's continued use of his waiver power has frustrated the legitimate rights of victims of terrorism, and thus this legislation is required. While still allowing the President to block the attachment of embassies and necessary operating assets, H.R. 3485 would amend the law to specifically deny blockage of attachment of proceeds from any property which has been used for any non-

> diplomatic purpose or proceeds from any asset which is sold or transferred for value to a third party.[49]

The House passed the bill by voice vote under a suspension of the rules.[50]

The Clinton Administration persisted in opposing the bill, however; and that led to extensive negotiations between the Administration and interested Members of Congress. Ultimately, these negotiations led to the addition to an unrelated bill pending in conference of a limited alternative compensation scheme, which was signed into law by President Clinton on October 28, 2000.[51] Section 2002 of the Victims of Trafficking and Violence Protection Act of 2000 directed the Secretary of the Treasury to pay portions of any judgments against Cuba and Iran that had been handed down by July 20, 2002, or that would be handed down in any suits that had been filed on one of five named dates on or before July 27, 2000. The judgments that had been handed down by July 20, 2000, were the *Alejandre*, *Flatow*, *Cicippio*, *Anderson* and *Eisenfeld* cases.[52] Six suits had been filed against Iran on the five dates specified in the statute — February 17, 1999; June 7, 1999; January 28, 2000; March

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[49] H.R. REP. NO. 106-733, at 4 (2000). As initially reported, H.R. 3485 also amended the "PayGo" provision of the Balanced Budget and Emergency Deficit Control Act of 1985 (2 U.S.C.A. § 902(d)) to bar the Office of Management and Budget from estimating any changes in direct spending outlays and receipts that would result from enactment of the bill. Because this provision apparently had not been discussed in committee, the committee subsequently deleted it before the bill went to the floor. *See* H.R. REP. NO. 106-733 (Part 2)(2000).

[50] 145 CONG. REC. H6938 (daily ed. July 25, 2000).

[51] P.L. 106-386, § 2002(f)(1) (Oct. 28, 2000); 114 Stat. 1543. The statute primarily addresses the issue of international trafficking in women and children.

[52] *See supra*, note 24.

15, 2000; and July 27, 2000 — and all have subsequently been decided.[53] (*See* Appendix I for a full list of the cases.)

Section 2002 gave the claimants in these eleven suits three options:

- First, they could obtain from the Treasury Department 110 percent of the compensatory damages awarded in their judgments, plus interest, if they agreed to relinquish all rights to collect further compensatory and punitive damages;

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[53] These six cases are as follows:

- Higgins v. Islamic Republic of Iran, No. 1:99CV00377 (D.D.C. 2000) ($55.4 million in compensatory damages and $300 million in punitive damages awarded to the wife of a Marine colonel who was kidnaped and subsequently hanged by Hezbollah while serving as part of the United Nations Truce Supervision Organization in Lebanon);
- Sutherland v. Islamic Republic of Iran, 151 F.Supp.2d 27 (D.D.C. 2001) ($46.5 million in compensatory damages and $300 million in punitive damages awarded to a professor (and his family) who was kidnaped while teaching at the American University in Beirut and subsequently imprisoned in "horrific and inhumane conditions" for six and a half years by Hezbollah);
- Jenco v. Islamic Republic of Iran, 154 F.Supp.2d 27 (D.D.C. 2001) ($14.6 million in compensatory damages and $300 million in punitive damages awarded to the estate and family of a priest who was kidnaped while working in Beirut as the Director of Catholic Relief Services and imprisoned in terrible conditions for a year and a half by Hezbollah);
- Polhill v. Islamic Republic of Iran, 2001 U.S.Dist.LEXIS 15322 (D.D.C. 2001) ($31.5 million in compensatory damages and $300 million in punitive damages awarded to the family of an American citizen who was kidnaped while working as a professor in Beirut and held in "deplorable" conditions for more than three years by Hezbollah);
- Wagner v. Islamic Republic of Iran, 172 F.Supp.2d 128 (D.D.C. 2001) ($16.3 million in compensatory damages and $300 million in punitive damages awarded to the estate and family of a petty officer in the U.S. Navy who was killed by a car bomb driven by a Hezbollah suicide bomber); and
- Stethem v. Islamic Republic of Iran, 201 F.Supp.2d 78 (D.D.C. 2002) ($21.2 million in compensatory damages awarded to the family of a serviceman who was tortured and killed during the hijacking of a TWA plane in 1985, $8 million awarded in compensatory damages to six servicemen and their families for their torture and detention during and after the same hijacking, and $300 million in punitive damages awarded against Iran for its recruitment, training, and financing of Hezbollah, the terrorist group the court found to be responsible for the hijacking).

It might be noted that in *Stethem* only the award to the Stethem family was originally covered by § 2002 of the Victims of Trafficking Act; the second suit filed by the six servicemen and their families — Carlson v. Islamic Republic of Iran — which was consolidated with *Stethem* was not covered by § 2002 but was later added to the list of compensable suits by P.L. 107-228 (Sept. 30, 2002).

- Second, they could receive 100 percent of the compensatory damages awarded in their judgments, plus interest, if they agreed to relinquish (a) all rights to further compensatory damages awarded by U.S. courts and (b) all rights to attach certain categories of property in satisfaction of their judgments for punitive damages, including Iran's diplomatic and consular property as well as property that is at issue in claims against the United States before an international tribunal. The property in the latter category included Iran's Foreign Military Sales (FMS) trust fund, which remains at issue in a case before the Iran-U.S. Claims Tribunal.

- Third, claimants could decline to obtain any payments from the Treasury Department and continue to pursue satisfaction of their judgments as best they could.[54]

To pay a portion of the judgment against Cuba in the *Alejandre* case, the statute directed that the President vest and liquidate Cuban government properties that have been frozen under TWEA. For the ten designated cases against Iran, § 2002 provided for payment out of U.S. funds, as follows:

- The statute directed the Secretary of the Treasury to use any proceeds that have accrued from the rental of Iranian diplomatic and consular property in the United States plus appropriated funds not otherwise obligated (meaning U.S. funds) up to the amount contained in Iran's Foreign Military Sales account. (That account contains slightly more than $400 million paid in advance by Iran for military equipment that, because of the takeover of Iran by Khomeini and the hostage crisis, has never been delivered, or is otherwise in dispute. In a claim filed with the U.S.-Iran Claims Tribunal, Iran contends that it is entitled to the return of this money; but no judgment has yet been rendered by the arbitral tribunal.)

- If payments are paid out of U.S. funds, § 2002 stated that the United States would be subrogated to the rights of the persons paid (meaning that the United States would be entitled to pursue their right to payment of the damage awards from Iran).

- Section 2002 further provided that the United States "shall pursue" these subrogated rights as claims or offsets to any claims or awards that Iran may have against the United States; and it bars the payment or release of any funds to Iran from frozen assets or from the Foreign Military Sales Fund until these subrogated claims have been satisfied.

Section 2002 further expressed the "sense of the Congress" that relations between the United States and Iran should not be normalized until these subrogated claims have been "dealt with to the satisfaction of the United States." It also

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[54] *See* Murphy, *supra* note 34, at 138.

"reaffirmed the President's statutory authority to manage and ... vest foreign assets located in the United States for the purpose[] ... of assisting and, where appropriate, making payments to victims of terrorism." In addition, § 2002 modified one provision of § 117 of the Treasury Department appropriations act for fiscal 1999 by changing the mandate that the State and Treasury Departments "shall" assist those who have obtained judgments against terrorist States in locating the assets of those States to the more permissive "should make every effort" to assist such judgment creditors.

Finally, § 2002 modified the waiver authority that the President had been given in § 117. It repealed that subsection and instead provided that "[t]he President may waive any provision of paragraph (1) in the interest of national security." (Paragraph (1) was the subsection that allowed the frozen assets of a terrorist State, including its diplomatic property, to be attached in satisfaction of a judgment against that State.)[55]

Immediately after signing the legislation into law on October 28, 2000, President Clinton exercised the substitute waiver authority granted by § 2002 and waived "subsection (f)(1) of section 1610 of title 28, United States Code, in the interest of national security."[56] Thus, except to the extent § 2002 allowed the blocked assets of Cuba to be used to satisfy a portion of the *Alejandre* judgment, it did not eliminate the bar to the attachment of the diplomatic property and the blocked assets of terrorist States to satisfy judgments against those States.[57]

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[55] Paragraph (1) is codified at 28 U.S.C.A. § 1610(f)(1) and the modified waiver authority is codified at 28 U.S.C.A. § 1610(f)(3).

[56] Presidential Determination No. 2001-03 (Oct. 28, 2000); 65 Fed. Reg. 66483.

[57] While the statute itself made no express mention of how the waiver was meant to be executed, the report of the House-Senate conference committee on the "Victims of Trafficking" bill expressed an intent that the waiver authority of § 2002 be exercised only on a case-by-case basis, as follows:

> Subsection 1(f) of this bill repeals the waiver authority granted in Section 117 of the Treasury and General Government Appropriations Act for fiscal year 1999, replacing it with a clearer but narrower waiver authority in the underlying statute. The Committee hopes clarity in the legislative history and intent of subsection 1(f), in the context of the section as a whole, will ensure appropriate application of the new waiver authority.
>
> This is a key issue for American victims of state-sponsored terrorism who have sued or who will in the future sue the responsible terrorism-list state, as they are entitled to do under the Anti-Terrorism Act of 1996. Victims who already hold U.S. court judgements, and a few whose related cases will soon be decided, will receive their compensatory damages as a result of this legislation. The Committee intends that this legislation will similarly help other pending and future Antiterrorism Act plaintiffs as and when U.S. courts issue judgements against the foreign state sponsors of specific terrorist acts ....
>
> In replacing the waiver, the conferees accept that the President should have the authority to waive the court's authority to attach blocked assets. But to

(continued...)

In November and December, 2000, the Office of Foreign Assets Control in the Department of the Treasury issued a notice detailing the procedures governing application for payment by those in the eleven designated cases who might want to obtain the partial payment of their judgments afforded by § 2002.[58] All of the claimants in the designated suits chose to obtain such compensation.

