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## Terrorism, the Law and Politics as Usual: A Comparison of Anti-Terrorism Legislation Before and After 9/11

Cover Page Footnote

18-4

# **TERRORISM, THE LAW AND POLITICS AS USUAL: A COMPARISON OF ANTI-TERRORISM LEGISLATION BEFORE AND AFTER 9/11**

*Mona Conway*<sup>1</sup>

## **INTRODUCTION**

Under the state sponsor of terrorism exception to the Foreign Sovereign Immunities Act (FSIA),<sup>2</sup> victims of terrorist acts may bring suit against foreign countries in federal district court to obtain compensatory and punitive damages. Prior to this fairly recent legislation foreign states retained almost absolute immunity from suit in United States courts.<sup>3</sup> With this jurisdictional element now in place, American plaintiffs can initiate lawsuits against foreign countries so long as they allege that the defendant foreign state is a “state sponsor of terrorism” (as defined in the statute), and that such support caused the injuries to be redressed.<sup>4</sup> The most challenging aspect of the process is collecting a judgment. It is for this reason that the FSIA, in its current form, has come under harsh criticism. Congress enacted the exceptions to foreign sovereign immunity for the express purposes of compensating victims and their families and deterring future acts of terrorism. However, despite numerous amendments enacted to facilitate claims against terrorist nations, the executive branch of our government has maintained protection of foreign state assets. Thus, it has become virtually impossible for plaintiffs to collect the judgments they fought so hard to win.

The FSIA has both legal and political ramifications. While the Anti-Terrorism legislation empowered U.S. courts to hear and redress claims brought by Americans against foreign governments, it simultaneously allowed the executive branch to block the

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<sup>2</sup> Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended at 28 U.S.C. §§ 1602 - 1611 (2000 & Nov. 28, 2001, Pub. L. No. 107-77, Title VI, § 626(c), 115 Stat. 803; Jan. 10, 2002, Pub. L. No. 107-117, Div B, Ch. 2, § 208, 115 Stat. 2299, Nov. 26, 2002, Pub. L. No. 107-297, Title II, § 201(c)(3), 116 Stat. 2337)).

<sup>3</sup> See *infra* text accompanying notes 6-13.

<sup>4</sup> See discussion *infra* Part I.A.

execution of judgments won by these plaintiffs. Therefore, the Act's very purpose can be overridden by the executive branch, effectively precluding any relief for the people it intended to be compensated. Consequently, vindication for plaintiffs who have successfully sued under the FSIA has been confined to theoretical notions of justice. This is so because no plaintiff has yet collected a tangible award from any defendant foreign state.

During the Clinton Administration, the legal hurdles faced by plaintiffs suing under the FSIA were dwarfed by the political obstacles they confronted. As such, this note will consider the potential fate of this legal remedy since the infamous terrorist attacks on U.S. citizens on September 11, 2001 (9/11). Prior to 9/11, the American public was largely detached from the devastating effects of terrorist attacks on our citizenry. Since terrorism has now hit home, the nation's outrage is palpable. Whereas the notion of terrorism took on a rudimentary meaning at the time President Clinton was in the White House, the term now embodies the nature of "evil" in a Bush-led<sup>5</sup> America. At this point in our country's history, it seems inconceivable that the U.S. government's opposition to suits brought by the victims of the World Trade Center massacre would be considered acceptable by the American public. Yet, there has been no public outcry condemning the United States' perfect record of successful opposition to such claims. Despite recent events and a change in administration the remedial landscape of the Foreign Sovereign Immunities Act may continue to take on new forms, but ultimately, it will leave victims of terrorism with a right, but no remedy. In this context, the adage "politics as usual" takes on a most disheartening connotation.

## BACKGROUND

In the United States, the doctrine of sovereign immunity has long been recognized as sacrosanct.<sup>6</sup> The "act of state"

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<sup>5</sup> All references made herein to President Bush refer to George W. Bush.

<sup>6</sup> See generally *The Schooner Exchange v. M'Faddon*, 11 U.S. 116, 136 (1812) (stating that a strict theory of sovereign immunity implies that foreign nations enjoy absolute immunity from the jurisdiction of U.S. courts and that our nation's immunity is reciprocally honored).

doctrine, for example, has been employed by the judiciary to avoid embarrassing the other branches of government by the courts' usurping the constitutional duty of the executive and legislative branches to decide issues of foreign concern.<sup>7</sup> By the middle of the twentieth century American jurisprudence recognized the need to shift from absolute immunity accorded to foreign states in U.S. courts toward a restrictive theory of sovereign immunity.<sup>8</sup> This trend was born out of the rise of Communism and increased foreign trading.<sup>9</sup> Yet, it was not until 1976 that this restrictive theory of sovereign immunity was codified in the Foreign Sovereign Immunities Act. Until that time, foreign states enjoyed virtually unrestricted and absolute immunity from suits in U.S. courts as a matter of common law.<sup>10</sup>

Prior to the passage of the FSIA, international conflicts were strictly a matter of diplomatic relations and the U.S. State Department had the final say with respect to immunity.<sup>11</sup> It was clear that private citizens could not be guaranteed a legal remedy

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<sup>7</sup> See *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976). The act of state doctrine has been described in the following manner:

Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

*Id.* at 691 (quoting *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897)). In the FSIA case of *Daliberti v. Republic of Iraq*, 97 F. Supp. 2d 38, 55 (D.D.C. 2000), the "act of state" doctrine was considered a judicial *interference* with foreign policy.

<sup>8</sup> See *Alfred Dunhill*, 425 U.S. at 698. A legal separation of foreign activities has been recognized by the courts since 1952, whereby public acts of a sovereign should remain judicially unchallenged but commercial and private acts should create an exception to sovereign immunity. *Id.*; see also S. Jason Baletsa, Comment: *The Cost of Closure: A Reexamination of the Theory and Practice of the 1996 Amendments to the Foreign Sovereign Immunities Act*, 148 U. PA. L. REV. 1247, 1254 (2000) (stating that the concern that a more global economy would increase the legal problems faced domestically was a key reason for necessitating foreign accountability).

<sup>9</sup> See *Flatow v. The Islamic Republic of Iran*, 999 F. Supp. 1, 18 (D.D.C. 1998).

<sup>10</sup> See *id.* at 11.

<sup>11</sup> See *id.*

when disputes arose involving foreign sovereigns.<sup>12</sup> Therefore, the FSIA was enacted to provide a jurisdictional basis for claims by Americans against foreign sovereigns.<sup>13</sup> Consequently, determinations of sovereign immunity were relinquished by the executive branch and empowered in the judiciary.<sup>14</sup> The idea was to allow certain legal disputes to be decided based on legal standards and not on political temperaments.<sup>15</sup> The FSIA must be applied in every private action involving a foreign state defendant within the United States.<sup>16</sup> The Act left intact the protective shield of immunity by virtue of a statutory presumption,<sup>17</sup> but removed from protection those acts which fell within certain enumerated exceptions.<sup>18</sup>

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<sup>12</sup> See Baletsa, *supra* note 8, at 1257.

<sup>13</sup> 28 U.S.C. §1602 provides:

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter. . . .

<sup>14</sup> See *Flatow*, 999 F. Supp. at 19.

<sup>15</sup> See *National Airmotive Corp. v. Government & State of Iran*, 499 F. Supp. 401, 406 (D.D.C. 1980); see also *Flatow*, 999 F. Supp. at 11.

<sup>16</sup> The FSIA is the "exclusive source of subject matter jurisdiction over all civil actions against foreign states." *Flatow v. The Islamic Republic of Iran*, 76 F. Supp. 2d 16, 20 (D.D.C. 1999) (citing *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434-35 (1989)).

<sup>17</sup> See *Hwang v. Japan*, 172 F. Supp. 2d 52, 56 (D.D.C. 2001) (the FSIA dictates that foreign states are presumptively immune from lawsuits brought in the U.S.).

<sup>18</sup> 28 U.S.C. §1602(a)(1-5). The original exceptions to the FSIA included voluntary waivers of immunity, commercial activity in the U.S. and non-commercial torts committed within the scope of employment.

Then came the problem of terrorism<sup>19</sup> against U.S. citizens, which began to escalate over the latter part of the twentieth century. In 1979, Iranian militants held hostage and tortured more than fifty Americans over a period of 444 days.<sup>20</sup> In 1988, Pan Am flight 103 was bombed in a terrorist attack over Lockerbie, Scotland, claiming the lives of 259 Americans aboard.<sup>21</sup> A suicide bomber bombed an Israeli tour bus in 1995, killing an American student on board.<sup>22</sup> Less than one year later, several more Americans were murdered in the terrorist bombing of another bus in Israel.<sup>23</sup> Also in 1996, three Americans were killed when the Cuban government ordered a military strike on a civilian airplane flying over international waters on a routine, humanitarian mission.<sup>24</sup> Between 1980 and 1996 foreign terrorists killed more than 600 Americans and injured many more.<sup>25</sup> In direct response to the growing pattern of terrorist attacks on U.S. citizens, Congress enacted legislation to fight the so-called war on terror.<sup>26</sup> In 1996, the FSIA was amended by the Anti-Terrorism and

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<sup>19</sup> Although definitions of terrorism vary to some degree, one statute has generally defined terrorism as "premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents." *Flatow*, 999 F. Supp. at 17 (citing 22 U.S.C. § 2656f (d) (2)).

<sup>20</sup> See *Roeder v. The Islamic Republic of Iran*, 195 F. Supp. 2d 140, 146 (D.D.C. 2002).

<sup>21</sup> See *In re Air Disaster at Lockerbie Scotland* on December 21, 1988, 37 F.3d 804, 810 (2d Cir. 1994).

<sup>22</sup> See *Flatow v. The Islamic Republic of Iran*, 76 F. Supp. 2d 16, 18 (D.D.C. 1999).

<sup>23</sup> See *Weinstein v. The Islamic Republic of Iran*, 184 F. Supp. 2d 13, 15-16 (D.D.C. 2002).

<sup>24</sup> See *Alejandre v. The Republic of Cuba*, 996 F. Supp. 1239, 1242 (S.D. Fla. 1997).

<sup>25</sup> Sean P. Vitano, Comment: *Hell-Bent on Awarding Recovery to Terrorism Victims: The Evolution and Application of the Antiterrorism Amendments to the Foreign Sovereign Immunities Act*, 19 DICK. J. INT'L L. 213, 218 (2000).

<sup>26</sup> See *Flatow v. The Islamic Republic of Iran*, 999 F. Supp. 1, 11 (D.D.C. 1998) (discussing that the anti-terrorism amendment was part of a federal initiative to combat international terrorism). The dismissal of *Smith v. Socialist People's Libyan Arab Jamahiriya*, 886 F. Supp. 306 (E.D.N.Y. 1995) (which concerned the bombing of flight 103 over Lockerbie, Scotland) for lack of jurisdiction, the lobbying efforts by the Flatow family, and the Cuban attack on American civilian pilots have all been considered catalysts for the amendments to the FSIA. See Baletsa, *supra* note 8, at 1261; see also Vitano, *supra* note 25, at 218.

Effective Death Penalty Act<sup>27</sup> (Anti-terrorism Act).<sup>28</sup> This sweeping legislation, enacted to hold terrorist nations accountable and to create a civil remedy for victims of foreign terrorism, had a two-fold effect: it removed sovereign immunity from state sponsors of terrorism<sup>29</sup> and allowed for the attachment of property and assets of foreign states within the United States to satisfy judgments obtained by victims of terrorism.<sup>30</sup> The Anti-terrorism Act carved out the exception to foreign sovereign immunity for two express purposes: (1) it was designed to influence the sovereign conduct of foreign states in an effort to combat terrorism, and (2) it provided the substantive law of liability for non-immune acts, i.e., terrorism.<sup>31</sup>

However, certain obstacles to recovery for victims remained<sup>32</sup> and a stronger message of absolute intolerance of terrorism needed to be conveyed by the U.S. government. In response, Congress further amended the FSIA by expanding the scope of attachment of foreign property within the United States

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<sup>27</sup> Pub. L. No. 104-132, 110 Stat. 1214, 1241-43 (codified as amended at 28 U.S.C. §1605(a)(7) (2000 & Nov. 28, 2001, Pub. L. No. 107-77, Title VI, § 626(c), 115 Stat. 803; Jan. 10, 2002, Pub. L. No. 107-117, Div B, Ch. 2, § 208, 115 Stat. 2299, Nov. 26, 2002, Pub. L. No. 107-297, Title II, § 201(c)(3), 116 Stat. 2337)).

<sup>28</sup> Most references made to the FSIA and to all anti-terrorism amendments made to the FSIA will be collectively referred to herein as the "Anti-Terrorism Act."

<sup>29</sup> This provision eliminated the limitation imposed in the original non-commercial tort exception of the FSIA requiring that the illegal conduct take place within the U.S. *See* Baletsa, *supra* note 8, at 1261-62.

<sup>30</sup> Prior to 1996, the FSIA imposed a strict *in rem* nexus requirement by allowing plaintiffs to enforce judgments only against the property out of which the claim arose. 28 U.S.C. §§ 1605, 1610(a)(2) (1994) (subsequently amended 1996, 1999, 2000, 2001). *See* Baletsa, *supra* note 8, at 1261-62.

<sup>31</sup> *See Flatow*, 999 F. Supp. at 14.

