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Legal Sidebar

It Belongs in a Museum: Sovereign Immunity Shields Iranian Antiquities Even When It Does Not Protect Iran

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Foreign sovereign immunity may protect property owned by nations designated as state sponsors of terrorism, even when it does not shield the nations themselves, the Supreme Court held in *Rubin v. Islamic Republic of Iran*. In an 8-0 opinion delivered by Justice Sotomayor (with Justice Kagan recused), the Court ruled that the Foreign Sovereign Immunities Act (FSIA) did not permit U.S. victims of Iran-sponsored terrorist attacks to seize a collection of Persian antiquities on loan from Iran to a museum at the University of Chicago. *Rubin* underscores a common side effect of the FSIA's terrorism-related exceptions to sovereign immunity: although victims of terror attacks may be able to obtain judgments against state sponsors of terrorism—currently, Iran, Sudan, Syria, and North Korea—they often have little chance of seizing covered states' property when seeking to collect their financial awards.

Background on *Rubin*

Rubin arose from a 1997 triple suicide bombing on a crowded pedestrian mall in Jerusalem. Hamas claimed responsibility for the attacks, which killed five bystanders and injured nearly 200 others. Among those wounded were eight U.S. citizens who, along with a group of close relatives, filed suit alleging that Iran should be held liable for the attacks because it provided material support and training to Hamas. When Iran did not appear to defend itself in the case, the district court entered a $71.5 million default judgment in favor of the plaintiffs.

Iran did not pay the judgment, leaving the plaintiffs to identify Iranian assets in the United States that were available for collection. Because various statutes and executive orders have restricted the transfer of much of Iran's property in the United States, the plaintiffs looked for nontraditional ways of collection. They eventually sought to attach a set of approximately 30,000 clay tablets and fragments known as the Persepolis Collection housed at the Oriental Institute in the University of Chicago. Discovered by archeologists during an excavation of the ancient city of Persepolis in the 1930s, Iran loaned the 2,500-year-old tablets to the University of Chicago in 1936 for research and translation. Iran still claims ownership of the collection, and when the plaintiffs sought a court order allowing seizure of the tablets,

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Iran and the University of Chicago asserted that the foreign sovereign immunity embodied in the FSIA protected the artifacts.

The Law of Foreign Sovereign Immunity

Originally enacted in 1976, the FSIA contains two presumptive rules of immunity: (1) foreign nations and their "agencies and instrumentalities" are immune from suit in the United States (called jurisdictional immunity), and (2) property owned by foreign sovereigns is immune from attachment. Both types of immunity, however, are subject to exceptions. For example, in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Congress amended the FSIA to eliminate jurisdictional immunity for certain claims against designated state sponsors of terrorism through a provision now titled the "Terrorism exception to the jurisdictional immunity of a foreign state." When a judgment is entered under that exception, AEDPA also created an exception to the immunity from attachment afforded to property that is owned by the state sponsor of terrorism and used for commercial activity in the United States.

This framework was further modified by the 2008 National Defense Authorization Act (2008 NDAA). There, Congress addressed the circumstances by which property owned by the agencies or instrumentalities of a foreign state sponsor of terrorism, such as state-owned corporation or financial institution, could be used to satisfy a judgment against the state itself. In 1983, the Supreme Court held that a plaintiff with judgment against a foreign state cannot attach property owned by the state's agencies and instrumentalities without overcoming the presumption of separateness between the state and those entities. Lower courts eventually developed a list of five factors—known as the *Bancec* factors—that can be used to overcome the presumption of separateness by showing, for example, that the state exercised economic control over the property or received profits derived from it. In a provision codified at 28 U.S.C. § 1610(g), the 2008 NDAA limited the requirement for proof of the five *Bancec* factors in the context of cases arising from state-sponsored terror attacks. More specifically, § 1610(g) provides that, when a judgment is entered under the terrorism exception to jurisdictional immunity, property owned by the state *or* its agencies and instrumentalities "is subject to attachment . . . regardless of" the application of the listed *Bancec* factors.

The Circuit Split over Immunity from Attachment and State Sponsors of Terrorism

Rubin addressed a circuit split regarding the scope of § 1610(g). As detailed in this earlier Sidebar, two U.S. courts of appeals had adopted a broad reading of the provision, interpreting it as containing a freestanding exception to immunity from attachment. Under this approach, any time a judgment is entered against a foreign state under the FSIA's terrorism exception to jurisdictional immunity, property owned by the state or its agencies and instrumentalities is not protected by immunity from attachment.

In the lower court proceedings in *Rubin*, however, the U.S. Court of Appeals for the Seventh Circuit (Seventh Circuit) adopted a narrower view. It held that, although 28 U.S.C. §1610(g) allowed plaintiffs with judgments against state sponsors of terrorism to attach property owned by the states' agencies and instrumentalities notwithstanding the applicability of the *Bancec* factors, the provision did not create a stand-alone exception to immunity from attachment in cases against state sponsors of terrorism. Thus, even though a judgment had been entered against Iran under the terrorism exception to jurisdictional immunity, the Seventh Circuit held that the FSIA's immunity from attachment still protected Iran-owned property unless a separate exception to immunity applied. Based on this interpretation, the Seventh Circuit denied the *Rubin* plaintiffs' request to attach the tablets in the Persepolis Collection.

The Supreme Court Affirms the Narrow Reading of the Exception to Immunity from Attachment

The plaintiffs in *Rubin* urged the Supreme Court to adopt a broader reading of § 1610(g), arguing that the provision was "designed to remove all impediments to terrorism victims' civil lawsuits against designated state sponsors of terrorism." But the Supreme Court disagreed and sided with the Seventh Circuit. The "most natural reading" of § 1610(g), the Court held, is that it was intended to limit the requirement for

proof of the *Bancec* factors in the terrorism context, not to create a "blanket abrogation" of immunity from attachment. Individuals with judgments against state sponsors of terrorism can still collect on their judgments, Justice Sotomayor explained in her opinion for the unanimous Court. But those victims must rely on the FSIA's other exceptions to immunity from attachment (e.g., the listed exceptions in 28 U.S.C. § 1610(a)) or identify specific property or sources of funds that Congress has made available under other federal laws, such as the Terrorism Risk Insurance Act or the Justice for United States Victims of State Sponsored Terrorism Act (discussed in this CRS In Focus).

Congressional Interest in *Rubin*

Congress has had a longstanding interest in addressing the extent to which victims of terrorist attacks overseas can obtain relief through civil suits in U.S. courts. Since the 1990s, Congress has enacted several laws that limit sovereign immunity for state sponsors of terrorism and provide a cause of action to certain victims of terror attacks. While federal courts have awarded these victims billions of dollars in judgments under these laws, the judgment-holders often are unable to collect on their awards when the foreign state does not have assets in the United States. Some judgment-holders have been creative in their efforts to identify assets, seeking to attach less obvious forms of property like contract rights, internet domain names, or the clay tablets in *Rubin*. But the *Rubin* decision serves as an illustration that, even when judgment-holders are to identify property in the United States, the FSIA's rules on immunity from attachment still may prevent collection.

As recently as the Justice Against Sponsors of Terrorism Act (JASTA), which was passed over President Obama's veto in 2016 (discussed here), Congress has enacted legislation that reduces FSIA's jurisdictional immunity in the terrorism context without creating parallel exceptions to immunity from attachment. Some argue that laws that eliminate jurisdictional immunity alone can be counterproductive because they can create foreign relations repercussions, while raising too many hurdles for victims of terrorism to receive tangible benefits. But others assert these laws can provide independent benefits, such as deterring financing of terrorism.

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