In early 2001 the federal government liquidated $96.7 million of the $193.5 million of Cuban assets that had previously been blocked and paid that amount to the claimants in the *Alejandre* suit and their attorneys.[59] The claimants in the ten designated cases against Iran variously chose to receive either 100 percent or 110 percent of their compensatory damages awards; and they ultimately received more

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[57] (...continued)

> understand the view of the committee with respect to the use of the waiver, it must be read within the context of other provisions of the legislation.
>
> A waiver of the attachment provision would seem appropriate for final and pending Anti-Terrorism Act cases identified in subsection (a)(2) of this bill. In these cases, judicial attachment is not necessary because the executive branch will appropriately pay compensatory damages to the victims and use blocked assets to collect the funds from terrorist States.
>
> Of particular significance, this section reaffirms the President's statutory authority, inter alia, to vest blocked foreign government assets and where appropriate make payments to victims of terrorism. The President has the authority to assist victims with pending and future cases.
>
> The Committee's intent is that the President will review each case when the court issues a final judgement to determine whether to use the national security waiver, whether to help the plaintiffs collect from a foreign state's non-blocked assets in the United States, whether to allow the courts to attach and execute against blocked assets, or whether to use existing authorities to vest and pay those assets as damages to the victims of terrorism.
>
> When a future President does make a decision whether to invoke the waiver, he should consider seriously whether the national security standard for a waiver has been met. In enacting this legislation, Congress is expressing the view that the attachment and execution of frozen assets to enforce judgements in cases under the Anti-Terrorism Act of 1996 is not by itself contrary to the national security interest. Indeed, in the view of the Committee, it is generally in the national security interest of the United States to make foreign state sponsors of terrorism pay court-awarded damages to American victims, so neither the Foreign Sovereign Immunities Act nor any other law will stand in the way of justice. Thus, in the view of the committee the waiver authority should not be exercised in a routine or blanket manner, but only where U.S. national security interests would be implicated in taking action against particular blocked assets or where alternative recourse — such as vesting and paying those assets — may be preferable to court attachment.
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> H.R. CONF. REP. NO. 106-939, at 117-118 (2000).

[58] 65 Fed. Reg. 70382 (Nov. 22, 2000) and 65 Fed. Reg. 78533 (Dec. 15, 2000).

[59] The original judgment had been rendered in Alejandre v. Republic of Cuba, 996 F.Supp. 1239 (S.D. Fla. 1997).

than $380 million in compensation out of U.S. funds.[60] (*See* Appendix I for a listing of the cases, the payments made, and the option chosen.)

107th Congress — Additional Cases Added to § 2002 and Attachment of Assets Allowed in Other Cases

Subsequent to the enactment of § 2002 of the Victims of Trafficking statute in late 2000, the courts handed down additional default judgments in suits against terrorist States under the FSIA exception. As noted above, six of these additional judgments were covered by the compensation scheme set forth in § 2002 because the suits had been filed on one of the five dates on or prior to July 27, 2000 specified in the statute.[61] But other default judgments,[62] as well as additional cases that were filed

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[60] This information has been provided by the Office of Foreign Assets Control and is current as of July 29, 2003.

[61] *See* the six cases summarized *supra*, note 53.

[62] Other default judgments against Iran that were handed down after the enactment of § 2002 on October 28, 2000, and prior to the adjournment of the 107th Congress in late 2002 but that were not covered by § 2002 included:

- Elahi v. Islamic Republic of Iran, 124 F.Supp.2d 97 (D.D.C. 2000) ($11.7 million in compensatory damages and $300 million in punitive damages awarded to the administrator of the estate of an Iranian dissident and naturalized U.S. citizen killed by gunshot in Paris by the Iranian Ministry of Information and Security);
- Mousa v. Islamic Republic of Iran, 238 F.Supp.2d 1 (D.D.C. 2001) ($12 million in compensatory damages and $120 million in punitive damages awarded to woman who suffered severe and long-lasting injuries from a suicide bombing of a bus in Jerusalem carried out at the instigation of Hamas, an entity the court found to be supported by Iran);
- Hegna v. Islamic Republic of Iran, No. 1:00CV00716 (D.D.C. 2002) ($42 million in damages awarded to the family of a U.S. Agency for International Development officer who was killed by Hezbollah militants during a hijacking of a Kuwaiti Airlines flight in 1984);
- Weinstein v. Islamic Republic of Iran, 184 F.Supp.2d 13 (D.D.C. 2002) ($33 million in compensatory damages and $150 million in punitive damages awarded to the family and estate of a person who was severely injured in a bus bombing in Jerusalem carried out by Hamas, which the court found to be funded by Iran, and who subsequently died from those injuries);
- Cronin v. Islamic Republic of Iran, 238 F.Supp.2d 222 (D.D.C. 2002) ($1.2 million in compensatory damages and $300 million in punitive damages awarded to an individual who, while he was a graduate student in Lebanon in 1984, was kidnaped and tortured for four days by Hezbollah and two other paramilitary groups which the court found to have been organized, funded, trained, and controlled by Iran); and
- Surette v. Islamic Republic of Iran, 231 F.Supp.2d 260 (D.D.C. 2002) ($18.96 million in compensatory damages and $300 million in punitive damages awarded to the widow and sister of CIA agent William Buckley who was kidnaped in Beirut and tortured for 14 months by the Islamic

(continued...)

and remained pending, were not covered by § 2002. As a consequence, pressure for finding some means to compensate the additional claimants continued to grow.[63] The 107th Congress enacted several pieces of legislation, as follows:

(1) Directive to develop a comprehensive compensation scheme (P.L. 107-77). In the "Act Making Appropriations for the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies for the Fiscal Year Ending September 30, 2002,"[64] Congress in November, 2001, directed President Bush to submit, no later than the time he submitted the proposed budget for fiscal 2003,

> a legislative proposal to establish a comprehensive program to ensure fair, equitable, and prompt compensation for all United States victims of international terrorism (or relatives of deceased United States victims of international terrorism) that occurred or occurs on or after November 1, 1979.[65]

That directive had not been part of either the House or Senate-passed versions of H.R. 2500. But it was added in lieu of an amendment sponsored by Senator Hollings that the Senate had adopted, without debate, which would have authorized partial payment of the judgments in five additional cases (including the *Roeder* case,

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[62] (...continued)

> Jihad, an entity the court found to be organized and funded by Iran, and who ultimately died while in captivity).

In addition, two default judgments were handed down against Iraq — Daliberti v. Republic of Iraq, 146 F.Supp.2d 19 (D.D.C. 2001) ($12.8 million in compensatory damages awarded to four U.S. citizens who were detained and tortured for varying periods of time between 1992 and 1995 by Iraq and $6 million awarded to their spouses) and Hill v. Republic of Iraq, 175 F.Supp.2d 36 (D.D.C. 2001) ($9 million in compensatory damages against Iraq and Saddam Hussein and $300 million in punitive damages against Saddam Hussein personally awarded to twelve U.S. citizens who were held hostage by Iraq after its invasion of Kuwait in 1990). In the latter case, the court subsequently found that an additional 168 plaintiffs had established their right to relief for being held hostage by Iraq; and the court awarded them approximately $85 million in compensatory damages. *See* Hill v. Republic of Iraq, 2003 U.S. Dist. LEXIS 3725 (D.D.C. 2003).

[63] *See* Shawn Zeller, *Hoping to Thaw Those Frozen Funds*, 33 NAT'L J. 3368-69 (Oct. 27, 2001).

[64] P.L. 107-77 (November 28, 2001). The text of the act and the conference report (H.R. CONF. REP. NO. 107-278) is printed at 147 CONG. REC. H7986-H8038 (daily ed. Nov. 9, 2001).

[65] *Id.* § 626, reprinted at 147 CONG. REC. H8001.

infra).[66] In explaining the conference substitute for that provision, the conference report stated:

> Objections from all quarters have been repeatedly raised against the current ad hoc approach to compensation for victims of international terrorism. Objections and concerns, however, will no longer suffice. It is imperative that the Secretary of State, in coordination with the Departments of Justice and Treasury and other relevant agencies, develop a legislative proposal that will provide fair and prompt compensation to all U.S. victims of international terrorism. A compensation system already is in place for the victims of the September 11 terrorist attacks; a similar system should be available to victims of international terrorism.[67]

In signing the measure into law, President Bush cited the directive regarding submission of a comprehensive plan and stated that "I will apply this provision consistent with my constitutional responsibilities."[68] No such plan was put forward in the second session of the 107th Congress.

(2) Coverage of additional cases under § 2002 (P.L. 107-228). On September 30, 2002, President Bush signed into law a measure — the Foreign Relations Authorization Act for Fiscal 2003 — that added cases filed against Iran on June 6, 2000, and January 16, 2002 to those that can be compensated under § 2002.[69] The first case — *Carlson v. The Islamic Republic of Iran*[70] — was by six Navy divers who were on board a TWA airliner that was hijacked in 1985 and who were subsequently imprisoned and tortured by Lebanese Shiite terrorists. That suit had been filed separately from a suit by the family of Robert Stethem, who was murdered in the course of the same hijacking — *Stethem v. The Islamic Republic of Iran*.[71] But the two suits had been consolidated for trial, and the court decided the cases together.[72] Stethem's suit had been included as one of the cases that was

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[66] *See* 147 CONG. REC. S9365 (daily ed. Sept. 13, 2001). The Hollings amendment generally followed the scheme of § 2002 by specifying the filing dates of four of the five additional cases rather than identifying them by name. The specified dates were May 17, 1996; May 7, 1997; October 22, 1999; and December 15, 1999. It identified the Roeder case only by its filing number in the federal district court in the District of Columbia — Case Number 1:00CV03110 (ESG). For the text of the amendment, *see* 147 CONG. REC. S9398-9400 (daily ed. Sept. 13, 2001).

[67] H.R. REP. NO. 107-278 (2001), *reprinted at* 147 CONG. REC. H 8033 (daily ed. Nov. 9, 2001).

[68] Office of the White House Press Secretary, "President Signs Commerce Appropriations Bill: Statement by the President on H.R. 2500" (Nov. 28, 2001), available on the White House website.

[69] P.L. 107-228, § 686 (September 30, 2002). Various members of Congress had previously introduced bills to add additional suits to the list compensable under § 2002. *See*, e.g., H.R. 4647.

[70] Civil Action No. 00-1309 (D.D.C., filed June 6, 2000).

[71] Civil Action No. 00-0159 (D.D.C. filed January 28, 2000).

[72] Stethem v. The Islamic Republic of Iran and Carlson v. The Islamic Republic of Iran, 201 F.Supp. 2d 78 (D.D.C. 2002).

compensable under § 2002 as originally enacted, but the companion suit by the Navy divers had not been included. The amendment enacted into law as part of the foreign relations authorization bill had been adopted by the House on May 16, 2001, by voice vote to rectify what its sponsor termed this "inadvertent error."[73] The second case, specified by its filing date of January 16, 2002, was added to the measure by the conference committee and has been identified by the Office of Foreign Assets Control as the case of *Kapar v. Islamic Republic of Iran*.

(3) Attachment of frozen assets authorized (P.L. 107-297). On November 26, 2002, President Bush signed the "Terrorism Risk Insurance Act" (TRIA) into law.[74] Section 201 of TRIA overrode long-standing objections by the Clinton and Bush Administrations and makes the frozen assets of terrorist States available to satisfy judgments for compensatory damages against such States (and organizations and persons) as follows:

> Notwithstanding any other provision of law, and except as provided in subsection (b), in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, or for which a terrorist party is not immune under section 1605(a)(7) of title 28, United States Code, the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment in aid of execution in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable.

Subsection (b) of § 201, in turn, narrowed the waiver authority previously afforded the President on this subject and permits the President to waive this provision "in the national security interest" only with respect to "property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations."