<sup>32</sup> A major roadblock in the execution of judgments against state sponsors of terrorism was the attachment requirement that the foreign-owned property be of a commercial nature. *See* J. W. Dellapenna, *Civil Remedies for International Terrorism*, 12 DEPAUL BUS. L.J. 169, 282 (1999). Congress attempted to remedy this by allowing a court to order execution of a judgment otherwise protected by diplomatic immunity or frozen under the President's orders. *Id.* at 282-83.



and allowing plaintiffs to recover punitive damages.<sup>33</sup> This is commonly known as the “Flatow Amendment,” enacted with the Flatow family’s pending suit against Iran in mind.<sup>34</sup> The Flatow Amendment created a civil cause of action against a foreign state and its agents for acts which, essentially, constitute a waiver of sovereign immunity under the FSIA.<sup>35</sup> Recognizing a potential conflict of interest early on, Congress sought to remove the political pressure inextricably involved in foreign matters and turn determinations of accountability over to the judiciary.<sup>36</sup> Yet, what Congress failed to foresee was the vehement resistance to execution of judgments that the executive branch has relentlessly exercised in precluding terrorist victims from their right to a remedy.<sup>37</sup>

In order to bring suit against a foreign sovereign under the state sponsored terrorism exception, the foreign state must be a designated sponsor of terrorism.<sup>38</sup> This is an official designation determined by the U.S. Department of State.<sup>39</sup> To date, there are

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<sup>33</sup> Punitive damages have been held not recoverable against the foreign nation itself but only against an agent or employee of the foreign state. *See Flatow*, 999 F. Supp at 12.

<sup>34</sup> *Id.* (construing Civil Liability for Acts of State Sponsored Terrorism, 28 U.S.C. § 1605 note (1996)). Both 1996 amendments are construed in conjunction with one another. *See Ungar v. Islamic Republic of Iran*, 211 F. Supp. 2d 91, 93 (D.D.C. 2002).

<sup>35</sup> *See Roeder v. The Islamic Republic of Iran*, 195 F. Supp. 2d 140, 149 (D.D.C. 2002); *Daliberti v. Republic of Iraq*, 97 F. Supp. 2d 38, 43 (D.D.C. 2000); *Flatow v. The Islamic Republic of Iran*, 76 F. Supp. 2d 16, 19 (D.D.C. 1999).

<sup>36</sup> *See Vitano, supra*, note 25, at 220-21.

<sup>37</sup> *Id.* at 222.

<sup>38</sup> Pursuant to 28 U.S.C. 1605(a)(7), providing an exception to a foreign sovereign’s immunity, there are three threshold requirements: (1) the plaintiff or victim must be a U.S. national; (2) if the terrorist act took place within the state’s borders, the state must be given the opportunity to arbitrate the claim; and (3) the foreign defendant must have been designated a state sponsor of terrorism pursuant to either Section 6(j) of the Export Administration Act of 1979 or Section 620A of the Foreign Assistance Act of 1961. *Daliberti v. Republic of Iraq*, 97 F. Supp. 2d 38, 44 (D.D.C. 2000).

<sup>39</sup> *See Daliberti*, 97 F. Supp. 2d at 44 (“The Export Administration Act calls upon the Secretary of State to make a determination that a foreign state has ‘repeatedly provided support for acts of international terrorism,’ to notify the relevant committees of both houses of Congress, and to publish the determination in the Federal Register.”).

seven foreign sovereigns designated as state sponsors of terrorism: Iran, Iraq, Cuba, Syria, Libya, Sudan, and North Korea.<sup>40</sup> State sponsorship is the term used to categorize the giving of material support and resources to an individual or entity that commits an illegal act resulting in the death or injury of a U.S. citizen.<sup>41</sup>

Former President Clinton publicly supported the new legislation, expressing great sympathy for the families of the victims of terrorism, whose spirit the legislation was honoring.<sup>42</sup> Yet the Clinton Administration had effectively sided with the enemy, undermining the effectiveness of the new amendments by successfully opposing enforcement of judgments obtained against foreign state sponsors of terrorism. Although many plaintiffs have won judgments, to date, there has not been a single plaintiff who has successfully executed a judgment won in a suit under the FSIA.<sup>43</sup>

#### ANALYSIS

Part one of this comment will focus on the legal obstacles to recovery encountered by plaintiffs after money damages have been awarded under the Anti-terrorism Act.

Part two will examine the political conflicts which impede the just process of recovery for victims of terrorism, yielding only what is known as a "pyrrhic victory." It will explain why the U.S. government has taken away with one hand what it gave with the other.

Part three will compare the political climates of the Clinton and Bush administrations in this context. It will examine the goals intended by the Clinton Congress and discuss how the Bush

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<sup>40</sup> Terrorism List Government Sanctions Regulations, 31 C.F.R. 596.201 (2002).

<sup>41</sup> *Flatow*, 999 F. Supp. at 12.

<sup>42</sup> "We renew our fight against those who seek to terrorize us, in your names: America will never surrender to terror." Vitrano, *supra* note 25, at 214 n.5 (quoting President Clinton on signing the Anti-terrorism and Effective Death Penalty Act of 1996, Pub. Papers, Administration of William J. Clinton, 1996, Book 1 (April 24, 1996)); *see also Flatow*, 76 F. Supp. 2d at 19 n.4.

<sup>43</sup> *See Hoffman and Stodola, Pursuing U.S. Civil Damages for Terrorism, THE METROPOLITAN CORP. COUNS.*, Dec., 2001, at 12. *But see infra* notes 84, 103 and accompanying text.

administration might pick up where the FSIA left off. The executive branch's lack of assistance in facilitating plaintiffs' recovery and its affirmative acts of intervention, precluding these plaintiffs from executing their judgments, will be evaluated in a post-September 11<sup>th</sup> political, social and legal world.

## I. OBSTACLES TO JURISDICTION AND EXECUTION OF JUDGMENTS

### A. *The State Sponsor Problem*

As a personal consideration, many plaintiffs contend that the awards they pursue in suits against foreign state supporters of terrorism are merely a secondary matter; for these plaintiffs, confrontation and closure are what they truly seek.<sup>44</sup> Yet, it is rare for foreign defendants to answer complaints brought under the Anti-terrorism Act;<sup>45</sup> most foreign defendants simply ignore them or refute them as being inappropriate in some manner.<sup>46</sup> Consequently, plaintiffs are generally not afforded the opportunity to confront their adversaries.

The first jurisdictional hurdle to be surmounted by plaintiffs seeking justice under the FSIA is establishing that they have been injured by a defendant nation whose name appears on the State Department's short list of state sponsors of terrorism.<sup>47</sup>

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<sup>44</sup> See, e.g., Pamela Falk, *Families of Missing Have Three Options*, N.Y.L.J., Nov. 27, 2001, at 5 (a "sense of justice" is what most families of the victims desire).

<sup>45</sup> The cases of *Rein v. Socialist People's Libyan Arab Jamahiriya*, 995 F. Supp. 325 (E.D.N.Y. 1998) and *Daliberti v. Republic of Iraq* are the only cases in which the defendant state responded to the action. *Daliberti*, 97 F. Supp. 2d 38, 44 (D.D.C. 2000). Defendant states Libya and Iraq responded, inter alia, by filing motions to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted, which both district courts denied.

<sup>46</sup> Iran never defended itself, but spurned the *Flatow* suit, calling it "politically motivated" and "totally lacking objectivity and credibility." Baletsa, *supra* note 8, at 1292 n.267 (quoting *Jerseyan Seeks Top-Level Aid in Iran Suit*, STAR-LEDGER (Newark, NJ), July 18, 1998, at 6, available at 1998 WL 3431042 (quoting an unnamed source from Tehran)). In *Rein*, Libya attempted to defend itself by asserting its rights under international law and mistakenly asserted that the U.S. court lacked subject matter jurisdiction over the claim. 995 F. Supp. at 328.

<sup>47</sup> See *supra* notes 38-40 and accompanying text.

The mere fact that a foreign nation has not heretofore been designated as a state sponsor of terrorism by the Department of State may itself preclude a cause of action by a plaintiff injured by that foreign state.<sup>48</sup> A case in point is *Saudi Arabia v. Nelson*.<sup>49</sup> Scott Nelson, an American,<sup>50</sup> was arrested by the Saudi Government and, during his thirty-nine day detainment, was beaten, starved and tortured.<sup>51</sup> Although Nelson's case was dismissed prior to the enactment of the Anti-terrorism Act,<sup>52</sup> his suit is still barred because Saudi Arabia has not been designated as a state sponsor of terrorism.<sup>53</sup> As will be discussed, a foreign state may be designated as a sponsor of terrorism for a lawsuit brought by one party, but not so designated for purposes of another suit brought by a different plaintiff.<sup>54</sup> This limitation would appear patently unfair.<sup>55</sup> That a plaintiff's cause of action is rendered valid or invalid, depending on a foreign state's status and relationship with our government, is offensive to traditional notions of justice. From the victim's point of view, no sense can be made of holding some states liable while other states, engaged in

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<sup>48</sup> See, e.g., *Smith v. Socialist People's Libyan Arab Jamahiriya*, 886 F. Supp. 306 (1995), *aff'd* 101 F.3d 239 (2d Cir. 1996), *cert. denied*, 520 U.S. 1204 (1997).

<sup>49</sup> 507 U.S. 349 (1993).

<sup>50</sup> See *supra* note 38. One of two preconditions upon which a federal court may acquire subject matter jurisdiction under the FSIA is that the plaintiff be a United States citizen at the time the cause of action arose. See *Stethem v. Islamic Republic of Iran*, 201 F. Supp. 2d 78, 86 (D.D.C. 2002) (citing 28 U.S.C. §1605(a)(7)(A) & (B)).

<sup>51</sup> Scott Nelson was hired by a privately owed Saudi Arabian hospital. Apparently in response to Nelson's repeated reports of safety violations at the facility, hospital employees reported him to Saudi police, who arrested him. *Nelson*, 507 U.S. at 352-53.

<sup>52</sup> Nelson's claim was dismissed because his arrest was not based upon a "commercial activity" under §1610(a)(2) of the Act. Saudi Arabia's tortious acts, therefore, were immune from the jurisdiction of the federal court. *Nelson*, 507 U.S. at 363.

<sup>53</sup> Baletsa, *supra* note 8, at 1287.

<sup>54</sup> See text accompanying notes 214-16. In *Roeder v. The Islamic Republic of Iran*, 195 F. Supp. 2d 140 (D.D.C. 2002), the court dismissed the FSIA claim upon finding that Iran was not a designated state sponsor of terrorism at the time of the terrorist act for which it was being sued, nor was it so designated as a result of that act.

<sup>55</sup> See Baletsa, *supra* note 8, at 1286-87.

the same level of terrorist activity, retain immunity.<sup>56</sup> This policy focuses on the actor rather than on the action and subjects the victims of terrorism to the precariousness of political determinations.<sup>57</sup>

September 11th,<sup>58</sup> in the minds of the American public, put the country of Afghanistan on the map in the context of terrorism.<sup>59</sup> With respect to terrorist organizations supported by Afghanistan, the issue of state sponsorship is exceedingly complicated. At the time of the attacks, Afghanistan was run by the Taliban.<sup>60</sup> The Taliban has never been recognized as a national government.<sup>61</sup> Therefore, even if it were shown that the Taliban

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<sup>56</sup> Daniel Wolf, Scott Nelson's counsel, stated, "There is no principled reason for providing redress in our courts for American citizens who are tortured by officials of foreign states on the Department's list, but denying such redress to Americans who are tortured by officials of other countries." Baletsa, *supra* note 8, at 1288 (quoting *Victims of Torture: Hearings Before Subcomm. on Int'l Operations and Human Rights of the House Comm. on Int'l Relations*, 104th Cong. 88 (1996)).

<sup>57</sup> See Baletsa, *supra* note 8, at 1288.

<sup>58</sup> "9/11" is unquestionably considered the deadliest terrorist attack on American citizens in history. See Allan Gerson, *The Price of Terror: One Bomb. One Plane. 270 Lives*, N.Y.L.J., Nov. 30, 2001, at 2.

<sup>59</sup> The hunt for Osama bin Ladan began soon after the 9/11 attacks, in the mountains of Afghanistan. See *Smith v. Islamic Emirate of Afghanistan*, No. 01 Civ. 10132 (HB), 01 Civ. 10144 (HB) 200,1 U.S. Dist. LEXIS 21712, at \*5 (S.D.N.Y. Dec. 20, 2001).

<sup>60</sup> It is believed that the Taliban, the Islamic military faction which ruled Afghanistan at the time of the 9/11 attacks, knew the whereabouts of reputed terrorist financier, Osama bin Ladan. See John F. Burns, *A Nation Challenged: The Taliban; Clerics Answer 'No, No, No!' and Invoke Fates of Past Foes*, N.Y. TIMES, September 22, 2001, at B3.