In addition, § 201 of P.L. 107-297 amended § 2002 of the Victims of Trafficking Act with respect to suits against Iran:

- It added to the list of suits against Iran that are compensable under § 2002, without further identification, all those that were filed before October 28, 2000 (previously the suits covered were those that had been decided by July 20, 2000, or that had been filed on February 17, 1999; June 7, 1999; January 28, 2000; March 15, 2000; June 6, 2000, July 27, 2000; or January 16, 2002).
- It made 90 percent of the amount remaining in the § 2002 fund (about $15.7 million) available to pay the compensatory damages awarded in any judgment rendered in the cases previously added by P.L. 107-228 and by this statute which had been entered as of the date of this statute's enactment (November 26, 2002) and provided

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[73] As with the other suits included within § 2002, the Carlson suit is not specified by name but merely by its filing date of June 6, 2000. The amendment, sponsored by Rep. Manzullo, was part of a group of amendments adopted by voice vote on May 16, 2001. *See* 147 CONG. REC. H2224-H2239 (daily ed. May 16, 2001).

[74] P.L. 107-297 (Nov. 26, 2002).

that, if the total amount of damages awarded exceeded the amount available, each claimant is to receive a proportionate amount.[75]

- It set aside the remaining 10 percent of the § 2002 fund for compensation under the same formula of the final judgment entered in the case filed against Iran on January16, 2002 (*Kapar v. Islamic Republic of Iran*).
- It provided that persons who receive less than 100 percent of the compensatory damages awarded in their judgments against Iran under the foregoing scheme do not have to relinquish their right to obtain additional compensatory damages, as was required of those previously compensated under § 2002, but only to relinquish their right to obtain punitive damages.

These amendments derived from provisions that had been added to the terrorism risk insurance bill in both the House and the Senate. On November 7, 2001, the House Committee on Financial Services by voice vote adopted an amendment by Representative Watt to its terrorism risk insurance bill (H.R. 3210) that would have allowed the frozen assets of terrorists or terrorist organizations to be used in satisfaction of judgments against them.[76] That amendment was substantially modified in a floor substitute to apply to terrorist States, organizations, and individuals and to allow the President to waive the requirement with respect to diplomatic and consular property (but only if the property had not been rented or sold to a third party), which was adopted by the House on November 29, 2001.[77] On June 18, 2002, the Senate by a vote of 81-3 adopted a broader rider proposed by Senator Allen to S. 2600, the Terrorism Risk Insurance Act of 2002.[78] Like the House provision, the Senate rider authorized the use of frozen assets to satisfy judgments against terrorist States, organizations, and individuals and allowed the President to waive that authorization only with respect to diplomatic and consular property. But it also added all suits against Iran filed by October 28, 2000, to the list of those

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[75] The Director, Office of Foreign Assets Control determined that the total compensable awards exceeded 90 percent of the available funds as of June 3, 2003, and directed his office to propose an appropriate pro rata distribution for Iran-related applications that were received by April 7, 2003. *See* Memorandum, Department of the Treasury, Determination of Insufficiency of Funds Victims of Trafficking and Violence Protection Act of 2000, Public Law No. 106-386, as Amended (June 3, 2003), *available at* [http://www.treasury.gov/offices/enforcement/ofac/legal/notices/insf_funds.pdf]. All judgment creditors of Iran eligible for compensation under § 2002 have received their payments.

[76] H.R. REP. NO. 107-300, Part I , at 17 (2001).

[77] 147 CONG. REC. H8596, 8629 (daily ed. Nov. 29, 2001). However, one court has since ruled that diplomatic property rented out by the United States was excepted under the definition of "blocked assets" in subsection (d)(2), and that the waiver therefore was not applicable to it. *See* Hegna v. Islamic Republic of Iran, 376 F.3d 485 (5th Cir. July 19, 2004).

[78] 147 CONG. REC. S5509-S5513 (daily ed. June 13, 2002) and S5575 (daily ed. June 14, 2002). The rider replicated a bill the Senate Judiciary Committee had reported on June 27, 2002 (S. 2134, the "Terrorism Victim's Access to Compensation Act of 2002"). With the enactment of the rider into law, the Senate took no further action on S. 2134.

compensable under § 2002 and set forth a proportional payment scheme for the added suits. On September 10, 2002, the House by a vote of 373-0 adopted a motion instructing its conferees on the terrorism risk insurance bills to accept the Senate rider.[79]

Roeder v. Islamic Republic of Iran

Judicial proceedings. In late 2000 a suit was filed in federal district court on behalf of the 52 embassy staffers who had been held hostage by Iran from 1979-81 and on behalf of their families. *Roeder v. Islamic Republic of Iran*[80] sought both compensatory and punitive damages from Iran. In August, 2001, the trial court granted a default judgment to the plaintiffs and scheduled a hearing on the damages to be awarded. But in October, 2001, a few days before the scheduled hearing, the U.S. government intervened in the proceeding and moved that the judgment be vacated and the case dismissed. The government contended that the suit did not meet all of the requirements of the terrorist State exception to the FSIA (notably, that Iran had not been designated as a State sponsor of terrorism at the time the U.S. personnel were held hostage) and that the suit was barred by the explicit provisions of the 1981 Algiers Accords that led to the release of the hostages.[81]

While that motion was pending before the court, the Senate approved as part of the Hollings amendment to the FY2002 Appropriations Act for the Departments of Commerce, Justice, and State noted in #1 of the preceding section a provision specifying that *Roeder* should be deemed to be included within the terrorist State exception to the FSIA; and the conference agreement on that bill retained that portion of the Hollings amendment. Thus, as amended, the pertinent section of the FSIA excludes suits against terrorist States from the immunity generally accorded foreign States but directs the courts to decline to hear such a case (with the amendment in italics)

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[79] 148 CONG. REC. H6138-39 (daily ed. Sept. 10, 2002).

[80] Case Number 1:00CV03110 (ESG) (D.D.C., filed December 29, 2000).

[81] The Algiers Accords contain the following provision:

> ...[T]he United States ... will thereafter bar and preclude the prosecution against Iran of any pending or future claim of the United States or a United States national arising out of events occurring before the date of this declaration related to (A) the seizure of the 52 United States nationals on November 4, 1979, (B) their subsequent detention, (C) injury to United States property or property of the United States nationals within the United States embassy compound in Tehran after November 3, 1979, and (D) injury to the United States nationals or their property as a result of popular movements in the course of the Islamic Revolution in Iran which were not an act of the Government of Iran. The United States will also bar and preclude the prosecution against Iran in the courts of the United States of any pending or future claims asserted by persons other than the United States nationals arising out of the events specified in the preceding sentence.
> 20 ILM 227 (1981).

> if the foreign state was not designated as a state sponsor of terrorism ... at the time the act occurred, unless later so designated as a result of such act *or the act is related to Case Number 1:00CV03110 (ESG) in the United States District Court for the District of Columbia*.[82]

The conference report on the bill explained the provision as follows:

> Subsection (c) quashes the State Department's motion to vacate the judgment obtained by plaintiffs in Case Number 1:00CV03110 (ESG) in the United States District Court for the District of Columbia. Consistent with current law, subsection (c) does not require the United States government to make any payments to satisfy the judgment.[83]

In signing the appropriations act into law on November 28, 2001, however, President Bush took note of this provision and commented as follows:

> [S]ubsection (c) ... purports to remove Iran's immunity from suit in a case brought by the 1979 Tehran hostages in the District Court for the District of Columbia. To the maximum extent permitted by applicable law, the executive branch will act, and will encourage the courts to act, with regard to subsection 626(c) of the Act in a manner consistent with the obligations of the United States under the Algiers Accord that achieved the release of U.S. hostages in 1981.[84]

Subsequently on December 13, 2001, the judge in *Roeder* (Judge Emmet G. Sullivan) heard arguments on the government's earlier motion to dismiss. The government continued to argue, *inter alia*, that the suit is barred by the Algiers Accords and ought to be dismissed; and during the course of the proceeding Judge Sullivan expressed concern regarding the lack of clarity of the recent Congressional enactment with respect to that contention. A week later in the fiscal 2002 appropriations act for the Department of Defense, the 107th Congress included a provision making a minor technical correction in the reference to the *Roeder* case.[85] But the conference report also elaborated on what it said was the effect and intent of the earlier amendment of the FSIA with respect to *Roeder*, seemingly in response to Judge Sullivan's expression of concern. The conference report stated as follows:

> Sec. 208. — The conference agreement includes Section 208, proposed as Section 105 of Division D of the Senate bill, making a technical correction to

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[82] P.L. 107-77, Title VI, § 626(c) (Nov. 28, 2001), amending 28 U.S.C.A. § 1605(a)(7)(A).

[83] H.R. REP. NO. 107-278 (2001).

[84] Statement on Signing the Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 2002, 37 WEEKLY COMP. PRES. DOC. 1723, 1724 (Nov. 28, 2001).

[85] The amendment inverted two letters in the case reference to Roeder that had been contained in P.L. 107-17, changing "1:00CV03110 (ESG)" to "1:00CV03110 (EGS)." *See* P.L. 107-117, Title II, § 208 (Jan. 10, 2002). This technical correction had originally been included in the DOD appropriations bill as reported and adopted by the Senate but without explanation. *See* H.R. 3388 as reported by the Senate Appropriations Committee (S. REP. NO. 107-109 (2001) and Senate floor debate at 147 CONG. REC. S12476-12529 (daily ed. Dec. 6, 2001), S12586-12676 and S12779-12812 (daily ed. Dec. 7, 2001).

> Section 626 of Public Law 107-77. The language included in Section 626(c) of Public Law 107-77 quashed the Department of State's motion to vacate the judgment obtained by plaintiffs in Case Number 1:00CV03110(EGS) and reaffirmed the validity of this claim and its retroactive application. Nevertheless, the Department of State continued to argue that the judgment obtained in Case Number 1:00CV03110(EGS) should be vacated after Public Law 107-77 was enacted. The provision included in Section 626(c) of Public Law 107-77 acknowledges that, notwithstanding any other authority, the American citizens who were taken hostage by the Islamic Republic of Iran in 1979 have a claim against Iran under the Antiterrorism Act of 1996 and the provision specifically allows the judgment to stand for purposes of award damages consistent with Section 2002 of the Victims of Terrorism Act of 2000 (Public Law 106-386, 114 Stat. 1541).[86]

Nonetheless, in signing the Department of Defense appropriations measure into law on January 10, 2002, President Bush continued to insist as follows:

> Section 208 of Division B makes a technical correction to subsection 626(c) of Public Law 107-77 (the FY2002 Commerce, Justice, State, the Judiciary and Related Agencies Appropriations Act), but does nothing to alter the effect of that provision or any other provision of law. Since the enactment of sub-section 626(c) and consistent with it, the executive branch has encouraged the courts to act, and will continue to encourage the courts to act, in a manner consistent with the obligations of the United States under the Algiers Accords that achieved the release of U.S. hostages in 1981.[87]

After two additional hearings, Judge Sullivan on April 18, 2002, granted the government's motion to vacate the default judgment against Iran and to dismiss the suit.[88] In a lengthy opinion the court concluded that:

- at the time it entered a default judgment for plaintiffs on August 17, 2001, it did not, in fact, have jurisdiction over the case and, thus, should not have entered a judgment[89];
- the cause of action which Congress had adopted in late 1996 did not, in fact, apply to suits against terrorist States but only against the

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[86] S. REP. NO. 107-109 (2001).