<sup>61</sup> Neither the Taliban nor the Islamic Emirate of Afghanistan is currently "recognized" by any country as a governmental entity. See *Smith*, 1 U.S. Dist. LEXIS 21712, at \*13 (plaintiffs, victims of the September 11, 2001 attack on the World Trade Center, have a pending suit against Afghanistan, *al Qaeda*, and Osama bin Ladan, pursuant to several federal anti-terrorism statutes). However, the Taliban was previously recognized as a government by only Pakistan, Saudi Arabia and the United Arab Emirates. See Burns, *supra* note 60. In 1996, when the Taliban had taken over most of Afghanistan by force, the U.S. State Department expressed hope that the Taliban might finally bring stability to the region. See Elaine Sciolino, *State Dept. Becomes Cooler To the New Rulers of Kabul*, N.Y. TIMES, October 23, 1996, at A14.

funded terrorist organizations such as *al Qaeda*<sup>62</sup> or that it lent material support to Osama bin Laden,<sup>63</sup> who funded terrorist organizations, the Taliban cannot be deemed a state sovereign. The legal status of Afghanistan would logically fall outside the jurisdiction of the FSIA since it is a non-governmental entity. Therefore, Afghanistan cannot be designated as a state sponsor of terrorism. It follows that plaintiffs wishing to sue the terrorist groups found to be linked to the 9/11 attacks will have to find a cognizable foreign state which has sponsored such groups. Undoubtedly without seeking it, the Taliban and Afghanistan have found a legal loophole to liability under the Anti-terrorism Act.

### *B. Locating Foreign Assets within the United States*

Satisfying a judgment is impossible without first locating the defendant foreign state's assets within the United States.<sup>64</sup> Furthermore, defendant states certainly will not "hand over the money voluntarily."<sup>65</sup> Without the help of the U.S. government, finding foreign state assets poses a monumental problem for plaintiffs. In an effort to reverse the effect of intervention by the United States,<sup>66</sup> which, ultimately served to undermine the legislative purpose of the Anti-Terrorism Act, Congress enacted legislation which forced the U.S. government to assist plaintiffs.<sup>67</sup> The Omnibus Consolidated and Emergency Supplemental

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<sup>62</sup> *Al Qaeda* has been legally deemed an "unincorporated association." See *Smith*, 2001 U.S. Dist. LEXIS 21712, at \*11.

<sup>63</sup> Osama bin Ladan, currently the target of a worldwide manhunt, has been widely held responsible for the September 11, 2001 attack on the World Trade Center as well as previous attacks on U.S. citizens. See *Smith*, 2001 U.S. Dist. LEXIS 21712, at \*9.

<sup>64</sup> American judgments are not automatically honored outside of the U.S. In fact, the U.S. is not a party to any international treaty which proposes to reciprocally honor domestic judicial orders. See Dellapenna, *supra* note 32, at 239. Section 1610(a)(7) of the FSIA removes immunity from attachment of property located in the United States "if the judgment relates to a claim for which the foreign state is not immune under section 1605(a)(7). . . ."

<sup>65</sup> Margaret Cronin Fisk, *After the Attacks*, NAT'L L.J., Oct. 1, 2001, at A5 (citing comment by Aaron S. Podhurst, plaintiff's attorney in *Alejandro*, who won a \$187 million judgment against Cuba in 1996).

<sup>66</sup> See discussion *infra* Part I.C.

<sup>67</sup> Baletsa, *supra* note 8, at 1293.

Appropriations Act of 1999 amended sections of the FSIA to subject certain foreign assets to attachment as long as the foreign nation surrendered its immunity through any of the exceptions to the FSIA.<sup>68</sup> Furthermore, the executive branch is required to assist FSIA plaintiffs in executing their judgments by locating blocked assets of the foreign states for them.<sup>69</sup> However, what the legislation gave with one pen stroke, it took away with another. The provision simultaneously gives the President the power to waive these requirements, leaving plaintiffs on their own once more.<sup>70</sup> Thus, while the executive branch is legally obligated to cooperate in sniffing out otherwise hidden financial interests held by the foreign state, it may, at its own discretion (which it has been known to freely exercise), refuse to assist plaintiffs and even participate in thwarting their efforts.

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<sup>68</sup> Pub.L. No. 105-277, Title I, §117, 112 Stat. 2681, 2681-491 (October 21, 1998). Section 117 added subsections 1610(f)(1)(A) & (B) to the FSIA. Section 1610(f)(1)(A) provides:

Notwithstanding any other provision of law, including but not limited to section 208(f) of the Foreign Missions Act (22 U.S.C. 4308(f)), and except as provided in subparagraph (B), any property with respect to which financial transactions are prohibited or regulated pursuant to section 5(b) of the Trading with the Enemy Act (50 U.S.C. 5(b)), section 620(a) of the Foreign Assistance Act of 1961 (22 U.S.C. 2370(a)), sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701-1702), or any other proclamation, order, regulation, or license issued pursuant thereto, shall be subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state (including any agency or instrumentality of such state) claiming such property is not immune under section 1605(a)(7).

This legislation even goes so far as to effectively supersede other U.S. laws pursuant to which foreign assets are frozen. Baletsa, *supra* note 8, at 1294.

<sup>69</sup> "Subsection (f)(2)(A) establishes requirements upon the Secretary of the Treasury and Secretary of State to assist in locating the blocked assets of terrorist states in order to facilitate attachment and execution." *Conference Report on H.R. 4328*, 144 CONG. REC. E2307 (daily ed. November 12, 1998) (statement of Hon. Bill Pascrell, Jr. of New Jersey in the House of Representatives).

<sup>70</sup> See *Flatow v. The Islamic Republic of Iran*, 76 F. Supp. 2d 16, 25 (D.D.C. 1999). ("[T]he President may waive the requirements of this section in the interest of national security." (quoting Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, Title I, § 117)).

These conflicting attachment provisions were tested for the first time in *Flatow v. The Islamic Republic of Iran*.<sup>71</sup> When the plaintiff levied writs of attachment on real property owned by Iran located in the United States to satisfy a default judgment of over \$250 million, the U.S. government intervened and successfully quashed the writs.<sup>72</sup> President Clinton exercised the aforementioned waiver option immediately following the attachment.<sup>73</sup> Although the plaintiff argued that giving the waiver provision this effect produces an “absurd – and hence unsanctionable – result,” the district court, in construing the attachment and execution amendments of the FSIA, found this “counterbalancing” by Congress to be “entirely reasonable.”<sup>74</sup>

A crucial dilemma faced by the plaintiffs in *Alejandro v. Republic of Cuba*,<sup>75</sup> who obtained a default judgment of \$187,627,911 under the FSIA, was locating the funds of the Cuban government that could be accessed here in the States. Resourcefully, the *Alejandro* plaintiffs attempted to satisfy the judgment by securing the funds through a garnishment action against debts owed to Cuba by certain telecommunications companies.<sup>76</sup> The district court had denied the U.S.’s motion to dissolve the writs of garnishment because to grant it would not only deny the plaintiffs their court-ordered remedy, but it would “override the clear legislative policy against such terrorist attacks and in favor of broadening the property which may be executed upon to compensate for them.”<sup>77</sup> Despite the fact that President Clinton had promptly waived the requirements under the attachment amendments, the district court denied the U.S.’s motion.<sup>78</sup> The U.S. followed up with an appeal to the Eleventh Circuit; however, the appellate court did not reach the issue of the

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<sup>71</sup> 76 F. Supp. 2d 16 (D.D.C. 1999).

<sup>72</sup> *Id.* at 16.

<sup>73</sup> *Id.* at 25 (citing *Determination to Waive Requirements Relating to Blocked Property of Terrorist-List States*, 63 F. R. 59201 (1998)).

<sup>74</sup> *Id.* at 26.

<sup>75</sup> 996 F. Supp. 1239 (S.D. Fla. 1997).

<sup>76</sup> *Alejandro v. Telefonica Larga Distancia De Puerto Rico*, 183 F.3d 1277 (11th Cir. 1999).

<sup>77</sup> *Id.* at 1339.

<sup>78</sup> *Id.* at 1279 (citing *Pres. Determination No. 99-1*).



President's waiver.<sup>79</sup> Instead, the Eleventh Circuit vacated the district court's denial of the U.S. motion on other grounds. The debt sought to be attached was found not to be owed to Cuba itself, but to an entity deemed separate from Cuba; the court so held even though the entity operated as a government instrumentality.<sup>80</sup> The plaintiffs were faced with overcoming a strong presumption in favor of finding separate judicial status promulgated by international public law.<sup>81</sup> According to the court, a showing of injustice, such as fraud, may surmount this presumption.<sup>82</sup> However, contrary to what the district court believed, the unfairness of the plaintiffs' inability to collect a judgment, by itself, was not enough.<sup>83</sup> For the *Alejandro* plaintiffs, the court's decision marked a collections dead end.<sup>84</sup>

### C. *United States Intervention to Prevent Attachment*

Even though Congress expanded the limitations inherent in the FSIA for the purpose of broadening the range of attachable assets held by terrorist foreign states, so as to make execution of judgments in favor of American victims of terrorism more probable and less problematic,<sup>85</sup> the subsequent case law attests to an entirely different result. The United States has consistently

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<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 1283-85.

<sup>81</sup> Under *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983), even if an entity is owned by the foreign state, there is a "presumption of independent and separate legal status." *Flatow v. Islamic Republic of Iran*, 308 F.3d 1065, 1070 (9th Cir. 2002). In order to overcome this presumption, plaintiffs would have to prove that the entity was, in fact, an alter ego of the Cuban government. *Alejandro*, 183 F.3d at 1285.

<sup>82</sup> *Alejandro*, 183 F.3d at 1286.

<sup>83</sup> *Id.* at 1286-87.

<sup>84</sup> The Clinton administration did, however, release a limited amount of funds (\$1.2 million) which were distributed to the *Alejandro* plaintiffs. See Vitano, *supra* note 25. The funds were taken from Cuban government bank accounts, which were frozen by the U.S. in 1962. See Zaffuto, *A "Pirate's Victory": President Clinton's Approach to the New FSIA Exception Leaves the Victors Empty-Handed*, 74 TUL. L. REV. 685, 710 (1999).

<sup>85</sup> See 28 U.S.C. §1610(a)(7); see also *Alejandro*, 183 F.3d at 1287 (stating that Congress intended to broaden the availability of property which may be executed upon to benefit victims of terrorist attacks).

demonstrated strong resistance to the recovery of judgments when the attachment of foreign state-owned property is at stake. In *Flatow*,<sup>86</sup> the United States intervened on every occasion to prevent the attachment of several Iranian properties located in the U.S.<sup>87</sup> The *Flatow* case represents the quintessential illustration of the stymied results encountered in attempting to execute a judgment awarded under the Anti-terrorism Act.

Alisa Flatow, an American college student, was killed by a terrorist suicide bomber in 1995 while she was traveling in Israel.<sup>88</sup> The Shaqaqi faction of Palestine Islamic Jihad claimed responsibility for the bombing of the bus on which Alisa was a passenger.<sup>89</sup> It was found that the sole source of funding for the Shaqaqi's terrorist activities came from the Islamic Republic of Iran.<sup>90</sup> Alisa's father, Stephen Flatow, sued Iran under the FSIA and the recently enacted "Flatow Amendment," the plaintiff's namesake, and won a default judgment of over \$240 million in 1998.<sup>91</sup> Subsequently, Flatow went about trying to collect on the judgment by initiating enforcement proceedings throughout the U.S.<sup>92</sup>

Flatow sought to attach Iran's diplomatic property, which was located in Washington, D.C., but since President Clinton had exercised his waiver authority, the U.S.'s motion to quash the writ of attachment was granted.<sup>93</sup> The Flatow family also pursued the attachment of an alleged Iranian owned property interest in Maryland, but the action was likewise denied because the court found that the record owner of the property was a non-profit organization, possibly controlled by Iran, but nonetheless entitled to a presumption of independent existence.<sup>94</sup> In their quest to find non-immune property to attach in execution of the judgment

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<sup>86</sup> *Flatow v. The Islamic Republic of Iran*, 999 F. Supp. 1 (D.D.C. 1998).

<sup>87</sup> See *infra* notes 93-113 and accompanying text.

<sup>88</sup> *Flatow*, 999 F. Supp. at 7-8.

<sup>89</sup> *Id.* at 8.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 34.

<sup>92</sup> See *Flatow v. Islamic Republic of Iran*, 67 F. Supp. 2d 535, 537 (D. Md. 1999), *aff'd* *Flatow v Alavi Found.*, 225 F.3d 653 (4th Cir. 2000).

<sup>93</sup> *Flatow v. The Islamic Republic of Iran*, 76 F. Supp. 2d 16, 24 (D.D.C. 1999).

<sup>94</sup> *Flatow*, 67 F. Supp. 2d at 542.

awarded to them, the Flatows made another attempt to combat the U.S.'s intervention on behalf of Iran by placing a lien on a debt owed to Iran.<sup>95</sup> The debt of \$5 million was owed by none other than the United States, awarded to Iran by the Iran-U.S. Claims Tribunal.<sup>96</sup> Once the court determined that the property, which included U.S. Treasury funds, belonged to the United States, the United States declared its own sovereign immunity and the debt became untouchable.<sup>97</sup> Regrettably, the same judge who awarded the Flatows a \$247.5 million judgment was compelled to grant yet another U.S. motion, forestalling plaintiffs' relief.<sup>98</sup> Relentlessly, the Flatows pursued satisfaction of their judgment by attempting to attach an arbitration award issued to Iran twelve years prior; this time the writ was barred by the statute of limitations.<sup>99</sup> Another attempt by the Flatows failed when they tried to attach "all property, trusts, credits or assets of any type whatsoever of either defendant . . . being held by the United States of America under the jurisdiction of the *Department of Defense*."<sup>100</sup> The attachment was barred by the law of the case.<sup>101</sup>

In October, 2000, the FSIA was further amended by The Victims of Trafficking and Violence Protection Act (Victims Protection Act),<sup>102</sup> allowing certain victims of terrorist acts to satisfy their outstanding judgments through the United States Treasury.<sup>103</sup> In January, 2001, pursuant to this Act, the Flatows

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<sup>95</sup> Flatow v. Islamic Republic of Iran, 74 F. Supp. 2d 18, 19 (D.D.C. 1999).

<sup>96</sup> *Id.* at 20 (citing Islamic Republic of Iran v. United States, Case No. A/27, AWD No. 586-A27-FT, (Iran-United States Claims Tribunal (June 5, 1998))).

<sup>97</sup> *Id.*

<sup>98</sup> Judge Lamberth acknowledged the "apparent unfairness" of the court's ruling and expressed appreciation for the Flatows' frustration with the White House's actions. *Id.* at 25-26; see also Flatow, 76 F. Supp. 2d at 18.

<sup>99</sup> Flatow, 76 F. Supp. 2d at 28.

<sup>100</sup> Flatow v. Islamic Republic of Iran, C.A. No. 97-396 (RCL), 2000 U.S. Dist. LEXIS 8910 \*1 (D.D.C. June 6, 2000) (emphasis added).

<sup>101</sup> *Id.* at \*9 ("The principle of law of the case, which ensures that 'the same issue presented a second time in the same case in the same court should lead to the same result,' dictates that this writ also be quashed.").

<sup>102</sup> Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 2002, 114 Stat. 1464, 1541-43 (2000).

<sup>103</sup> See Flatow v. Islamic Republic of Iran, 305 F.3d 1249 (D.C. Cir. 2002). By electing to receive 100% of their compensatory damage awards, FSIA plaintiffs give up their rights to execution and attachment with respect to

were given \$26 million, the amount of compensatory damages awarded, on the condition that they relinquish "all rights to execute against or attach property that is ... subject to section 1610(f)(1)(A) of title 28, United States Code" (Anti-Terrorism Act)<sup>104</sup> Despite this, Flatow filed a motion with the district court to compel payment by the U.S. Treasury Department of post-judgment interest of the punitive damage award of \$225 million against Iran.<sup>105</sup> Unsurprisingly, the district court refused to interpret the statute as holding the United States accountable for the "indefinite obligation" of paying interest on the multi-million dollar punitive damages award.<sup>106</sup> In the same action, Flatow also opposed the modification of a subpoena to compel the United States to assist in locating Iran's assets, a duty owed by the Treasury under the FSIA, as amended by the Victim's Protection Act.<sup>107</sup> Flatow argued that the provision of the Victims Protection Act at issue, ostensibly precluding Flatow's right to assistance by the U.S. government since the right was abrogated by acceptance of the compensatory damage award, was the product of closed negotiations with members of Congress and the Executive.<sup>108</sup> Flatow claimed that he had "struck a deal" with members of the government, permitting the attachment of certain Iranian properties in order to satisfy the punitive damage award.<sup>109</sup> Conceding that

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property that falls into any of three categories: (1) property that is "at issue in claims against the United States before an international tribunal," (2) property that is "the subject of awards rendered by such tribunal," or (3) property that is "subject to section 1610(f)(1)(A) of title 28, United States Code." *Flatow v. Islamic Republic of Iran*, 201 F.R.D. 5, 9 (D.D.C. 2001), *vacated by* 305 F.3d 1249 (D.C. Cir. 2002) (quoting the Victims Protection Act, § 2002(a)(2)(D)).

<sup>104</sup> *Flatow*, 305 F.3d at 1251(citing section 2002(a)(2)(D) of the Victim's Protection Act).

<sup>105</sup> *Flatow*, 201 F.R.D. at 6.

<sup>106</sup> *Id.* at 10.

<sup>107</sup> *Id.* at 8-9. 28 U.S.C. § 1610(f)(2)(A) (as amended by section 2002(f) of the Victims Protection Act) states that the Treasury "should make every effort to fully, promptly, and effectively assist any judgment creditor or any court that has issued any such judgment in identifying, locating, and executing against the property of that foreign state or any agency or instrumentality of such state."

<sup>108</sup> Flatow's brief asserted that negotiations were held with Jack Lew, Director of the Office of Management and Budget and Stuart Eizenstat, Deputy Secretary of the Treasury on behalf of President Clinton, and Senators Connie Mack (R-FL.) and Frank Lautenberg (D-N.J.) on behalf of the victim's families. *Id.* at 9.

<sup>109</sup> *Id.*

“legislation is the product of interest group negotiation and thus should sometimes be interpreted so as to give each party the benefit of the bargain,”<sup>110</sup> the court nevertheless adhered to the plain meaning of the Act’s text and denied Flatow’s opposition.<sup>111</sup> Upon appeal, the United States’ argument that it was not a party to the FSIA suit against Iran was enough to have Flatow’s claim dismissed for lack of subject matter jurisdiction.<sup>112</sup>

In December, 2001, the United States won another argument against Flatow in the Ninth Circuit. Flatow sought to attach property located in California, which was owned by an Iranian bank.<sup>113</sup> Flatow argued at the district level that the bank was “extensively controlled” by Iran in order to show that the bank and Iran were not separate entities, deserving separate juridical status.<sup>114</sup> To support this proposition, Flatow introduced as evidence Iran’s own constitution, which expressly states that banks are owned and administered by Iran.<sup>115</sup> The district court found the nationalization of Iranian banks insufficient to overcome the presumption of independent status between the bank and Iran;<sup>116</sup> therefore, the bank was not subject to execution of the judgment against Iran.<sup>117</sup> However, the U.S. government was asked by the Ninth Circuit Court to submit a brief on the issue of whether the anti-terror amendments to the FSIA vitiate this common law presumption of separate juridical status.<sup>118</sup> Predictably, the United States was able to persuade the court that it did not, and the appellate court affirmed the lower court decision.<sup>119</sup>

The Flatow family has not been able to execute their judgment against Iran to date,<sup>120</sup> despite years of litigation against

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<sup>110</sup> *Id.* at 10 (citing [Judge] Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 535 (1983)).

<sup>111</sup> *Id.*

<sup>112</sup> *Flatow v. Islamic Republic of Iran*, 305 F.3d 1249, 1252 (D.C. Cir. 2002).

<sup>113</sup> *Flatow v. Islamic Republic of Iran*, 308 F.3d 1065, 1067 (9th Cir. 2002).

<sup>114</sup> *Id.* at 1068; *see also supra* note 81.

<sup>115</sup> *Flatow*, 308 F.3d at 1068.

<sup>116</sup> *Id.* at 1073.

<sup>117</sup> *Id.* at 1068.

<sup>118</sup> *Id.* at 1071.

<sup>119</sup> *Id.*

<sup>120</sup> This is notwithstanding the U.S. Treasury’s reimbursement of \$26 million in compensatory damages. *See supra* text accompanying note 104.

a foreign adversary and, effectively, their own government. As Judge Lamberth put it:

[P]laintiff's efforts to satisfy his judgment against Iran have proven futile. Indeed, in light of his lack of success thus far, it appears that plaintiff Flatow's original judgment against Iran has come to epitomize the phrase "Pyrrhic victory." Yet, unless or until Congress decides to enact a law that authorizes the attachments plaintiff seeks, this Court lacks the proper means to assist him with such endeavors.<sup>121</sup>

*D. Little or no property to attach*

Currently, the United States does not have meaningful diplomatic or economic relations with any of the seven nations designated as state sponsors of terrorism.<sup>122</sup> It stands to reason that those countries would not hold property interests within the United States which would be amenable to attachment under section 1610(a)(7) of the FSIA.<sup>123</sup> However, as was evidenced in the *Flatow* proceedings,<sup>124</sup> some state sponsors of terrorism may have attachable assets located within our borders. In response to the attacks on U.S. citizenry on September 11<sup>th</sup>, President Bush ordered millions of dollars in assets, believed to be the source of funding by various terrorist organizations, to be frozen.<sup>125</sup> Whether any portion of this money will ever be susceptible to the

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<sup>121</sup> *Flatow v. The Islamic Republic of Iran*, 76 F. Supp. 2d 16, 18 (D.D.C. 1999).

<sup>122</sup> See Vitrano, *supra* note 25, at 238.

<sup>123</sup> *Id.*; see also Ian Fisher, *Combative Milosevic Displays a Flair for Courtroom Tactics*, at <http://www.nytimes.com/2002/02/20/international/europe/20MILO> (Feb. 20, 2002) (stating that Iran and Cuba have few, if any, assets in the U.S. not held by the U.S. Government). *But see* Fisk, *supra* note 65 (asserting that only Iran and Cuba, of the seven listed state sponsors of terrorism, may have assets in the U.S.).

<sup>124</sup> See *supra* notes 93-113 and accompanying text.

<sup>125</sup> See, 7 *Families Sue bin Laden and Others for Billions*, N.Y. TIMES, Feb. 20, 2002, at A11 [hereinafter 7 *Families Sue*]; see also Falk, *supra* note 44 (stating that approximately \$300 million in assets of the Taliban and Afghan terrorist groups have been seized by the U.S.).

execution of judgments awarded to FSIA plaintiffs is entirely uncertain.

Additionally, United States courts have been disinclined to find third party corporations acting as agents or alter egos of foreign states, even when it is fairly clear that these corporations and purported charitable organizations are mere fronts for defendant governments, thereby insulating them from the execution of judgments.<sup>126</sup> In a situation analogous to that in *Alejandre*,<sup>127</sup> terrorist groups like *al Qaeda*<sup>128</sup> are known to hide assets in the United States behind the cover of legal businesses. President Bush has publicly addressed this issue by announcing a focus on nongovernmental organizations (NGOs) which act as fronts for terrorist groups.<sup>129</sup> Including such NGOs as targets against the war on terror, the President has frozen the assets of many individuals and organizations believed to be associated with the terrorist groups suspected of perpetrating the 9/11 attacks.<sup>130</sup> Now that the monstrous effects of terrorism have hit home, it remains to be seen whether the judiciary will display a change of heart and be more inclined to pierce the corporate veil of terrorist organizations hiding behind the shield of legitimate enterprise within the United States.

Even if such foreign defendants do, in fact, have attachable property located in the United States, it is highly unlikely that the assets involved would be enough to satisfy the large judgment sums awarded.<sup>131</sup> The awards won thus far against any single foreign defendant have amounted to tens and hundreds of millions

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<sup>126</sup> See, e.g., *Alejandre v. Telefonica Larga Distancia De Puerto Rico*, 183 F.3d 1277 (11th Cir. 1999); *Flatow v. Islamic Republic of Iran*, 67 F. Supp. 2d 535, 537 (D. Md. 1999).

<sup>127</sup> 183 F.3d 1277. See *supra* text accompanying notes 75-83.

<sup>128</sup> See *Global Relief Found. v. N.Y. Times Co.*, No. 01 C 8821, 2002 U.S. Dist. LEXIS 17081, at \*6 (N.D. Ill. Sept. 9, 2002) ("President Bush publicly identified Osama bin Laden and his *al Qaeda* network as the prime suspects behind the September 11, 2001 terrorist attacks.").

<sup>129</sup> See *id.* at \*6.

<sup>130</sup> See *id.* at \*6-7 (stating that Executive Order 13224 targeted 27 individuals and organizations, three of which were charitable or humanitarian).

<sup>131</sup> See Early, *Flatow v. Islamic Republic of Iran and the Foreign Sovereign Immunities Act: Is Peace of Mind Enough?*, 14 CONN. J. INT'L L. 203, 233-34 (1999).

of dollars.<sup>132</sup> It is hard to imagine that a nation, which has been codified by the United States as a state sponsor of terrorism, would possess or have abandoned hundreds of millions of dollars worth of property here.<sup>133</sup> Over three thousand civilians died in the September 11, 2001 terror attack.<sup>134</sup> The number of casualties multiplied by the number of compensatory and punitive dollars which could potentially be awarded to the victims' families equals an astronomical sum. In light of these figures, what was once thought to be a "highly unlikely" possibility of executing judgments under the FSIA looks, today, downright impossible.<sup>135</sup>

## II. COMPETING INTERESTS AND RESOLUTION: POLITICAL REASONS FOR U.S. INTERVENTION ON BEHALF OF STATE SPONSORS OF TERRORISM

The overall goal of the Anti-terrorism Act was to assert the United States' stance of being tough on terrorism.<sup>136</sup> However, by intervening in court actions on behalf of terrorists, the U.S. hardly

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<sup>132</sup> See, e.g., *Weinstein v. Islamic Republic of Iran*, 184 F. Supp. 2d 13, 22-24 (D.D.C. 2002) (over \$30 million in compensatory damages and \$570 million in punitive damages awarded); *Cicippio v. Islamic Republic of Iran*, 18 F. Supp. 2d 62, 69-70 (D.D.C. 1998) (compensatory damage award of \$65 million; punitive damages against the foreign state deemed prohibited under the statute); *Flatow v. The Islamic Republic of Iran*, 999 F. Supp. 1, 28, 32, 34 (D.D.C. 1998) (over \$20 million in compensatory damages and \$225 million in punitive damages awarded, calculated as three times the annual expenditure for terrorist activities by the Republic of Iran); *Alejandro v. Republic of Cuba*, 996 F.Supp. 1239, 1253-54 (S.D. Fla. 1997) (nearly \$50 million in compensatory damages and over \$137 million in punitive damages awarded).