[87] Remarks on Signing the Department of Defense and Emergency Supplemental Appropriations for Recovery from and Response to Terrorist Attacks on the United States Act, 2002, in Arlington, Virginia, 38 WEEKLY COMP. PRES. DOC. 44 (Jan. 10, 2002).

[88] Roeder v. Islamic Republic of Iran, 195 F.Supp.2d 140 (D.D.C. 2002).

[89] The court said that it did not have jurisdiction over the suit until Congress amended the FSIA by means of § 626(c) of the FY2002 appropriations act for the Departments of Justice, Commerce, and State, which was signed into law on November 28, 2001. Prior to that amendment, it said, the suit did not fall within the terrorist state exception to the FSIA because Iran had not been declared to be a terrorist state at the time it seized and held the American personnel hostage. The court said also that, absent an "express statement of intent by Congress," it could not apply § 626(c) retroactively.

officials, employees, and agents of those States who perpetrate terrorist acts[90]; and

- the provision of the Algiers Accords committing the United States to bar suits against Iran for the incident constitutes the substantive law of the case, and Congress' two enactments specifically concerning the case were too ambiguous to conclude that it specifically intended to override this international commitment.[91]

In addition, the court in *dicta* suggested that Congress' enactments on the *Roeder* case might have interfered with its adjudication of the case in a manner that raised constitutional separations of powers concerns.[92] It also chastised the plaintiffs'

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[90] The court stressed that the terrorist state exception which Congress had added to the FSIA in 1996 meant only that U.S. courts could exercise jurisdiction over such cases. Traditional State immunity, in other words, was eliminated as a jurisdictional barrier. But that amendment to the FSIA did not in itself, the court said, provide a cause of action for such suits. The specific statute providing for such a cause of action which Congress enacted later in 1996, it said, provided only for a cause of action against an official, employee, or agent of a terrorist State, not against the terrorist State itself. (*See* P.L. 104-208, Div. A, Title I, § 101(c) (Sept. 30, 1996); 110 Stat. 3009-172; 28 U.S.C.A. § 1605 note.)

[91] The court stressed that an act of Congress "ought never to be considered to violate the law of nations, if any other possible construction remains." None of the statutes Congress had adopted relating to a cause of action generally or to *Roeder* itself, the court said, unambiguously declared an intent to override the Algiers Accords. Nor, it said, did they unambiguously declare an intent not to override the Accords. They, and their "scant" legislative history, were ambiguous on the question, it held, and, consequently, must be construed not to conflict with the Accords:

> Neither the Anti-Terrorism Act, the Flatow Amendment, Subsection 626(c), or Section 208 contain the type of express statutory mandate sufficient to abrogate an international executive agreement. Furthermore ..., the legislative histories of these statutes contain no clear statements of Congressional intent to specifically abrogate the Algiers Accords. Therefore, ... unless and until Congress expresses its clear intent to overturn the provisions of a binding agreement between two nations that has been in effect for over twenty years, this Court can not interpret these statutes to abrogate that agreement.
> Roeder v. Islamic Republic of Iran, *supra*, at 177.

The court also rejected the argument that because the U.S. entered into the Algiers Accords under duress, the Accords constituted "an unenforceable illegal contract." "Whatever emotional appeal and rhetorical flourish this argument contains," the court said, "it is absolutely without basis in law." *Id.* at 168.

[92] The court did not base its decision on any separation of powers considerations. But it did say that if it had construed § 626(c) to apply retroactively, Congress' "post-judgment retroactive imposition of jurisdiction [would raise] serious separations of powers concerns" and might be "an impermissible encroachment by Congress into the sphere of the federal courts ...." *Id.* at 161. "By expressly directing legislation at pending litigation, Congress has arguably attempted to determine the outcome of this litigation," it said. *Id.* at 163. The court also suggested that the narrowness of Congress' enactments, i.e., their application only to this one case and not to any others, raised possible Article III concerns. *Id.* at 165-66.

attorneys for what it said were serious breaches of their professional and ethical responsibilities.[93]

The U.S. Court of Appeals for the District of Columbia affirmed the decision of the lower court, placing emphasis on the fact that the legislative history plaintiffs sought to use– joint explanatory statement prepared by House and Senate conferees– is not part of the Conference Report voted on by both houses of Congress and thus does not carry the force of law.[94]

> Executive agreements are essentially contracts between nations, and like contracts between individuals, executive agreements are expected to be honored by the parties. Congress (or the President acting alone) may abrogate an executive agreement, but legislation must be clear to ensure that Congress - and the President - have considered the consequences. The "requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." The kind of legislative history offered here cannot repeal an executive agreement when the legislation itself is silent.(citations omitted)

The court denied that its interpretation rendered any act of Congress futile. On the contrary, it stated that, "[i]f constitutional ... the amendments had the effect of removing Iran's sovereign immunity, which the United States had raised in its motion to vacate."[95]

107th and 108th Congresses – Efforts To Abrogate the Algiers Accords

Subsequent to the trial court's decision in *Roeder*, efforts have been made in both the 107th and the 108th Congresses to enact legislation that would explicitly abrogate the provision of the Algiers Accords barring the hostages' suit. On July 24, 2002, the Senate Appropriations Committee reported the "Fiscal 2003 Appropriations Act for the Departments of Commerce, Justice, and State" (S. 2778). Section 616 of that bill proposed to amend the FSIA as follows:

> SEC. 616. Section 1605 of title 28, United States Code is amended by adding a new subsection (h) as follows:

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[93] In commenting on what it called the "repeated ethical failures by class counsel," the court stated that "[p]laintiffs' counsel in this case repeatedly presented meritless arguments to this Court, repeatedly failed to substantiate their arguments by reference to any supporting authority, and repeatedly failed to bring to the Court's attention the existence of controlling authority that conflicted with those arguments." *Id.* at 185.

[94] Roeder v. The Islamic Republic of Iran, 333 F.3d 228, 238 (D.C. Cir. 2003)("While legislative history may be useful in determining intent, the joint explanatory statements here go well beyond the legislative text of § 208, which did nothing more than correct a typographical error.").

[95] The court noted, but did not decide whether the amendments were an impermissible intrusion by Congress into the role of the courts. *Id*. at 237 & n.5.

> (h) CAUSE OF ACTION FOR IRANIAN HOSTAGES- Notwithstanding any provision of the Algiers Accords, or any other international agreement, any United States citizen held hostage in Iran after November 1, 1979, and their spouses and children at the time, shall have a claim for money damages against the government of Iran. Any provision in an international agreement, including the Algiers Accords that purports to bar such suit is abrogated. This subsection shall apply retroactively to any cause of action cited in 28 U.S.C. 1605(a)(7)(A).

In explaining the provision, the report of the Committee simply stated that "Section 616 clarifies section 626 of Public Law 107-77 that the Algiers Accord is abrogated for the purposes of providing a cause of action for the Iranian hostages."[96] The measure received no further action prior to the adjournment of the 107th Congress, however.

In the 108th Congress the Senate added the same or a similar amendment to three appropriations bills, but in each case the amendment has been deleted in conference. On January 15, 2003, the same amendment was included in a managers' amendment offered by Senator Stevens to the House-passed version of the consolidated appropriations resolution for fiscal 2003, H.J.Res. 2. The Senate adopted the amendment by voice vote without comment on the provision.[97] But the provision was deleted in conference[98] and did not become law.[99] The Senate on April 3, 2003, adopted without debate a managers' amendment offered by Senator Stevens to the "Emergency Wartime Supplemental Appropriations Act, 2003" (S. 762, H.R. l559) which included a similar provision.[100] The bill primarily provided substantial additional funding for the military action against Iraq and for the Department of Homeland Security. But § 606 of the managers' amendment provided as follows:

> Sec. 606. Section 1605 of title 28, United States Code, is amended by adding at the end the following new subsection:
>
> (h) CLAIMS FOR MONEY DAMAGES FOR DEATH OR PERSONAL INJURY — (1) Any United States citizen who dies or suffers injury caused by a foreign state's act of torture, extrajudicial killing, aircraft sabotage, or hostage taking committed on or after November 2, 1979, and any member of the immediate family of such citizen, shall have a claim for money damages against such foreign state, as authorized by subsection (a)(7), for death or personal injury (including economic damages, solatium, pain and suffering). (2) A claim under paragraph (1) shall not be barred or precluded by the Algiers Accords.

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[96] S. REP. NO. 107-218, at 167 (2002).

[97] 149 CONG. REC. S839 (daily ed. Jan. 15, 2003).

[98] H.R. CONF. REP. NO. 108-10 (2003).

[99] P.L. 108-7 (Feb. 20, 2003).

[100] The managers' amendment was adopted by voice vote with no debate on this particular provision. *See* 149 CONG. REC. S4806-08 (daily ed. April 3, 2003). The text of the amendment can be found at *id.* S4866-67.

The amendment was deleted in conference, however, and was not part of the measure as enacted into law (P.L. 108-11).[101]

Similarly, the Senate passed, without debate,[102] an amendment to the Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan, 2004 (S. 1689, H.R. 3289), as follows:

> Sec. 5006. Section 1605 of title 28, United States Code, is amended by adding at the end the following new subsection:
>
> (h) Notwithstanding any provision of the Algiers Accords, or any other international agreement, any United States citizen held hostage during the period between 1979 and 1981, and their spouses and children at the time, shall have a claim for money damages against a foreign state for personal injury that was caused by the foreign state's act of torture or hostage taking. Any provision in an international agreement, including the Algiers Accords that purports to bar such suit is abrogated. This subsection shall apply retroactively to any cause of action cited in section 1605(a)(7)(A) of title 28, United States Code.

This amendment was stripped from the bill at conference without explanation (P.L. 108-106).[103]

Thus, no legislation has been enacted as yet specifically abrogating the Algiers Accords.

Confiscation of Iraq's Blocked Assets for Use in the Reconstruction of Iraq (POW Lawsuit)

On March 20, 2003, immediately after the U.S. and its coalition partners initiated military action against Iraq, President Bush issued an executive order providing for the confiscation and vesting of Iraq's frozen assets in the U.S. government and placing them in the Development Fund for Iraq for use in the post-war reconstruction of Iraq.[104] According to the *Terrorist Assets Report 2002* published by the Office of Foreign Assets Control, Iraq's blocked assets totaled approximately $1.73 billion at the end of 2002. However, the President's order excluded from confiscation and vesting Iraq's diplomatic and consular property as well as assets that had, prior to March 20, 2003, been ordered attached in satisfaction of judgments against Iraq rendered pursuant to the terrorist suit provision of the FSIA and § 201 of the

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[101] *See* P.L. 108-011 (April 16, 2003). Neither the conference report nor the House or Senate debates on acceptance of the conference agreement made any mention of the deletion of this provision. *See* H.R. REP. NO. 108-76 (2003), *reprinted at* 149 CONG. REC. H3357 *et seq.* (daily ed. April 12, 2003), *id.* H3385-3404 (House debate), and *id.* S 5392 (daily ed. April 11, 2003) (unanimous consent agreement in the Senate providing for automatic approval of the conference report when received from the House).