<sup>133</sup> But see *supra* note 125.

<sup>134</sup> See Porter Anderson, *The 'Great Struggle': Consoling the Living*, September 12, 2002, at <http://www.cnn.com/2002/US/09/11/ar911.memorial.main/index>.

<sup>135</sup> See Marcia Coyle, *How Two Lawyers Brought a Suit They Just Might Win*, 24 NAT'L L.J., No. 60, November 11, 2002, at A1 (stating that three thousand 9/11 victims' families have filed suit in an attempt to win a \$1 trillion judgment).

<sup>136</sup> "America will never tolerate terrorism. America will never abide terrorists. Wherever they come from, wherever they go, we will go after them." Vitrano, *supra* note 25, at 214 n.5 (quoting President Clinton on signing the Anti-terrorism and Effective Death Penalty Act of 1996, Pub. Papers, Administration of William J. Clinton, 1996, Book 1 (April 24, 1996)).



appears as tough as it claims to be. The Clinton administration sought to pronounce its unwavering intolerance for terrorism.<sup>137</sup> It went so far to make this point that it officially circumscribed any act of terrorism and revoked all of the protection traditionally enjoyed by sovereigns through a long-standing principle of immunity. To enact legislation for this express purpose, and then to simultaneously provide for an overriding provision which has the effect of obliterating that purpose, does not convince that the U.S. has taken any stand.<sup>138</sup> Without allowing the legislation to have “teeth,” it also appears that the amendments were merely symbolic and not truly remedial.<sup>139</sup> If the Anti-terrorism Act, indeed, proves to have no practical value, then it ergo fails as a symbolic gesture as well because, “Protecting the assets of terrorists is absolutely the wrong message to send to killers of American citizens.”<sup>140</sup>

Of course, not everyone views the U.S.’s intervention in FSIA suits as demonstrating a weak posture with respect to terrorism. As government lawyers have explained, “a commitment to the rule of law should not be mistaken for weakness in the face of terrorist violence.”<sup>141</sup> As far as the White House is concerned, U.S. intervention proves the government’s commitment to foreign relations, which, in turn serves only to protect the American people against foreign hostility. Both the Bush and Clinton administrations have expressed concern over allowing judgments to come from frozen assets for fear of compromising foreign policy.<sup>142</sup> Therefore, the U.S. is faced with a conflict; this conflict lies generally in its responsibilities both to its citizenry in condemning terrorism and to its international colleagues in

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<sup>137</sup> See *id.*; see also *supra* note 42.

<sup>138</sup> “Overall, the administration’s approach seems illogical.” Zaffuto, *supra* note 84, at 710.

<sup>139</sup> See Early, *supra* note 131, at 230.

<sup>140</sup> See Zaffuto, *supra* note 84, at 709 (citing Obey, *White House Lines Up Behind Iran in Federal Case*, FORWARD, July 24, 1998, at 1998 WL 11416354 (quoting Representative Matt Salmon)).

<sup>141</sup> See Miller & Mintz, *Once-Supportive U.S. Fights Family Over Iranian Assets*, WASH. POST, September 27, 1998, at A8.

<sup>142</sup> See Neely Tucker, *In Lawsuit Against Iran, Former Hostages Fight U.S.; Government Calls Frozen Assets Untouchable*, WASH. POST, Dec. 13, 2001, at A1.

maintaining effective foreign relations.<sup>143</sup> This quandary places the U.S. government in “a terribly uncomfortable position.”<sup>144</sup>

The United States intervenes in pending FSIA actions by filing a “statement of interest.”<sup>145</sup> This interest can be expressed in broad terms, such as when the government intervenes in the “interest of national security,” which the aforementioned waiver provision of the FSIA addresses.<sup>146</sup> Other asserted interests involve specific international treaty agreements under which the U.S. is bound and which appear to countervail plaintiffs’ interests. In *Flatow*, for instance, the U.S. government raised both the FSIA waiver authority of the President as well as the restraints placed upon it pursuant to the International Emergency Economic Powers Act, the Foreign Missions Act and the Vienna Convention on Diplomatic Relations.<sup>147</sup> The court went no further than the FSIA itself to hold that the plaintiff’s attachment of Iranian properties was barred because the president had waived the statute’s requirements of attaching blocked property.<sup>148</sup> In *Roeder v. The Islamic Republic of Iran*,<sup>149</sup> the court was powerless to even hear the FSIA suit because the Algiers Accords precluded a cause of action for the *Roeder* plaintiffs.<sup>150</sup>

With respect to international agreements, the U.S. maintains at least two concerns of great importance. First, the U.S. must contend with the likelihood of reciprocal breaches of various

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<sup>143</sup> “[T]he United States is now caught in this . . . odd position of . . . having to either back a citizen or warm relations.” *CBS This Morning: Senator Lautenberg and Stephen Flatow Discuss Flatow’s Lawsuit Against the Iranian Government After an Islamic Jihad Bomb Tore Through a Bus and Killed His Daughter in 1995* (CBS television broadcast, September 28, 1999) (CBS News Transcripts), available at [www.lexis.com/research/transcripts](http://www.lexis.com/research/transcripts) [hereinafter *CBS This Morning*] (statement of Stephen Flatow during interview by Russ Mitchell); see Early, *supra* note 131, at 229.

<sup>144</sup> See Coyle, *supra* note 135 (quoting international law scholar, Robert Goldman, American University Washington College of Law).

<sup>145</sup> In *Flatow v. Islamic Republic of Iran*, 76 F. Supp. 2d 16 (D.D.C. 1999), the United States appeared pursuant to 28 U.S.C. § 517, which allows the U.S. to “attend to the interests of the United States” in a pending suit. *Id.* at 18.

<sup>146</sup> *Id.* at 25; see also *supra* note 70 and accompanying text.

<sup>147</sup> *Flatow*, 76 F. Supp. 2d at 18.

<sup>148</sup> *Id.*

<sup>149</sup> 195 F. Supp. 2d 140 (D.D.C. 2002).

<sup>150</sup> See *infra* note 209 and accompanying text.

treaty agreements around the world; by breaking its own international accords, it invites negative reciprocity.<sup>151</sup> Second, the U.S. must maintain credibility for itself in a global forum; defying international policy and agreements could seriously damage the U.S.'s reputation as an international political participant.<sup>152</sup> As a judicial matter, courts are likely to be without authority to reconcile international agreements with the remedial provisions of the FSIA.<sup>153</sup>

Economic leverage is one of the purported interests held by the United States.<sup>154</sup> Without the inclusion of the Presidential waiver provision in the FSIA, a potential threat is posed to the power of the President in using such assets as leverage when economic sanctions are imposed on targeted sovereigns.<sup>155</sup> Frozen assets, for instance, can potentially be put to future use as "bargaining chips" with foreign states.<sup>156</sup> Economic clout is just one of the weapons in the arsenal of international power; does it justify undermining the purposes for which the Anti-terrorism Act was designed to accomplish?

Within the realm of economic strategy in combating terrorism, there appears to be some overlap in the interests of foreign policy and plaintiff recovery. By allowing plaintiffs to attach foreign property in order to collect on a judgment the goal of imposing an economic sanction on terrorists would seem to be accomplished on behalf of the government. The interests of the U.S. might be well served by relinquishing the power of this type of economic leverage to American citizens and the U.S. judiciary. This is, after all, consistent with the main premise of the restrictive theory of sovereign immunity.<sup>157</sup> It also directly carries out a primary objective of the Anti-terrorism Act in depleting the

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<sup>151</sup> See Early, *supra* note 131, at 229.

<sup>152</sup> See *id.*

<sup>153</sup> See, e.g., Roeder, 195 F. Supp. 2d at 140.

<sup>154</sup> See Zaffuto, *supra* note 84, at 710.

<sup>155</sup> See *id.*

<sup>156</sup> 60 Minutes: In Memory of Alisa; After Going to Great Lengths to Get the Right to Sue a Terrorist State, a Victim's Father Finds His Own Government Won't Let Him Collect His Settlement (CBS television broadcast, October 4, 1998) (CBS News Transcripts), available at [www.lexis/research/transcripts](http://www.lexis/research/transcripts) [hereinafter 60 Minutes: In Memory of Alisa].

<sup>157</sup> See *supra* note 8 and accompanying text.

economic resources of terrorist groups. Consistent with this goal, Senator Lautenberg said, “[N]o nation can pick on American citizens without our country responding in some lawful but direct way. Short of military action, the best response is to hit them in the wallet.”<sup>158</sup>

Notwithstanding the foregoing, it has been suggested that the legal dilemma in FSIA proceedings boils down to a balancing of competing interests between the United States and the plaintiffs, and that this balance always tips in favor of the U.S.<sup>159</sup> This is the thrust of the conflict faced by the U.S. in attempting to meet its obligations both at home and abroad and this is the reasoning behind the U.S.’s perceived betrayal of its own citizens who seek redress under the FSIA. To say that the U.S. has successfully blocked the attachment of foreign property in these suits because its interests have weighed more heavily in the balance is to view the issues at stake too narrowly. It is true that executive action authorized by Congress is “supported by the strongest of presumptions and the widest latitude of judicial interpretation.”<sup>160</sup> However, in preventing the attachment of the properties in question, the United States has not won a legal battle, per se. The defendants in FSIA actions are state sponsors of terrorism, not the United States. Contrary to the beliefs of many FSIA plaintiffs that “their courtroom foe is not their tormentors, but the U.S. government,”<sup>161</sup> the United States does not appear in these actions to defend the interests of foreign defendants. Ostensibly, plaintiffs are placed in, what Stephen Flatow has called, “the surreal position of being opposed by the [U.S. government].”<sup>162</sup> The U.S.’s

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<sup>158</sup> Zaffuto, *supra* note 84, at 711 (internal citations omitted). *But see* Review by Emily Altman, *The Price of Terror: One Bomb. One Plane. 270 Lives*, N.Y.L.J., Nov. 30, 2001, at 2 (“[J]ust how realistic is it that terrorists who might be undeterred by the threat of American military force must now weigh the possibility of retaliation by the world’s largest contingent of lawyers?”) (quoting Allan Gerson and Jerry Adler’s book).

<sup>159</sup> See Early, *supra* note 131, at 234.

<sup>160</sup> Flatow v. The Islamic Republic of Iran, 76 F. Supp. 2d 16, 20 (D.D.C. 1999) (in attacking this presumption, the plaintiff has a heavy burden of persuasion).

<sup>161</sup> Tucker, *supra* note 142.

<sup>162</sup> Baletsa, *supra* note 8, at 1293 (quoting Stephen Flatow, *Keep Fighting*, JERUSALEM POST at 10 (September 1, 1998)).

appearance in these suits does give the impression that it is fighting to protect the interests of the foreign state sponsor of terrorism.<sup>163</sup> However, “[n]otwithstanding how [the U.S.] appears,” spokespersons for the United States have, on numerous occasions, denied that the purpose of intervention is to defend the interests of state sponsors of terrorism.<sup>164</sup> Perhaps in an effort to counterpoise its image, in its Statement of Interest presented to the *Flatow* court, the United States professed that it was not acting on behalf of the defendant and “expressly condemns the acts that brought about the judgment in this case.”<sup>165</sup>

While it may not offer much consolation to the victims of terrorism, the White House has defended its position by cautioning that if the U.S. were to attach diplomatic properties, “then other countries could retaliate, placing our embassies and citizens overseas at grave risk.”<sup>166</sup> For this reason, “diplomatic property must remain sacrosanct.”<sup>167</sup> This rationale is certainly objectively reasonable, but plaintiffs like Stephen Flatow cannot be expected to be understanding. In Flatow’s view, “Protecting Iranian assets of any type is equivalent to the FBI director saying he’s tough on gangsters but needs to be sensitive to the Mob.”<sup>168</sup> In another statement, Flatow confessed to his inability to see things from a diplomatic perspective: “I can’t be diplomatic; I lost a child to

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<sup>163</sup> See Marcia Coyle, *Hostages of the Law; Ex-Iran Captives’ Obstacle to Award for Damages is the U.S. Government*, 24 NAT’L L.J., No. 24, February 18, 2002, at A1 (quoting David Roeder who stated that the U.S. is, “in effect defending Iran”); see also *Commemorating the Fourth Anniversary of the Brothers to the Rescue Shootdown*, 146 CONG. REC. S779 (daily ed. Feb. 24, 2000) [hereinafter *Brothers to the Rescue*] (speaker Senator Mack III (R-Fla), accused the U.S. government of entering the *Alejandro* lawsuit on the side of Fidel Castro).

<sup>164</sup> See Tucker, *supra* note 142 (quoting James Gilligan, a Justice Department lawyer); *60 Minutes: In Memory of Alisa*, *supra* note 156 (comment of State Department spokesman, James Rubin, that the U.S. is not representing Iran in *Flatow* case).

<sup>165</sup> *Flatow v. Islamic Republic of Iran*, 305 F.3d 1249, 1252 (D.D.C. 2002).

<sup>166</sup> See Laurence Arnold, *Clinton Blocks Budget Provision Meant to Help NJ Family*, ASSOC. PRESS SERV., October 22, 1998 (quoting White House spokesperson).