[102] S12682 October 16, 2003

[103] H.R. REP. NO. 108-337 (2003).

[104] E.O. 13290, 68 Fed. Reg. 14305-08 (March 24, 2003).

Terrorism Risk Insurance Act (which reportedly total about $300 million).[105] The President stated that the remaining assets "should be used to assist the Iraqi people ...." Thus, notwithstanding the enactment of § 201 of TRIA, the President's action appeared to make Iraq's frozen assets unavailable to those who, after March 20, 2003, obtain judgments against that State for its sponsorship of, or complicity in, acts of terrorism.

Subsequently, the President took several additional actions complementing and reinforcing this executive order. In the "Supplemental Appropriations Act for Fiscal 2003," Congress provided that "the President may make inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961 or any other provision of law that applies to countries that have supported terrorism."[106] On the basis of that authority, President Bush on May 7, 2003, declared a number of provisions concerning terrorist States, including the FSIA exception and the section of the Terrorism Risk Insurance Act making their blocked assets available to victims of terrorism, inapplicable to Iraq.[107] On May 22, 2003, he issued another executive order providing that the Development Fund of Iraq cannot be attached or made subject to any other kind of judicial process.[108]

Acree v. Republic of Iraq. Whether the President has the legal authority to restore Iraq's sovereign immunity and make its assets unavailable to victims of terrorism who obtain judgments against Iraq was contested in *Acree v. Republic of Iraq*.[109] In that case a federal district court on July 7, 2003 – two and half months after the President's order – handed down a default judgment against Iraq for its imprisonment and torture of 17 American prisoners of war (POWs) during the first Gulf War in 1991. After detailing the treatment given the POWs, the court awarded them and their families $653 million in compensatory damages and added a punitive damages award of $306 million for the benefit of the POWs against Saddam Hussein

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[105] *See* Tom Schoenberg, *Fights Loom for Iraqi Riches*, LEGAL TIMES (March 31, 2003). Judgment creditors were paid about $140 million from the vested assets.

[106] P.L. 108-11, § 1503 (April 16, 2003).

[107] *See* Memorandum for the Secretary of State (Presidential Determination No. 2003-23) (May 7, 2003). This Determination simply replicated the general language of the Supplemental Appropriations Act provision. But in a subsequent message to Congress, President Bush stated:

> ... [B]y my memorandum to the Secretary of State and Secretary of Commerce of May 7, 2003, (Presidential Determination 2003-23), I made inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961, Public Law 87-195, as amended, and any other provision of law that applies to countries that have supported terrorism. Such provisions of law that apply to countries that have supported terrorism include, but are not limited to, 28 U.S.C. 1605(a)(7), 28 U.S.C. 1610, and section 201 of the Terrorism Risk Insurance Act.

President George Bush, Message to the Congress of the United States (May 22, 2003), available on the White House website.

[108] E.O. 13303, 68 Fed. Reg. 31931 (May 28, 2003).

[109] Acree v. Republic of Iraq, 276 F.Supp.2d 95 (D.D.C. 2003).

and the Iraqi Intelligence Service. Upon request by the plaintiffs, Judge Roberts on July 18, 2003, issued a temporary restraining order (TRO) requiring the government to retain at least $653 million of Iraq's assets vested in the United States by President Bush's executive order pending further decision by the court.

The Justice Department then sought to intervene in the case, arguing that Iraq's sovereign immunity had been restored by Presidential Determination pursuant to authority granted by Congress. The court denied the government's motion to intervene as untimely because the Justice Department had waited 75 days past the Determination before it intervened, knowing that the *Acree* case was pending before the court.[110] Additionally, the court found that the government's interest in promoting a new, democratic Iraqi government did not constitute a cognizable interest warranting intervention as of right, especially absent any showing of how the default judgment impaired such interest. The court also held that only Iraq could assert a defense based on sovereign immunity, and that Congress and President could not retroactively restore Iraq's previously waived sovereign immunity.

While the Presidential Determination did not retroactively restore Iraq's sovereign immunity, it was held to effectively preclude the plaintiffs from enforcing their judgment against the $1.73 billion in frozen Iraqi assets that had been vested by the President for the restoration of Iraq.[111] After an expedited hearing on the matter, the court on July 30, 2003, held that none of the assets in question could be attached by the plaintiffs; and the court dissolved the TRO.[112] In reaching that conclusion, the court relied primarily on the Supplemental Appropriations Act provision noted above and the subsequent actions by President Bush rather than on his March 20, 2003, executive order. The court concluded:

> The Act is Congressional authorization for the President to make TRIA prospectively inapplicable to Iraq, and the President exercised that authority when he issued the Determination on May 7, 2003. As a result, at the time the plaintiffs obtained their judgment against Iraq on July 7, 2003, TRIA was no longer an available mechanism for plaintiffs to use to satisfy their judgment.[113]

The Justice Department appealed the decision denying its motion to intervene, while plaintiffs appealed the decision that frozen Iraqi funds were unavailable to satisfy their judgment. On appeal, the Court of Appeals for the D.C. Circuit held that the district court had abused its discretion by denying the government's motion to intervene.[114] However, the court reversed the President's Determination insofar as it nullified the FSIA provisions with respect to Iraq, finding that Congress had not

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[110] *Id.* at 98.

[111] Acree v. Snow, 276 F.Supp.2d 31 (D.D.C.), *aff'd* 78 Fed.Appx. 133 (D.C.Cir. 2003)(unpublished opinion); Smith v. Federal Reserve Bank of New York, 280 F.Supp.2d 314 (S.D.N.Y), *aff'd* 346 F.3d 264 (2nd Cir. 2003)(judgment against Iraq by victims of Sep. 11, 2001, terrorist attacks).

[112] *Id*.

[113] *Id*. at 33.

[114] Acree v. Republic of Iraq, 370 F.3d 41 (D.C. Cir. 2004).

intended to permit the President to revoke those provisions. The plaintiffs were nevertheless prevented from collecting, because the court of appeals vacated their judgment based on their failure to state a cause of action against Iraq, and because Saddam Hussein retained immunity for official conduct. The court followed its precedent in *Cicippio-Puelo v. Islamic Republic of Iran*[115] to hold that the terrorism exception to the FSIA combined with the so-called Flatow Amendment create a private right of action against officials, employees and agents of a foreign government for their private conduct, but not against the foreign government itself, including its agencies and instrumentalities, nor agents, officials or employees in their official capacity. The Supreme Court declined to review the decision.

Proposed Legislation. Two bills were introduced during the 108th Congress in the House of Representatives to provide relief for the plaintiffs. H.Con.Res. 344 would have expressed the sense of the Congress that the POWs and their immediate family members should be compensated for their suffering and injuries as the court had decided, notwithstanding section 1503 of the Emergency Wartime Supplemental Appropriations Act of 2003. The bill would also have expressed Congress' resolve to continue its oversight of the application of § 1503 "in order to ensure that it is not misinterpreted, including by divesting United States courts of jurisdiction, with respect the POWs and other victims of Iraqi terrorism."[116] Additionally, the Senate passed language in § 325 of its version of the Emergency Supplemental Appropriations for Iraq and Afghanistan Security and Reconstruction Act, 2004 (H.R. 3289) that would have found that

> the Attorney General should enter into negotiations with each such citizen, or the family of each such citizen, to develop a fair and reasonable method of providing compensation for the damages each such citizen incurred, including using assets of the regime of Saddam Hussein held by the Government of the United States or any other appropriate sources to provide such compensation.

The language was not enacted.[117]

The other House bill from the 108th Congress, H.R. 2224, the "Prisoner of War Protection Act of 2003," would have allowed the plaintiffs, as well as any POWs who might later assert a cause of action in the more recent war against Iraq, to recover damages out of the $1.73 billion in frozen Iraqi assets that were vested by order of the President to pay for the reconstruction of Iraq.

Nothing similar to the Prisoner of War Protection Act has yet been introduced in the 109th Congress, but H.Con.Res. 93 would "express[] the sense of the Congress that the Department of Justice should halt efforts to block compensation for torture inflicted by the Government of Iraq on American prisoners of war during the 1991 Gulf War." H.R. 1321, introduced March 15, 2005, would authorize the payment of $1 million dollars to each of the seventeen plaintiffs out of unobligated funds appropriated under the heading of "Iraq Relief and Reconstruction Fund" in the 2004

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[115] 353 F.3d 1024 (D.C. Cir. 2004).

[116] H.Con.Res. 344.

[117] *See* P.L. 108-106, 117 Stat. 1209 (2003).

Emergency Supplemental[118] It is possible that Congress may be asked to pass legislation to resolve some of the issues in order to reinstate the judgment and provide for its satisfaction.

Ministry of Defense (Iran) v. Elahi

Although Iran has not appeared in court to defend itself in any of the terrorism cases brought against it, it is nonetheless challenging a decision that allows a judgment-holder to collect part of an award against Iran out of an award owed to Iran by a third party.[119] The Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran (MOD) has asked the Supreme Court to overturn a decision that allowed the respondent, Dariush Elahi to attach a $2.8 million arbitral award issued in Iran's favor by the International Chamber of Commerce for a breach of contract that occurred in 1979. Elahi had been awarded a default judgment of $311.7 million in a lawsuit against Iran and its Ministry of Intelligence and Security (MOIS) based on the 1990 the assassination of his brother, Dr. Cyrus Elahi, a dissident who was shot to death in Paris by agents of the Iranian intelligence service.[120] Dariush Elahi and another judgment-holder, Stephen Flatow, both attempted to intervene in MOD's suit against Cubic Defense Systems, Inc. to attach the award in partial satisfaction of their judgments against Iran. Flatow's petition was denied after the court found that he had waived his right to attach the award by accepting payment under section 2002 of the Victims of Trafficking and Violence Protection Act of 2000.[121]

Elahi's lawsuit was one of those cases added later to section 2002 of the VTVPA, however; and since he was only able to collect a portion of the compensatory damages from U.S. funds, he retained the right to pursue satisfaction of the rest of the compensatory portion of his claim from Iranian blocked assets. Iran argued that its judgment retained immunity under the FSIA as military property.[122] The court

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[118] *Id.* Presumably, the "17 plaintiffs in the [*Acree* case]" in H.R. 1321 refers to those plaintiffs who were actually held prisoner, but excludes 37 family members and relatives, who also participated as plaintiffs and were awarded damages of from $5 - 10 million each. Acree v. Republic of Iraq, 271 F.Supp.2d 179 (D.D.C. 2003), *vacated by* 370 F.3d 41 (D.C. Cir. 2004), *cert. denied* __ U.S. __ (2005).

[119] Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran, v. Cubic Defense Systems, 385 F.3d 1206 (9th Cir. 2004), *petition for cert. filed sub nom* Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Elahi,, 73 USLW 3498 (Feb 11, 2005)(NO. 04-1095).

[120] Elahi v. Islamic Republic of Iran, 124 F.Supp.2d 97 (D.D.C. 2000).

[121] Flatow chose to receive 100 percent of his compensatory damages from U.S. funds, but in return was required to relinquish "all rights to execute against or attach property that is at issue in claims against the United States before an international tribunal, that is the subject of awards rendered by such tribunal, or that is subject to section 1610(f)(1)(A) of title 28, United States Code." The court found that the award was covered by section 1610(f)(1)(A) because it is property regulated (although not blocked) by the Office of Foreign Assets control.

[122] 28 U.S.C. § 1611(b) exempts from the exception to immunity in § 1610 property that "is, (continued...)

rejected Iran's contention, noting that MOD did not assert that the judgment would be used for military purposes, but instead stated the money would be deposited in Iran's central bank.[123] The court also rejected Iran's contention that the judgment is protected as "the property . . . of a foreign central bank or monetary authority held for its own account" within the meaning of section 1611(b)(1), because it found that language to apply only to money held by a foreign bank "to be used or held in connection with central banking activities."[124] MOD also sought to invoke the blocking regulations as a bar to the attachment of the judgment, but the court rejected that argument as well, pointing out that the transaction was permitted under a general license.

Finally, MOD sought to bring a collateral attack against Elahi's default judgment, contesting the jurisdiction of the court that issued it on the basis of the alleged invalidity of the FSIA terrorism exception under the *Cicippio-Puleo* decision, *supra*. The court, construing the jurisdictional question as one of personal jurisdiction rather than subject-matter jurisdiction, found that MOD could have attempted to void the judgment on this basis at the district court level, but had waited too long to raise the issue during appellate proceedings. Because MOD was unable to show that the district court that issued the default judgment in favor of Elahi acted in a manner inconsistent with due process, or that the district court lacked subject-matter jurisdiction over the case, the court affirmed the decision in favor of Elahi.

MOD has petitioned for certiorari to the Supreme Court to review the decision on several bases. MOD challenges the 9th Circuit's finding that MOD is an "agency or instrumentality" of Iran rather than an integral part of the Iranian government without separate juridical status. This distinction has bearing under the FSIA as to how its assets are treated and whether it can be held liable for the debts of MOIS. MOD also challenges the assessment that the judgment due it on a military contract is not military property under the FSIA. As to the collateral attack on Elahi's judgment, Iran argues that in the context of the FSIA, questions of personal jurisdiction and subject-matter jurisdiction over a foreign sovereign are so intimately linked as to be inseparable, which would allow MOD to dispute the validity of Elahi's default judgment by asserting it was founded on an invalid cause of action.

If the Supreme Court decides to take this case, it could potentially review a wide range of issues affecting lawsuits against State sponsors of terrorism, including which entities may be sued, which causes of action plaintiffs may assert, what kinds of damages may be awarded, which foreign assets are available for attachment in enforcement of any resulting judgments, and whether default judgments may be reopened and possibly vacated during proceedings to enforce those judgments.

Bush Administration's Proposed Compensation Alternative

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[122] (...continued)
or is intended to be, used in connection with a military activity and (A) is of a military character, or (B) is under the control of a military authority or defense agency."

[123] 383 F.3d at 1222-23.

[124] *Id*. at 1223.

During the 108th Congress, Senator Lugar (R-IN) introduced an Administration proposal that would establish an administrative procedure to provide compensation to victims of international terrorism as an alternative to suits under the terrorist State exception to the FSIA. S. 1275 would have amended § 201 of the Terrorism Risk Insurance Act to provide that claimants who obtain judgments against terrorist States after the date of the bill's introduction can no longer collect on the compensatory damages portions of those judgments out of the States' blocked assets. As an alternative, the bill would have created a new compensation scheme called the "Benefits for Victims of International Terrorism Program." Administered by the State Department, the program would have been able to authorize the payment of up to $262,000 to those who have been killed, injured, or held hostage by an act of international terrorism.[125] A person who accepted benefits under the program would be barred from bringing or maintaining a suit against a terrorist State for the same act.

In a hearing on the bill by the Senate Committee on Foreign Relations on July 17, 2003,[126] William Taft, then State Department Legal Adviser, asserted that "[t]he current litigation-based system of compensation is inequitable, unpredictable, occasionally costly to the U.S. taxpayer, and damaging to foreign policy and national security goals of this country." Stuart Eizenstat, now in private practice but formerly the Clinton Administration's point man on this issue, claimed that the amount of compensation that would be provided under the bill was insufficient to make the scheme a viable alternative to litigation. Allan Gerson, a professor and trial lawyer involved in suits under the FSIA exception, charged that the proposal would deny plaintiffs their day in court and do nothing to hold terrorist States accountable for their actions. No further action was taken on the bill.

109th Congress – Proposed Legislation

In addition to the bills addressing the *Acree* decision, (H.R. 1321 and H.Con.Res. 93, discussed *supra)*, one other bill in the 109th Congress would make an effort to untangle the state of litigation against terrorist States. H.R. 865 would repeal the Flatow Amendment and enact a new subsection (h) after the current 28 U.S.C. § 1605 to provide an explicit cause of action against foreign terrorist States as well as their agents, officials and employees, making them liable "for personal injury or death caused by acts of that foreign State, or by that official, employee, or agent while acting within the scope of his or her office, employment, or agency, for which the courts of the United States may maintain jurisdiction under subsection (a)(7) for money damages." New subsection (h)(1)(A) would also state that the removal of a

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[125] The proposal used as its standard the amount available to the families of public safety officers who are killed in the line of duty under subpart 1 of part L of title I of the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C.A. §§ 3796 *et seq*. That act originally set the death benefit at $50,000; in 2001 Congress increased the death benefit to $250,000, adjusted annually for inflation. *See* P.L. 107-56, § 613(a) (Oct. 26, 2001); 115 Stat. 369. As adjusted, the amount of the benefit now is about $262,000.

[126] *Benefits for U.S. Victims of International Terrorism: Hearing Before the Senate Committee on Foreign Relations*, 108th Cong. (July 17, 2003).

foreign State from the list of designated foreign State sponsors of terrorism would not terminate a cause of action that arose during the period of such designation.

H.R. 865 would state that the discovery limitations in 28 U.S.C. §1605(g) would apply to the new cause of action, as the current Flatow Amendment also provides.[127] Subsection (g) provides that, in case of discovery requests on the United States involving actions allowed under subsection (a)(7), a court may issue a stay if the Attorney General requests one and certifies such discovery "would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action. . ." until the Attorney General advises the court that the risk of interference has passed.

New subsection (h)(1)(C) would limit the cause of action in new subsection (h)(1)(A) to exclude those arising out of acts of foreign States and their officials, employees, and agents when neither the claimant nor the victim was a U.S. national at the time the act occurred. The Flatow Amendment does not include such a limitation, but similar language contained in 28 U.S.C. § 1605(a)(7)(B)(ii), which limits the abrogation of immunity to cases where either the claimant or the victim was a U.S. national, would seem to produce the same effect.

New subsection (h)(2) would authorize money damages for such actions to include economic damages, solatium, damages for pain and suffering, and punitive damages. The foreign State would also be made vicariously liable for the actions of its officials, employees, or agents.

H.R. 865 would limit appeals applicable to suits under the terrorism exception to the FSIA. Under new subsection (h)(3), appeals in federal courts would have to be filed within 30 days from the entry of a final decision. Interlocutory appeals would be allowed only to challenge a decision denying the immunity of a State, in accordance with appellate rules governing such rulings (28 U.S.C. § 1292). The bill would not appear to restrict appeals in state courts, which are only infrequently the venue for lawsuits under the terrorism exception to the FSIA.[128]

Section 2 of H.R. 865 addresses property of foreign States that can be levied on under execution of terrorism judgments against those States. It would add a new subsection (g) to 28 U.S.C. § 1610 to provide that a property interest of a foreign

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[127] This may seem somewhat redundant, inasmuch as an action under the new subsection (h)(1)(A) is by definition one that is allowed under subsection (a)(7), and would already be covered by subsection (g).

[128] At least three such suits have yielded default judgments. In *Martinez v. Republic of Cuba*, No. 13-1999-CA 018208 (Miami-Dade Co., Fla., Cir. Ct. decided March 9, 2001), a woman was awarded $27.1 million by the Miami-Dade Court, Florida, for sexual battery based on her marriage by fraud to a Cuban spy. In *Weininger v. Republic of Cuba*, No. 03-22920 CA 20 (Miami-Dade Co., Fla., Cir. Ct. decided Nov. 11, 2004), the same court awarded $136.5 million to the daughter of a CIA pilot who was shot down over Cuba during the Bay of Pigs invasion and subsequently executed. The court also awarded $67 million to the daughter of a U.S. businessman who was tried as a spy and executed in the aftermath of the Cuban Revolution, *McCarthy v. Republic of Cuba*, No. 01-28628 CA04 (Miami-Dade Co., Fla., Cir. Ct. decided Apr. 17, 2003).

State (or its agencies or instrumentalities) against which a judgment has been entered under 1605(a)(7) is "subject to execution upon [a terrorism] judgment"[129] regardless of how much control over that property interest the foreign government actually exercises and whether the government derives profits or benefits from it. It would also allow execution on the property interest where "establishing the property interest as a separate entity would entitle the foreign State to benefits in [U.S.] courts while avoiding its obligation."[130] It would not provide the President any waiver authority.

The purpose and ramifications of the proposed language are not entirely clear. The FSIA does not define the term "property interest."[131] The proposed language suggests that it applies to a commercial entity in which the foreign government has an interest. The proposed language would render subject to execution any property interest of the defendant foreign State regardless of five criteria set forth in proposed subsection (g)(1):

> (A) The level of economic control over the property interest by the government of the foreign state;
> (B) whether the profits of the property interest go to that government;
> (C) the degree to which officials of that government manage the property interest or otherwise have a hand in its daily affairs;

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[129] The bill would not allow the attachment of such property in aid of execution prior to the award of a judgment.

[130] This clause appears designed to avoid the application of the Supreme Court decision in First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611 (1983) ("Bancec") to judgments against designated terrorist States. *Bancec* held that duly-created instrumentalities of a foreign State are to be accorded a presumption of independent status, but that this presumption may be overcome where such recognition would permit the foreign State to pursue a claim in United States courts while itself escaping liability by asserting immunity. The proposed language could allow a judgment creditor to "pierce the corporate veil"of a corporation owned by a judgment debtor State without having to demonstrate to the court that the presumption of independent status should be overridden.