<sup>167</sup> *60 Minutes: In Memory of Alisa*, *supra* note 156 (comment of State Department spokesman, James Rubin).

<sup>168</sup> See Arnold, *supra* note 166 (quoting Stephen Flatow).

terrorism; now I'm losing U.S. support."<sup>169</sup> Faced with this perspective, it seems implausible for the U.S. to reconcile the conflict between its political actions and incongruous legal conduct to the satisfaction of FSIA plaintiffs.<sup>170</sup>

It seems that no matter how compelling the interest is in maintaining national security, or how rational their arguments may be that they are not siding with the enemy, the U.S. government comes across as villainous. The anti-terrorism message is simply not getting through; instead, the U.S. is sending a mixed message and the anti-terrorism legislation is creating more conflict than it sought to resolve.<sup>171</sup> Representative Jim Saxton castigated the Clinton administration as "making a grave mistake in adopting the policy that the protection of Iranian assets is more important than justice for these victims."<sup>172</sup> Judge James Lawrence King, who wrote the District Court opinion in *Alejandro* said:

The court notes with great concern that the very President who in 1996 decried this terrorist action by the Government of Cuba now sends the Department of Justice to argue before this Court that Cuba's blocked assets ought not be used to compensate the families of the U.S. nationals murdered by Cuba. The Executive branch's approach to this situation has been inconsistent at best. It now apparently believes that shielding a terrorist foreign state's assets is more important than compensating for the loss of American lives.<sup>173</sup>

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<sup>169</sup> See Vitrano, *supra* note 25, at 214 n.8.

<sup>170</sup> The U.S. legislature has sought to strike a balance between victims' needs and national security. Congress passed bills in 1998 and 2000 allowing \$400 million to be paid out of the U.S. Treasury in certain cases. See *supra* note 103. However, not only are these funds limited, but the legislation does nothing to deter terrorism. See Tucker, *supra* note 142.

<sup>171</sup> In *Roeder v. The Islamic Republic of Iran*, 195 F. Supp. 2d 140, 144 (D.D.C. 2002), the court characterized the FSIA litigation for the plaintiffs as a continued "roller coaster ride."

<sup>172</sup> See Zaffuto, *supra* note 84, at 709 (citing Obey, *White House Lines Up Behind Iran in Federal Case*, FORWARD, July 24, 1998, at 1998 WL 11416354 (internal citations omitted) (quoting Representative Matt Salmon)).

<sup>173</sup> *Alejandro v. The Republic of Cuba*, 42 F. Supp. 2d 1317, 1332 n.16 (S.D. Fla. 1999).

Informed of the experiences of previous FSIA plaintiffs, Terry Anderson filed suit against Iran for its sponsorship of the Hezbollah, the terrorist organization which held Anderson and others hostage for six years.<sup>174</sup> In anticipation of litigation, he stated: "much of our argument is likely to be with the U.S. government, rather than the Iranian government."<sup>175</sup> The Flatow, Alejandre, and Roeder families are all too familiar with being placed in this position.<sup>176</sup> Having demonstrated the executive branch's predilections in the past, future plaintiffs will also quickly come to understand that part, if not all, of the battle they will wage will be with their own government; that is, unless the current administration redeems the Executive branch's reputation as a devoted warrior against terrorism and makes a clear showing of exactly whose side they are on.<sup>177</sup>

Aside from the questions of national loyalty and competing interests, the fundamental question remains: does United States intervention in FSIA suits render foreign defendants judgment proof?<sup>178</sup> As Stephen Flatow once remarked, "[m]aybe American policy is a joke."<sup>179</sup> Judge Lamberth, who has presided over many FSIA cases over the past few years and who has empathetically expressed his great frustration along with those plaintiffs, seems to foster some hope for change in the future. In *Eisenfeld v. Islamic Republic of Iran*, he said, "the court ... must express its conviction

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<sup>174</sup> See *Anderson v. Islamic Republic of Iran*, 90 F. Supp. 107 (D.D.C. 2000).

<sup>175</sup> Zaffuto, *supra* note 84, at 715 (citing Arlene Levinson, *Ex-Hostage Anderson Suing Iran for Lost Years*, ATLANTA CONST., March 22, 1999, at A6 (quoting Terry Anderson) (internal citations omitted)).

<sup>176</sup> See *Flatow v. Islamic Republic of Iran*, 76 F. Supp. 2d 16 (D.D.C. 1999) (U.S.'s motion to quash writs of attachment of three parcels of Iranian-owned property and two bank accounts, granted); *Alejandre v. Telefonica Larga Distancia De Puerto Rico*, 183 F.3d 1277 (11th Cir. 1999) (garnishment action vacated upon U.S. appeal); *Roeder*, 195 F. Supp. 2d at 140 (U.S.'s motion to dismiss granted).

<sup>177</sup> Stephen Flatow stated that the judge in his case asked the attorneys for the U.S., "Whose side are you on?" 60 Minutes: *In Memory of Alisa*, *supra* note 156.

<sup>178</sup> Given the likelihood of collection of judgments awarded under the Anti-terrorism Act, some critics believe that, ultimately, state sponsors of terrorism remain immune. See, e.g., Early, *supra* note 131, at 232.

<sup>179</sup> 60 Minutes: *In Memory of Alisa*, *supra* note 156.

that ultimately this judgment will not be a mere Pyrrhic victory  
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### III. COMPARISON OF POLITICAL CLIMATES OF THE CLINTON AND BUSH ADMINISTRATIONS AND THE “NEW AND IMPROVED” FSIA

The fundamental objective in initially amending the FSIA was not ultimately achieved. American victims of terrorism were supposed to be given an apolitical arena for resolution of claims against foreign states. Instead, the Anti-terrorism Act has brought politics back into the forefront of consideration. It has done this in two ways: by giving the Department of State the power to decide jurisdiction in deeming a foreign state immune or amenable to suit<sup>181</sup> and by giving the President the power to block recovery of judgments through the waiver provision of the statute.<sup>182</sup> The Anti-Terrorism Act, vulnerable to political whims, remains, therefore, a legal wild card ensuring only unpredictable outcomes.<sup>183</sup> Setting aside the onslaught of criticism that has emerged to confront these inconsistencies,<sup>184</sup> the FSIA, although a legal doctrine, is fraught with political ramifications, subject, therefore, to political forces.

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<sup>180</sup> 172 F. Supp. 2d 1, 9 (D.D.C. 2000).

<sup>181</sup> By applying the statute to only those nations designated as state sponsors of terrorism, the amendment “re-injects the unpredictable political element that the drafters of the FSIA desperately tried to remove.” Baletsa, *supra* note 8, at 1278. Unless the exception includes all states, not just those designated by the State Department as terrorist sponsors, the provision cannot be based on principle and not politics. See Vadnais, *The Terrorism Exception to the Foreign Sovereign Immunities Act: Forward Leaning Legislation or Just Bad Law?*, 5 UCLA J. INT’L L. & FOREIGN AFF. 199, 226 (2000).

<sup>182</sup> See *supra* note 70.

<sup>183</sup> See Vadnais, *supra* note 181, at 221.

<sup>184</sup> Baletsa, *supra* note 8, at 1299 n.323 (“Congress should never have passed, nor President Clinton signed, a law that could only offer Mr. Flatow justice by depriving the administration of control over important foreign policy. This law should be repealed.”) (quoting, Editorial: *Lawsuits and Terrorism*, WASH. POST, Dec. 26, 1999, at B6); see *Brothers to the Rescue*, *supra* note 163 (Senator Mack stated to the President, “The executive branch’s approach to this situation has been inconsistent at best.”).



The “experiment” of the FSIA amendments was, at the very least, a noble one. The Anti-terrorism Act was motivated by a call for justice in punishing and, hopefully, putting an end to the cruelty and insidiousness of global terrorism.<sup>185</sup> Subsequent FSIA amendments were further inspired by a sublime compassion for the victims of terrorism whose pain was suffered as the price of being American. However, many would agree that the Clinton administration created a monster in its political experiment of enacting the 1996 and 1998 amendments to the FSIA. Now the question is, will the Bush administration allow this experiment to continue to run awry, tame it, or destroy it? Perhaps the more immediate question is, what can President Bush afford to do in this highly charged political climate of fear and patriotism in the wake of our nation being besieged by terrorism?<sup>186</sup>

Ultimately, these noble gestures by the Congress and Clinton Administration left victims of terrorism with a right but not a remedy.<sup>187</sup> American victims were not only provided with the statutory right to sue terrorists, they were encouraged to pursue remedies under the FSIA. In the course of personal conversations with Stephen Flatow, President Clinton urged him to sue Iran under the Anti-Terrorism Act.<sup>188</sup> For those plaintiffs who relied on

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<sup>185</sup> See *Conference Report on H.R. 4328*, 144 CONG. REC. E2307 (daily ed. November 12, 1998) (“[The statute] is designed to send a message around the globe to those nations who sponsor terrorism...your assets are no longer protected from justice. The reality of significant financial loss to terrorist states will be a critical deterrent to further acts of terrorism targeted at the citizens of this country.”) (statement of Hon. Bill Pascrell, Jr.).

<sup>186</sup> See *Statement by the President in Address to the Nation*, FED. INFO. & NEWS DISPATCH, INC., White House Press Releases, Sept. 11, 2001:

Today, our fellow citizens, our way of life, our very freedom came under attack in a series of deliberate and deadly terrorist acts. Thousands of lives were suddenly ended by evil, despicable acts of terror. The pictures of airplanes flying into buildings, fires burning, huge structures collapsing, have filled us with disbelief, terrible sadness, and a quiet, unyielding anger.

<sup>187</sup> Baletsa, *supra* note 8, at 1301.

<sup>188</sup> See *60 Minutes: In Memory of Alisa*, *supra* note 156 (President Clinton telephoned Mr. Flatow to express his condolences. On another occasion, Clinton praised Flatow for his courage in filing suit against Iran); *CBS This Morning*, *supra* note 143 (Flatow stating that he was “astounded” to learn of the government’s intervention on behalf of Iran in his suit against them).

such governmental assurances to obtain some justice for the horrific wrongs perpetrated against them by terrorists, the results have been especially appalling.<sup>189</sup> The same government that offered them hope for justice stood in the way of it.<sup>190</sup> Mr. Flatow commented at that time that the law gave him a weapon.<sup>191</sup> Years after the initial shock of having to fight the U.S. government in court over the attachment of Iranian assets, Stephen Flatow stated, "I got into this suit to put Iran out of the terrorism business. What I got instead was a cat fight with State, Treasury and Justice [sic] Departments."<sup>192</sup> In her testimony before the Senate Judiciary Committee, Maggie Khule, sister of Armando Alejandre, a victim of the "Brothers to the Rescue" shoot-down, said, "[n]o 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. The Clinton administration has shut its doors to us."<sup>193</sup> Many years after his release from captivity for 444 days, during the infamous Iran hostage crisis in 1979, David Roeder, a U.S. Air Force attaché, commented on his lawsuit brought pursuant to the FSIA: "It never occurred to me when I was getting the crap beat out of me in a Tehran jail cell that I would have to one day fight the same government that I was defending. It's just so demoralizing. So discouraging."<sup>194</sup> These are just a few of the reactions from plaintiffs whose hopes for justice were ultimately defeated by the very legal weapon that had held the promise for such hope. There is no doubt that the best intentions of our government exacerbated the pain these plaintiffs have already suffered at the hands of other governments.

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<sup>189</sup> See *Brothers to the Rescue*, *supra* note 163 ("When the President and his administration give assurances and advice, and American families trust and obey this advice only to be dragged along and let down, the administration commits a great injustice.") (remarks of Senator Mack).

<sup>190</sup> Referring to the *Alejandre* plaintiffs in his remarks to the President and Congress, Mack stated that the Clinton administration "encouraged the families to postpone closure and pursue legal action" but then began to oppose them. "They entered the lawsuit on the side of Fidel Castro." *Brothers to the Rescue*, *supra* note 163 (statements of Senator Mack).

<sup>191</sup> See *60 Minutes: In Memory of Alisa*, *supra* note 156.

<sup>192</sup> See Tucker, *supra* note 142.

<sup>193</sup> See *Brothers to the Rescue*, *supra* note 163.

<sup>194</sup> See Tucker, *supra* note 142.

Since the invocation of the Anti-Terrorism Act concededly involves the participation of all three branches of the U.S. government, the force of public opinion is undeniable. The type of magnanimous support for fellow Americans as was demonstrated by Congress and President Clinton upon the passage of the anti-terrorism legislation has today, post-9/11, become downright “politically correct.”<sup>195</sup> Currently, national sentiment expects nothing less. In his Address to the Nation on September 11, 2001, President Bush proclaimed, “we stand together to win the war against terrorism.”<sup>196</sup> Before September 11<sup>th</sup>, U.S. legal intervention on behalf of terrorist organizations may have been considered, by the American public, a Clinton administration faux pas. Many would consider such un-American behavior intolerable today. The emotional pulse of our nation today is incomparable to what it was during the reign of President Clinton. At present, we are at war.<sup>197</sup> In the immediate aftermath of the attack of September 11<sup>th</sup>, President Bush referred to the familiar campaign of “the war against terrorism.”<sup>198</sup> The meaning of terrorism has been recently redefined in the collective consciousness of the American people. President Bush has characterized the campaign of terrorism against U.S. citizens as “evil”<sup>199</sup> on so many occasions that acts of terrorism may never again be thought of as something

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<sup>195</sup> In the ensuing days after September 11<sup>th</sup>, political correctness rose to a fever pitch. “Bill Maher, host of ABC’s ‘Politically Incorrect,’ is under attack. Viewers are angry. Several affiliates have dropped him. His show is teetering on the brink of cancellation, all because he said the terrorists who attacked the World Trade Center weren’t cowards. Rather, he said, ‘We have been the cowards lobbing cruise missiles from 2,000 miles away. That’s cowardly.’” Jonah Goldberg, ‘*Politically Incorrect*’ Wounded, WASH. TIMES, September 29, 2001, at A14.

<sup>196</sup> *Statement by the President in Address to the Nation*, *supra* note 186.

<sup>197</sup> President Bush declared, “We’re at war. We will not only deal with those who dare attack America, we will deal with those who harbor them and house them and feed them.” Evan Thomas & Mark Hosenball, *Bush: ‘We’re at War’*, NEWSWEEK, September 24, 2001, at 26.

<sup>198</sup> *Statement by the President in Address to the Nation*, *supra* note 186.

<sup>199</sup> “Today, our nation saw evil” was one of four times the President used the term “evil” in his address to the nation on September 11, 2001. *Statement by the President in Address to the Nation*, *supra* note 186; see Serge Schemann, *U.S. Attacked; President Vows to Exact Punishment for “Evil”*, N.Y. TIMES, September 12, 2001, at A1.

remote from the American experience. American courts, having recently become all too familiar with the atrocious results of terrorist activity, have publicly expressed their outrage as well. "Terrorism. . . is the implacable enemy of all civilization under law."<sup>200</sup> Terrorism invokes all that Americans now hate and fear.<sup>201</sup> Given this, it would seem likely that the attorneys acting on behalf of the United States would be pursuing a different agenda than they had during the Clinton days of court battles over enforcement proceedings under the FSIA.

However, in the year following September 11, 2001, no such shift in practice has, thus far, been evidenced in the federal courts. The *Roeder*<sup>202</sup> case provides one of the few examples of U.S. intervention since 9/11. More than twenty years ago, the Iranian government, now listed as the State Department's number one sponsor of terrorism,<sup>203</sup> held 52 Americans hostage for 444 days.<sup>204</sup> The hostages, who had endured extraordinary mental and physical torture throughout the duration of their confinement, initiated several suits.<sup>205</sup> These suits were dismissed because, during that time, Iran still retained sovereign immunity.<sup>206</sup> It was not until the passage of the Anti-Terrorism Act that the Iranian

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<sup>200</sup> *Wagner v. Islamic Republic of Iran*, 172 F. Supp. 2d 128, 138 (D.D.C. 2001).

<sup>201</sup> See *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 2d 1, 23 (D.D.C. 1998) ("[T]errorism has achieved the status of almost universal condemnation, as have slavery, genocide, and piracy. . . the terrorist is the modern era's *hosti humani generis* – an enemy of all mankind. . .").

<sup>202</sup> *Roeder v. The Islamic Republic of Iran*, 195 F. Supp. 2d 140 (D.D.C. 2002).

<sup>203</sup> See Neely Tucker, *Iran Loses \$42 Million Judgment in Hijack Suit*, WASH. POST, January 23, 2002, at A3 (Iran is listed by the State Department as "the world's biggest sponsor of terrorism").

<sup>204</sup> *Roeder*, 195 F. Supp. 2d at 143.

<sup>205</sup> See *Persinger v. Islamic Republic of Iran*, 729 F.2d 835 (D.C. Cir. 1984); *McKeel v. Islamic Republic of Iran*, 722 F.2d 582 (9th Cir. 1983); *Ledgerwood v. State of Iran*, 617 F. Supp. 311 (D.D.C. 1985). See also *Roeder*, 195 F. Supp. 2d at 145-47 (finding that the hostages were imprisoned under inhumane living conditions, beaten, repeatedly interrogated and occasionally awakened in the middle of the night to be present for their own (feigned) execution ceremonies; one former hostage testified that his captors told him that his wife and children were in danger, describing exactly where his son went to school and on what bus he rode).

<sup>206</sup> See *Roeder*, 195 F. Supp. 2d at 144.

hostages were able to bring a cause of action and win a default judgment against Iran.<sup>207</sup> In October 2001, when the trial on the issue of damages was about to commence, the United States intervened to dismiss the suit brought under the FSIA.<sup>208</sup> Unlike previous challenges made during the Clinton administration in FSIA cases, however, the United States was obligated under the Algiers Accords to block the suit; it was this agreement, which released nearly \$8 billion in frozen Iranian assets that freed the hostages at the end of the Carter administration.<sup>209</sup> The hostages argued that the Accords should be superseded by the Anti-Terrorism Act.<sup>210</sup> The power to abrogate the Accords was deemed to be outside the purview of the judiciary and relegated exclusively to the legislative and the executive branches.<sup>211</sup> As a result, the judgment was vacated and the case was dismissed.<sup>212</sup>

Tangentially, several interesting issues emerged from the *Roeder* case, which seem to further cloud the already murky waters of the largely uncharted FSIA. Upon granting the United States' motion to intervene,<sup>213</sup> and in examining the United States' motion to vacate the default judgment entered against Iran, the district court found that the case was subject to dismissal due to a lack of subject matter jurisdiction over the claim.<sup>214</sup> The 1996 Anti-Terrorism Act states that jurisdiction will be lacking if the foreign state is "not designated as a state sponsor of terrorism. . . at the time the act occurred, *unless later so designated as a result of such act.*"<sup>215</sup> The U.S. government made its case on the tenuous argument that since the designation of Iran as a state sponsor of terrorism occurred three years after the hostage calamity it shows that the decision by the State Department had nothing to do with

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<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> See *id.* at 166; see also Tucker, *supra* note 142.

<sup>210</sup> *Roeder*, 195 F. Supp. 2d at 151, 153.

<sup>211</sup> *Id.* at 145.

<sup>212</sup> *Id.* 180-82, 185-86.

<sup>213</sup> The United States filed an Emergency Motion to Intervene, arguing its entitlement to do so pursuant to the Federal Rules of Civil Procedure 24(a) and showing a "cognizable interest" in the outcome of the litigation. *Id.* at 154-55.

<sup>214</sup> *Id.* at 160.

<sup>215</sup> *Roeder*, 195 F. Supp. 2d at 160 (quoting 28 U.S.C. § 1605(a)(7)).

the hostages.<sup>216</sup> Consequently, the plaintiffs were again precluded from bringing suit under the FSIA for the hostage ordeal.

Knowing this, Congress once again acted to ensure protection of American plaintiffs' rights by "interfering" with the ongoing litigation.<sup>217</sup> One month after the U.S. government filed its motion to vacate the *Roeder* judgment (two months after the attacks on the World Trade Center) President Bush signed an appropriations bill amending the FSIA.<sup>218</sup> This action, known as subsection 626(c), specifically cited the *Roeder* case in removing Iran's immunity from suit "in a case brought by the 1979 Tehran hostages in the District Court for the District of Columbia."<sup>219</sup> This was the first time a specific case was put into the statutory text of the Anti-terrorism Act and *Roeder* is the only case to which subsection 626(c) could apply.<sup>220</sup> This new legislation gave the district court the authority to hear the case. However, while it appeared that the government was doing its best to proclaim and even clarify its support for these American plaintiffs, subsection 626(c) could be the quintessential "right-without-a-remedy" legislative amendment. Upon signing the bill, President Bush said:

To the maximum extent permitted by applicable law, the executive branch will act, and encourage the courts to act, with regard to subsection 626(c) of

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<sup>216</sup> *Id.* The decision to designate Iran as a state sponsor of terrorism was "based on convincing evidence of a broad Iranian policy of furthering terrorism beyond its borders." *Id.* (quoting the Department of State Bulletin, Vol. 84, No. 2084, 77 (March, 1984)).

<sup>217</sup> *Id.* at 145. The court seemed irate over the separation of powers regime being threatened by Congress' apparent interference, which was admittedly intended to "quash" the United States' motion to vacate the judgment. *Id.* at 166. The *Roeder* court declined to resolve the Article III problem because the legislation could not affect any future cases and the case could be dismissed on other grounds. *Id.*

<sup>218</sup> Justice, Commerce, and Treasury Appropriations Act of 2002, Pub. L. No. 107-77, § 626(c), 115 Stat. 748, 803 (amending 28 U.C.S. § 1605(a)(7)(A)); *Id.* at 145. In December of 2001, Congress acted again by passing a rider to explain the intent behind Section 626(c). *Id.* at 152-53 (citing Section 208 of the Department of Defense and Emergency Supplemental Appropriations Act, Pub. L. No. 107-117, 115 Stat. 2230).

<sup>219</sup> *Roeder*, 195 F. Supp. 2d at 152 (citing Statement by the President, November 28, 2001, available at 2001 WL 1509507 (White House) (quoting President Bush upon signing the new law)).

<sup>220</sup> *Id.* at 164-65.

the Act in a manner consistent with the obligations of the United States under the Algiers Accords that achieved the release of the U.S. hostages in 1981.<sup>221</sup>

Subsection 626(c) removed the obstacle of Iran's sovereign immunity for its acts arising out of the hostage crisis, thereby giving the federal courts subject matter jurisdiction over the *Roeder* claim. However, the President's remarks make it clear that the agreement with Iran under the Algiers Accords prevents the court from establishing subject matter jurisdiction over the claims for a different reason.<sup>222</sup> Equivocally (if not hypocritically), the government's actions with respect to subsection 626(c) do nothing more than supplant one restriction to jurisdiction with another, leaving the *Roeder* plaintiffs at the exact same jurisdictional road block they encountered in the 1980s.<sup>223</sup> In reaction to this, the *Roeder* court stated, "Both Congress and the President have expressed their support for these plaintiffs' quest for justice while failing to act definitively to enable these former hostages to fulfill that quest."<sup>224</sup>

As frustrated as the *Roeder* court was in being restrained from granting the hostages a remedy<sup>225</sup> and as much as previous decisions in the circuit had permitted jurisdiction for suits against foreign states, the *Roeder* decision stated that the Anti-terrorism Act did not create a cause of action against foreign governments.<sup>226</sup>

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<sup>221</sup> *Id.* at 152 (citing Statement by the President, November 28, 2001, available at 2001 WL 1509507 (White House) (quoting President Bush upon signing the new law)).

<sup>222</sup> Although not specifically mentioned as such, the decision by the *Roeder* court to dismiss the case was likely based on the political question doctrine.

<sup>223</sup> See *supra* notes 205-06 and accompanying text.

<sup>224</sup> *Roeder*, 195 F. Supp. 2d at 145.

<sup>225</sup> *Id.* ("Were this Court empowered to judge by its sense of justice, the heart-breaking accounts of the emotional and physical toll of those 444 days on plaintiffs would be more than sufficient justification for granting all the relief that they request.").

<sup>226</sup> *Id.* at 172. But see *Cronin v. Islamic Republic of Iran*, 99-2890 (RCL), 2002 U.S. Dist. LEXIS 24115 (D.D.C. Dec. 18, 2002). Based on the suggestiveness of the text, the legislative history and subsequent amending of the statute, the *Cronin* court held that the Flatow Amendment does create a cause of action against the culpable foreign state itself. *Cronin*, 2002 U.S. Dist. LEXIS 24115, at \*24.

The District Court for the District of Columbia seemed to notice, for the first time, that the cause of action created by the Flatow Amendment can only be pursued against the “official, employee, or agent” of a foreign state which participates in terrorist activity.<sup>227</sup> The court rejected the plaintiff’s arguments for a claim against Iran even after they had cited the many landmark cases brought pursuant to the Act in the District Court for the District of Columbia. The *Roeder* court said that the previous opinions of the court<sup>228</sup> merely show “the lengths to which the Court had to go to interpret these [FSIA] provisions consistently.”<sup>229</sup> Interestingly, the court noted that the previous cases cited had gone forward with default judgments without the “benefit” of the United States’ “adept demonstration of the flaws in plaintiff’s interpretation of the statutes at issue.”<sup>230</sup> This suggests that the U.S. Solicitor General under the Bush administration is an even fiercer opponent to be reckoned with for American victims of terrorism. While the *Roeder* court did not hold that a foreign state cannot be sued pursuant to the Flatow Amendment, it certainly raised the issue, now rendering federal jurisdiction over such suits questionable.<sup>231</sup>

Previously, many had thought that the uncertainties and injustices inherent in the FSIA were due to the Clinton Administration’s brand of beguiling politics.<sup>232</sup> Those who had blamed the Clinton Administration for the problems it created in

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<sup>227</sup> *Roeder*, 195 F. Supp. 2d at 172. (citing the “plain text” of 28 U.S.C. § 1605(a)(7)).

<sup>228</sup> See, e.g., *Weinstein v. Islamic Republic of Iran*, 184 F. Supp. 2d 13 (D.D.C. 2002); *Wagner v. Islamic Republic of Iran*, 172 F. Supp. 2d 128 (D.D.C. 2001); *Daliberti v. Islamic Republic of Iran*, 146 F. Supp. 2d 38 (D.D.C. 2000); *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 2d 1 (D.D.C. 1998) (all issuing judgments on behalf of plaintiffs).

<sup>229</sup> *Roeder*, 195 F. Supp. 2d at 173.