[131] In the context of transactions that are prohibited or subject to license, Treasury regulations define property and property interest quite broadly. *See* 31 C.F.R. § 575.315 (Iraq Sanctions Regulations):

> The terms property and property interest include, but are not limited to, money, checks, drafts, bullion, bank deposits, savings accounts, debts, indebtedness, obligations, notes, debentures, stocks, bonds, coupons, any other financial instruments, bankers acceptances, mortgages, pledges, liens or other rights in the nature of security, warehouse receipts, bills of lading, trust receipts, bills of sale, any other evidences of title, ownership or indebtedness, letters of credit and any documents relating to any rights or obligations thereunder, powers of attorney, goods, wares, merchandise, chattels, stocks on hand, ships, goods on ships, real estate mortgages, deeds of trust, vendors sales agreements, land contracts, leaseholds, ground rents, real estate and any other interest therein, options, negotiable instruments, trade acceptances, royalties, book accounts, accounts payable, judgments, patents, trademarks or copyrights, insurance policies, safe deposit boxes and their contents, annuities, pooling agreements, services of any nature whatsoever, contracts of any nature whatsoever, and any other property, real, personal, or mixed, tangible or intangible, or interest or interests therein, present, future or contingent.

"Interest," according to the regulations, means "an interest of any nature whatsoever, direct or indirect." 31 C.F.R. § 500.312

(D) whether that government is the real beneficiary of the conduct of the property interest; or
(E) whether establishing the property interest as a separate entity would entitle the foreign state to benefits in [U.S.] courts while avoiding its obligation.

Courts might consider these criteria in determining whether an entity is an "agency or instrumentality" of a foreign government for purposes of immunity,[132] or whether it is an "alter ego" of the foreign government for liability purposes.[133] An entity that is not an agency or instrumentality of a foreign government is not entitled to sovereign immunity, but neither are its assets subject to attachment in execution of a judgment awarded against that foreign government, not due to immunity, but because a judgment creditor may not levy against a third-party's property in order to satisfy a money judgment against a judgment debtor.[134] The language does not purport to extinguish the rights of persons who have an interest in the same property to contest the levy of execution. The proposed language does not explicitly abrogate immunity, unlike other subsections of 1610 (except for subsection (f)), but a court might interpret it as an abrogation of immunity in keeping with the rest of § 1610.

Proposed subsection (g) could be read as an effort to make third-party assets available to judgment creditors by making any entity in which the foreign State has any interest whatsoever, regardless of whether it qualifies as an agency or instrumentality of the foreign State, liable for debts of that foreign State related to actions brought under section 1605(a)(7). However, the proposed bill would not alter the definition of agency or instrumentality of a foreign State under the FSIA, which is any entity:

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[132] *See* Flatow v. Islamic Republic of Iran, 67 F.Supp.2d 535, 539 (D.Md. 1999)(holding "a principal-agent relationship has been created for the purposes of the FSIA when the foreign sovereign exercises day-to-day control over its activities"(citing McKesson Corp. v. Islamic Republic of Iran, 52 F.3d 346, 351-52 (D.C.Cir.1995); *see also* Hester Int'l Corp. v. Federal Republic of Nigeria, 879 F.2d 170, 178-80 (5th Cir.1989) (holding that an entity in which Nigeria held 100% of its stock was not an agent because there was no showing of day-to-day control); Baglab Ltd. v. Johnson Matthey Bankers Ltd., 665 F.Supp. 289, 297 (S.D.N.Y. 1987) (holding that the plaintiff failed to overcome the presumption of separateness because it failed to prove that the Bank of England exercised "general control over the day-to-day activities" of an entity so that the entity could be deemed an agent).

[133] *See* Alejandre v. Telefonico Larga Distancia de Puerto Rico, 183 F.3d 1277, 1283 & n. 13 (11th Cir. 1999)(noting the court "conduct[s] exactly the same inquiry in order to determine both whether an exception to the Cuban Government's immunity from garnishment also applies to [Empresa de Telecomunicaciones de Cuba, S.A. ("ETECSA")] and whether ETECSA can be held substantively liable for the Government's debt to the plaintiffs: namely, whether the plaintiffs have overcome the presumption that ETECSA is a juridical entity separate from the Government").

[134] *See* 67 F.Supp.2d at 538 ("In order to levy against a third-party's property, the judgment creditor must prove that the property of a third-party can be seized because: (1) the third-party is an agent, alter ego, or instrumentality of the judgment debtor; (2) the third-party is a garnishee of the judgment debtor; or (3) there was a conveyance of property between the judgment debtor and the third-party which was motivated by the intent to defrauding creditors.").

> (1) which is a separate legal person, corporate or otherwise, and
> (2) which is 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) which is neither a citizen of a State of the United States as defined in section 1332 (c) and (d) of this title, nor created under the laws of any third country.[135]

Thus, only the property of the foreign State or its agencies and instrumentalities would be subject to attachment, and any assets associated with a separate-entity "property interest" that are not owned by the foreign State or its agencies or instrumentalities could not be levied against by judgment creditors; stripping such assets of immunity they do not enjoy would not make them available to judgment creditors of the foreign State for attachment. On the other hand, if the proposed language were interpreted to make assets of third parties available for execution by judgment creditors, constitutional questions regarding due process may arise.

Proposed subsection (g)(2), captioned "U.S. sovereign immunity inapplicable," would make a property interest described in (g)(1) that is regulated by reason of U.S. sanctions *not* immune by reason of such regulation from execution to satisfy a judgment rendered under section 1605(a)(7). It would not explicitly waive U.S. sovereign immunity,[136] but appears designed to defeat provisions in the sanctions regulations that make blocked property effectively immune from court action.[137] In this respect, it echoes language in current § 1610(f)(1), except that it applies only to *regulated* property interests rather than property that is *blocked or regulated* pursuant to sanctions regimes, and it would not be subject to the presidential waiver in § 1620(f)(3). Unlike § 201 of TRIA (28 U.S.C. § 1610 note), the new language would apply to *regulated* rather than *blocked* assets,[138] and it would allow assets to be attached in aid of enforcing punitive damages.

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[135] 28 U.S.C. § 1603(b).

[136] For a court to recognize a waiver of U.S. sovereign immunity, it must be "unequivocally expressed in the statutory text" and "is to be strictly construed, in terms of its scope, in favor of the sovereign." *See* Weinstein at 56 (citing Dep't of the Army v. Blue Fox, Inc., 525 U.S. 255, 261 (1999)).

[137] *See*, e.g., 31 C.F.R.§ 335.203(e) ("Unless licensed or authorized pursuant to this part any attachment, judgment, decree, lien, execution, garnishment, or other judicial process is null and void with respect to any property in which on or since the effective date there existed an interest of Iran."); 31 C.F.R. § 575.203(e)(same, with respect to Iraq).

[138] TRIA § 201(d)(2) defines 'blocked asset' to mean property seized or frozen pursuant to certain sanctions, but not property that may be transferred pursuant to a license that is required by statute *other than* IEEPA or the United Nations Participation Act of 1945. It also excludes diplomatic or consular property being used solely for diplomatic or consular purposes, from the definition of 'blocked asset.' This definition explicitly applies only within TRIA § 201, and may not have any bearing on the meaning of 'regulated property interest' in the context of the FSIA, which does not define 'property' or 'property interest.' TRIA does not refer to regulated assets, so it is unclear whether 'blocked' and 'regulated' are mutually exclusive terms, or whether 'blocked' assets would be considered to be 'regulated' as well.

Despite its caption, new section (g)(2) would not likely make funds in the U.S. Treasury, such as any funds set aside to pay a debt to Iran[139] or those held in the Foreign Military Sales (FMS) trust fund account presently under dispute between Iran and the United States, reachable by judgment creditors. To allow attachment of the FMS trust fund would eliminate the U.S.' ability to claim a right to claim those funds in subrogation of payments made pursuant to VTVPA § 2002 in the event the Iran-U.S. Claims Tribunal issues an award in Iran's favor. It is also unclear whether the proposed language would enable judgment creditors to levy against property held by others in the United States that is contested before the Iran-U.S. Claims Tribunal. To make such assets available to holders of terrorism judgments could affect the rights of other persons who claim an interest in the property, and could also breach U.S. obligations under the Algiers Accords. New section (g)(2) would not likely affect the rights of those who received U.S. funds in partial payment of their judgments against Iran, who would likely remain barred by the applicable provisions of VTVPA § 2002 from attaching certain property or attempting (in certain cases) to collect the punitive portions of their damages.

Sec. 3 of H.R. 865 would amend the Victims of Crime Act by changing the effective date to October 23, 1988 (instead of December 21, 1988), and would expressly include investigations in civil matters. This would make available funds under the Victims of Crime Act, 42 U.S.C. § 10603(c), to pay costs associated with appointment of a special master to determine civil damages for the bombing of the Marine barracks in Lebanon in 1983. Subsection (b) would direct the Attorney General to make such funds available for that purpose in the matter of Person v. Islamic Republic of Iran, Case No. 01CV02094 (RCL), probably a reference to *Peterson v. Islamic Republic of Iran*,[140] a suit brought by those injured as a result of the 1983 bombing of the Marine barracks in Lebanon.

Section 4 of H.R. 865 would provide for the establishment of an automatic lien of lis pendens with respect to all real or tangible personal property located within the judicial district that is titled in the name of a defendant State sponsor of terrorism or any entities listed by the plaintiff as "controlled by" that State (not further defined), upon the filing of a notice of action in complaints that rely on the terrorism exception to the FSIA. There are no federal procedures for establishing lis pendens; the rules vary by state. Ordinarily, the doctrine of lis pendens applies to specific property at issue in a dispute, which must be described with sufficient specificity to enable a prospective purchaser to identify it. Lis pendens applies with respect to only the property described in the notice, and cannot affect other property of a defendant.[141] It is not ordinarily available in suits seeking money judgments over matters unrelated

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[139] *See* Flatow v. Islamic Republic of Iran, 74 F.Supp.2d 18 (D.D.C. 1999)(holding that FSIA terrorist State provisions exceptions did not authorize attachment of United States Treasury funds owed to Iran in accordance with an award of the Iran-United States Claims Tribunal, as such funds remained the property of the United States, and the amendments did not contain the express and unequivocal waiver required to abrogate the United States' sovereign immunity).

[140] 264 F.Supp.2d 46 (D.D.C. 2003).

[141] 54 C.J.S. *Lis Pendens* § 31 (1987).

to the property unless and until a valid judgment has been awarded.[142] It does not generally apply to negotiable instruments.[143]

Ordinarily, the purpose of filing a lis pendens in civil litigation is to put third-parties on notice that the property is the subject of litigation, which effectively prevents the alienation of such property, although it is not technically a lien. Its effect is to bind a person who acquires an interest in property subject to litigation to the result of the litigation as if he or she were a party to it from the outset.[144] However, in the case of State sponsors of terror, whose property for the most part is already subject to substantial limitations on transactions, the primary utility may be the establishment of a line of priority among lien-holders, to determine which successful plaintiffs have priority in collecting from the defendant's assets. In the case of suits filed under 28 U.S.C. § 1605(a)(7), H.R. 865 would direct the clerk of the district court to file the notice of action "indexed by listing as defendants and all entities listed as controlled by any defendant." This would appear intended to relieve plaintiffs of the burden of identifying specific property in the notices,[145] but it is difficult to see how adequate notice could be afforded to purchasers under the procedure. Due process implications may arise both with respect to entities alleged to be controlled by the defendant State and third parties who acquire an interest in their property after notice of an action is filed. The proposed language would have no effect on actions in state court, and would not explicitly exclude diplomatic or consular property.

Section 5 would establish that the above amendments would apply retroactively and that in the case of any action that was dismissed before the enactment of the bill that would be made cognizable by the bill, the 10-year statute of limitations would be tolled from the time the action was first filed to 60 days after the enactment of the bill. It does not appear that the bill would enable plaintiffs whose cases were not dismissed, but who suffered some other adverse ruling (for example, denying punitive damages), to reopen their case. To the extent that this provision would reopen any cases that have already been finally adjudicated (no longer subject to appeal), it may be viewed as an unconstitutional usurpation of a judicial function.[146]

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[142] *Id.* § 11.

[143] *Id*. § 10.

[144] *Id*. § 34.

[145] Section 4's limitation to property located within the judicial district where the complaint is filed may limit its usefulness to plaintiffs in this respect. It is typical for judgment-holders in these cases to seek to attach assets in multiple jurisdictions, while venue is generally available to bring such actions against a foreign State only in the D.C. Circuit or in "any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated." 28 U.S.C. § 1391(f).

[146] Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995)(invalidating a statute that retroactively extended the statute of limitations for certain claims under the Securities Exchange Act of 1934).

Suits Against the United States for "Terrorist" Acts

At least two of the States affected by the FSIA exception appear to have enacted legislation allowing their citizens to file suit against the United States for violations of human rights or interference in the countries' internal affairs. Cuba reportedly allows such suits for violations of human rights; and two judgments assessing billions of dollars in damages against the U.S. have apparently been handed down.[147] Iran reportedly has authorized suits against foreign States for intervention in the internal affairs of the country and for terrorist activities resulting in the death, injury, or financial loss of Iranian nationals; and at least one judgment for half a billion dollars in damages has been handed down against the U.S.[148]

Conclusion

The 1996 amendments to the FSIA allowing victims of terrorism to sue the State(s) responsible for damages in U.S. courts were enacted with broad political support in Congress. But subsequent difficulties in obtaining payment of the substantial damages assessed in default judgments by the courts and subsequent efforts in Congress to facilitate or allow such payment out of the assets of such States located in the United States have raised issues fraught with both emotion and complexity. Matters of effectiveness, fairness, diplomacy, and possible reciprocal action against U.S. assets abroad have all entered the debate. In addition, the issue has pitted the compensation of victims of terrorism against U.S. compliance with specific international obligations and, most recently, against the use of funds for the reconstruction of Iraq.

As the situation stands now, claimants in a first tier of cases designated under § 2002 of the Victims of Trafficking Act were able to obtain either 100 percent or 110 percent of their compensatory damages awards – nearly $100 million in one case against Cuba out of Cuba's blocked assets, more than $380 million in ten cases against Iran out of U.S. funds. Claimants in a second tier of cases designated under § 2002 received a smaller percentage of their compensatory damages awards – about 20 percent. Under § 201 of the Terrorism Risk Insurance Act, claimants in other cases not covered by § 2002 may now compete with each other to lay claim to the blocked assets of terrorist States to satisfy the compensatory damages portions of their judgments. But in the case of Iran – the defendant in the largest number of suits filed, those blocked assets are virtually non-existent; and Presidential Determination 2003-23 has made Iraq's blocked assets unavailable as well. Disagreement among the courts as to whether a cause of action exists to sue terrorist States themselves, as opposed to their employees, officials, and agents, casts the status of many of such cases in doubt. Confusion about the definition of an "agency or instrumentality" of a foreign State also lends uncertainty to these lawsuits. Iran's petition in the *Elahi* case may provide the Supreme Court with an opportunity to address some of the

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[147] Law Library of Congress, *Suits Against Terrorist States: Cuba* (Feb. 2002) (Rept No. 2002-11904).

[148] Law Library of Congress, *Iran: Suits Against Americans for Acts of Terrorism* (July 2003) (Rept. No. 2003-14887) and *Christian Science Monitor*, "Tehran Court Rules Against U.S." (Feb. 3, 2003), at 6.

myriad issues raised by the terrorism exception to the FSIA, if it decides to take the case.

Thus, notwithstanding Congress' enactments, the compensation of victims of terrorism who have brought suit, or will bring suit, under the terrorist State exception to the FSIA seems likely to continue in an *ad hoc* fashion, with substantial benefits for some and little or none for others. The issue seems certain to continue to draw Congressional attention.

APPENDIX I
Judgments Against Terrorist States Covered By, and Payments Made Pursuant to, § 2002

Judgment	Compensatory Damages Awarded	Punitive Damages Awarded	Amount Paid Pursuant to § 2002 (Including Interest)	Procedure Used
Alejandre v. Republic of Cuba, 996 F.Supp. 1239 (S.D. Fla. 1997)	$50 million	$137.7 million	$96,708,652.03	Paid from liquidated Cuban assets
Flatow v. Islamic Republic of Iran, 999 F.Supp.2d 1 (D.D.C. 1998)	$22.5 million	$225 million	$26,002,690.15	100% option (appropriated funds)
Cicippio v. Islamic Republic of Iran, 18 F.Supp. 2d 62 (D.D.C. 1998)	$65 million	$0	$73,260,501.72	100% option (appropriated funds)
Anderson v. Islamic Republic of Iran, 90 F.Supp.2d 107 (D.D.C. 2000)	$41.2 million	$300 million	$47,315,791.80	110% option (appropriated funds)
Eisenfeld v. Islamic Republic of Iran, 172 F.Supp.2d 1 (D.D.C. 2000)	$24.7 million	$300 million	$27,365,288.83	100% option (appropriated funds)
Higgins v. Islamic Republic of Iran, 2000 WL 33674311 (D.D.C. 2000)	$55.4 million	$300 million	$57,086,233.16	100% option (appropriated funds)
Sutherland v. Islamic Republic of Iran, 151 F.Supp.2d 27 (D.D.C. 2001)	$53.4 million	$300 million	$56,084,467.27	One claimant chose the 110% option, the others the 100% option (appropriated funds)
Polhill v. Islamic Republic of Iran, 2001 WL 34157508 (D.D.C. 2001)	$31.5 million	$300 million	$35,041,877.36	110% option (appropriated funds)
Jenco v. Islamic Republic of Iran, 154 F.Supp.2d 27 (D.D.C. 2001)	$14.64 million	$300 million	$14,865,685.76	100% option chosen (appropriated funds)

Judgment	Compensatory Damages Awarded	Punitive Damages Awarded	Amount Paid Pursuant to § 2002 (Including Interest)	Procedure Used
Wagner v. Islamic Republic of Iran, 172 F.Supp.2d 128 (D.D.C. 2001)	$16.28 million	$300 million	$18,032,569.00	110% option chosen (appropriated funds)
Stethem v. Islamic Republic of Iran, 201 F.Supp.2d 78 (D.D.C. 2002)	$21.2 million	$300 million (jointly with *Carlson*)	$21,579,737.64	100% option chosen (appropriated funds)
Carlson v. Islamic Republic of Iran, 201 F.Supp.2d 78 (D.D.C. 2002)	$7.8 million	$300 million (jointly with *Stethem*)	$ 8,784,584.90	110% option chosen (appropriated funds)
Martinez v. Republic of Cuba, No. 13-1999-CA 018208 (Miami-Dade Co., Fla., Cir. Ct. decided March 9, 2001)	$7.1 million	$20 million	at least $7.1 million*	Paid from Cuban assets
Cases added by P.L. 107-228 and TRIA:				
Elahi v. Islamic Republic of Iran, 124 F.Supp.2d 97 (D.D.C. 2000)	$11.7 million	$300 million	$ 2,342,729.89	Pro rata payment (appropriated funds)
Mousa v. Islamic Republic of Iran, 238 F.Supp.2d 1 (D.D.C. 2001)	$12 million	$120 million	$ 2,394,606.04	Pro rata payment (appropriated funds)
Weinstein v. Islamic Republic of Iran, 184 F.Supp.2d 13 (D.D.C. 2002)	$33 million	$150 million	$ 6,634,687.87	Pro rata payment (appropriated funds)
Hegna v. Islamic Republic of Iran, No. 1:00CV00716 (D.D.C. 2002)	$42 million	$333 million	$ 8,387,121.10	Pro rata payment (appropriated funds)
Kapar v. Islamic Republic of Iran, C.A. No. 02-CV-78- HHK (D.D.C. 2004)	$13.5 million	$0	approx. $2.5 million*	Pro rata payment (appropriated funds)

Note: Information on the amounts paid under § 2002 has been provided by the Office of Foreign Assets Control (OFAC) and is current as of July, 2003 (*these figures have not been confirmed by OFAC but are estimates of amounts payable under the statute). Claimants in the first tier (*Flatow* through *Carlson*) choosing the 100 percent option were entitled to receive

100 percent of the compensatory damages awarded plus post-judgment interest on condition that they relinquish any further right to compensatory damages and any right to satisfy their punitive damages award out of the blocked assets of the terrorist State (including diplomatic property), debts owed by the United States to the terrorist State as the result of judgments by the Iran-U.S. Claims Tribunal, and any property that is at issue in claims against the United States before that and other international tribunals (such as Iran's Foreign Military Sales account). Claimants who chose the 110 percent option were entitled to receive 110 percent of the compensatory damages awarded plus post-judgment interest on condition they relinquish any further right to obtain compensatory and punitive damages. The claimants in the second tier (added by P.L. 107-228 and TRIA) divided the amount remaining in the fund on a *pro rata* basis and were not required to give up their right to recover additional compensatory damages, except from property at issue before an international tribunal. Our research shows that at least 14 additional judgments have been awarded in cases not covered under § 2002, with a total value of $2.44 billion ($575,264,848.19 of this figure is compensatory damages, the remaining $1,865,000,000.00 represents punitive damages. This figure does not include the vacated award in the *Acree* case). Judgment creditors in this category of cases may attempt to collect compensatory (but not punitive damages) from all blocked assets of the defendant State under TRIA § 201, except for diplomatic and consular property where the President has issued a waiver and property that does not fall under an exception in 28 U.S.C. § 1610.

APPENDIX II
Amount of Assets of Terrorist States

State	Blocked Assets in millions of dollars	Non-blocked Assets in millions of dollars
Cuba	$ 192.0	$0
Iran	$ 23.2	$59.0
Libya*	$1247.9	$0
North Korea	$ 31.7	$0
Sudan	$ 60.5	$0
Syria	$ 0.0	$58.0
Total	**$1555.3**	**$117**

Note: This information is from the *Calendar Year 2004 Thirteenth Annual Report to the Congress on Assets in the United States of Terrorist Countries and International Terrorism Program Designees* (September, 2004), which was prepared by the Office of Foreign Assets Control in the Department of the Treasury. These values may fluctuate. *Libya's assets are no longer blocked as of September 21, 2004, pursuant to E.O. 13357 (terminating national emergency with respect to Libya).