<sup>230</sup> *Id.*

<sup>231</sup> See *Price v. Socialist People’s Libyan Arab Jamahiriya*, 294 F.3d 82 (D.C. Cir. 2002).

There is a question. . . whether the FSIA creates a federal cause of action. . . against *foreign states*. . . The “Flatow Amendment” confers a right of action. . . against an “official, employee, or agent of a foreign state,”. . . but the amendment does not list ‘foreign states’ among the parties against whom such an action may be brought.

*Id.* at 87 (emphasis in original) (citations omitted).

<sup>232</sup> See *supra* text accompanying notes 42-43.



promulgating the FSIA's anti-terrorism amendments now must turn their scrutiny to the Bush administration for having put its two cents into the Act. The *Roeder* case demonstrates that neither the change in administration, nor the events of 9/11 have changed the political aspects of the FSIA. As the first critic of the most recent amendments of the FSIA, the *Roeder* court said that the U.S. legislative and executive branches "should not with one hand express support for plaintiffs and with the other leave it to this Court to play the role of the messenger of bad news."<sup>233</sup> In light of the administrative steps taken over the past six years, it appears that President Bush is acting out the same political charade previously carried out by former President Bill Clinton.

Why did Bush even bother to sign the amended the Anti-terrorism Act to allow the hostages to bring suit against Iran when it was clear that the Algiers Accord prevented litigation on the matter? If the answer is simply stated, "politics as usual," then it seems that the American public has been kept in the dark about the court battles between the U.S. and American victims of terrorism. One would reasonably presume that widely publicized facts of the U.S. government betraying its own citizenry would incite a public outcry. The fact is, contemporary media coverage of the issue has been conspicuously scant.<sup>234</sup> Likewise, at the time of enactment, the Anti-terrorism Act went largely unnoticed by the American public.<sup>235</sup> Deemed the new "right to sue" provision, the legislation was considered "a major landmark in protection of victims" of foreign terrorism and predicted to "go down in history as one of the crown jewels of the Anti-Terrorism legislation."<sup>236</sup> Yet, even though it was asserted that the United States would "not rest easy until every act of terrorism is stopped,"<sup>237</sup> the country did not

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<sup>233</sup> *Roeder*, 195 F. Supp. 2d at 145.

<sup>234</sup> *But see* Coyle, *supra* note 163.

<sup>235</sup> *See* Baletsa, *supra* note 8, at 1250 n.12.

<sup>236</sup> Allan Gerson, *Holding Terrorist States Accountable*, WASH. TIMES, June 4, 1996, at A15.

<sup>237</sup> Baletsa, *supra* note 8, at 1275 n.265 (quoting a statement of Rep. Saxton, 144 CONG. REC. H1095 (daily ed. Mar. 11, 1998); Vitano, *supra*, note 25, at 214 n.5 ("We will not rest until we have brought them all to justice and secured a future for our people, safe from the harm they would do. . . .") (quoting President Clinton on signing the Anti-terrorism and Effective Death Penalty Act of 1996, Pub. Papers, Admin. of William J. Clinton (April 24, 1996)).

appear all that restless. Popular media sources did address the new anti-terrorism legislation to some extent. President Clinton appeared on television to address the Cuban Air Force's shoot-down of an American civilian aircraft, which was the subject of the *Alejandro*<sup>238</sup> case, and to request that Congress release frozen Cuban assets to compensate the victims.<sup>239</sup> Stephen Flatow<sup>240</sup> appeared on *60 Minutes* in 1998 to portray the personal story behind the new legislation.<sup>241</sup> A year later, on *CBS This Morning*, he appeared to expose the hypocrisy of the Clinton administration in vigorously supporting the "Flatow Amendment" while later opposing the attachment proceedings brought against Iran.<sup>242</sup> However, the landmark legislation received little attention in the popular press overall.<sup>243</sup> Despite its importance, the Anti-terrorism Act was "hardly heralded."<sup>244</sup> The same holds true today. It has been suggested that the U.S. government is "quietly" opposing American victims of terrorism.<sup>245</sup> In addition, it would seem that the acts of the Bush administration in FSIA proceedings are even more deserving of media attention. Undoubtedly, David Roeder, the lead plaintiff in *Roeder*,<sup>246</sup> would want to spread the word that the U.S. government is "defending Iran, and against the backdrop of our war on terrorism."<sup>247</sup>

Upon signing the Anti-terrorism Act in 1996, President Clinton stated that "this bill strikes a mighty blow against terrorism."<sup>248</sup> At the time of its imminent passing, President

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<sup>238</sup> *Alejandro v. Republic of Cuba*, 996 F. Supp. 1239 (S.D. Fla. 1997).

<sup>239</sup> See *Brothers to the Rescue*, *supra* note 163 at Exhibit 1 (transcript of ABC NEWS, February 26, 1996).

<sup>240</sup> See *supra* text accompanying notes 88-92 (lead plaintiff and father of terror victim, Alisa Flatow).

<sup>241</sup> See *60 Minutes: In Memory of Alisa*, *supra* note 156.

<sup>242</sup> See *CBS This Morning*, *supra* note 143.

<sup>243</sup> See Allan Gerson, *Holding Terrorist States Accountable*, WASH. TIMES, at A15 (June 4, 1996).

<sup>244</sup> *Id.*

<sup>245</sup> Pamela Falk, *Suing Saddam: Victims of Terror Cannot Thaw Iraq's Frozen Assets*, N.Y.L.J., October 11, 2002, at 4 [hereinafter *Suing Saddam*].

<sup>246</sup> *Roeder v. The Islamic Republic of Iran*, 195 F. Supp. 2d 140 (D.D.C. 2002).

<sup>247</sup> See Coyle, *supra* note 163.

<sup>248</sup> Flatow v. The Islamic Republic of Iran, 76 F. Supp. 2d 16, 20 (D.D.C. 1999) (citing President's Remarks on Signing the Anti-terrorism and Effective

Clinton publicly espoused that the bill “stands up for victims in so many important ways,” concluding, “America will never abide terrorists. . . .”<sup>249</sup> Referring to the attacks on September 11<sup>th</sup>, President Bush said, “we will make no distinction between the terrorists who committed these acts and those who harbor them.”<sup>250</sup> Does the U.S. “harbor” terrorists by intervening on their behalf in actions brought under the FSIA? If so, what exactly is the “distinction” that President Bush is talking about? Political rhetoric so often goes this way, in practical terms, always begging the same question. Yet, whereas Clinton’s noble fight in the war on terrorism may have gone unchecked by the American majority, Americans are now intently focused on Bush’s actions in dealing with terrorists. President Bush has also called for solidarity, for Americans to “stand together”<sup>251</sup> in fighting terrorism; this must embrace the idea that in a court battle of *Us* versus *Them*, *We* are all on only one side of the conflict.

For injuries caused by the terrorist attack of September 11<sup>th</sup>, the first FSIA lawsuit against the Islamic Emirate of Afghanistan, the Taliban and Osama bin Laden was filed on October 10, 2001.<sup>252</sup> Perhaps more for matters of principle than compensation,<sup>253</sup> these plaintiffs will likely seek hundreds of millions of dollars in compensatory and punitive damages.<sup>254</sup> Assuming that Afghanistan is someday designated as a state sponsor of terrorism, the fact is, Afghanistan is not a wealthy country. Therefore, it is highly unlikely that enough funds could be discovered to satisfy judgments for thousands of potential plaintiffs seeking civil justice for 9/11.<sup>255</sup>

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Death Penalty Act of 1996, 32 WEEKLY COMP. PRESS. Doc 717 (April 24, 1996)).

<sup>249</sup> *Id.*

<sup>250</sup> *Statement by the President in Address to the Nation, supra* note 186.

<sup>251</sup> *Id.*

<sup>252</sup> *See Falk, supra* note 44.

<sup>253</sup> The wife of a victim of the World Trade Center attack stated that her lawsuit filed against Osama bin Laden, et al., was not to recover financially, but to deprive the terrorists of their funds. “I will do whatever I can to bankrupt all terrorists, those that harbor terrorists and those that help terrorists.” 7 *Families Sue, supra* note 125.

<sup>254</sup> *See Falk, supra* note 44.

<sup>255</sup> Fisk, *supra* note 65 (citing comment by Aaron S. Podhurst, plaintiff’s attorney in *Alejandro*, who won a \$187 million judgment against Cuba in 1996).

It is reasonable to assume that the Bush administration would be more amenable than the former administration was to allowing the release of frozen foreign assets, given the current state of relations between the United States and certain Middle Eastern states.<sup>256</sup> But, so far, the political agenda remains unchanged.<sup>257</sup> The Department of State is as resistant as ever and for the same reasons. According to The Department of State, contrary legislation would “spark a race to the courthouse” as well as “impair our ability to use blocked assets as diplomatic leverage  
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Iraq is another named defendant foreign state in FSIA lawsuits seeking justice for the September 11<sup>th</sup> terror attack.<sup>259</sup> In *Hill v. Republic of Iraq*,<sup>260</sup> approximately twenty U.S. citizens, who were taken hostage by Iraqi officials during the Gulf War and used as human shields, sued Iraq and Saddam Hussein<sup>261</sup> under the FSIA.<sup>262</sup> The United States declined an invitation by the district court to participate and express its interests in the pending action.<sup>263</sup> In addition to being awarded several million dollars in compensatory damages, the *Hill* plaintiffs were awarded \$300 million in punitive damages against Saddam Hussein.<sup>264</sup> Currently, the *Hill* plaintiffs are pursuing execution of their

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<sup>256</sup> See Falk, *supra* note 44.

<sup>257</sup> *Id.*

<sup>258</sup> *Id.* (quoting Paul V. Kelly, an assistant secretary for legislative affairs at the Department of State in a letter to Rep. Chris Cannon, R-Utah, who has proposed a new bill which would loosen the attachment provisions of the FSIA).

<sup>259</sup> *US Attacks-Related Lawsuit Targets Iraq, bin Laden*, AGENCE FRANCE PRESSE, December 5, 2001, (Washington), available at <http://www.lexis/research/news> (Judicial Watch chairman and General Counsel Larry Klayman stated, “The evidence is overwhelming that Iraq was involved in the September 11<sup>th</sup>, 2001 attack which murdered our client’s wife.”).

<sup>260</sup> 175 F. Supp. 2d 36 (D.D.C. 2001).

<sup>261</sup> Saddam Hussein is ostensibly the president of Iraq, but more realistically believed to be the dictator of a one-party nation. *Id.* at 48 (citing the testimony of former Ambassador Morris D. Busby). Busby was the Coordinator for Counterterrorism of the U.S. Dep’t. of State from 1988 to 1991. *Id.* at 39. For all intents and purposes, Hussein is the “alter ego” of Iraq; for punitive liability purposes, he was considered an “instrumentality” of Iraq by the court. *Id.* at 48.

<sup>262</sup> *Id.* at 37-38.

<sup>263</sup> *Id.* at 38.

<sup>264</sup> *Id.* at 48-49.

judgments by attaching frozen Iraqi funds held in U.S. banks.<sup>265</sup> The Bush Administration has reportedly been obstructing the execution of the judgments with vigorous opposition.<sup>266</sup> Further, the Bush Administration, like the Clinton Administration before it, has exhibited its disinclination to allow the release of frozen assets in order to pay plaintiffs' judgments for the same reasons: political leverage and international integrity.<sup>267</sup>

Another current development implicating the Bush Administration surrounds a new provision entitled, "Justice for Victims of Terrorism," recently added as part of a terrorism insurance bill.<sup>268</sup> Section 201 of Title II of the Terrorism Risk Protection Act states its purpose as comprehensively dealing with "the problem of enforcement of judgments rendered on behalf of victims of terrorism. . . by enabling them to satisfy such judgments through the blocked assets of terrorist parties."<sup>269</sup> This legislation affects the presidential waiver provision of the Anti-Terrorism Act.<sup>270</sup> Section 201(b) (1) addresses the presidential waiver provision generally by requiring that "upon determining on an asset-by-asset basis that a waiver is *necessary* in the national security interest the President may waive the requirements of subsection (a)," which subjects blocked assets of the foreign state to execution or attachment.<sup>271</sup> This legislation could have a dramatic impact on FSIA litigation if "necessary" is strictly construed by the judiciary. Such an amendment might actually do what the Anti-Terrorism Act was intended to do: compensate American victims of terrorist acts and punish state sponsors of terrorism.

The Bush Administration has been steadfast in its policy of "preserv[ing] the prerogatives of the President in the area of foreign affairs" at the expense of unsatisfied plaintiffs'

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<sup>265</sup> See *Suing Saddam*, *supra* note 245.

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

<sup>268</sup> Treatment of Terrorist Assets, Pub. L. No. 107-297, Title II § 201, 116 Stat. 2337 (November 26, 2002).

<sup>269</sup> *Id.*

<sup>270</sup> See *id.* § 201 (b).

<sup>271</sup> *Id.* § 201 (a), (b) (emphasis added).

judgments.<sup>272</sup> The Congress, on the other hand, continues to reconstruct the Anti-Terrorism Act so as to facilitate its intended purpose of using terrorist assets to compensate American victims of terrorism. In fact, two U.S. senators had threatened to block the entire terrorism insurance bill if the "Justice for Victims of Terrorism" provision was not passed.<sup>273</sup> In response, Secretary of State Colin Powell unsuccessfully took up opposition by personally calling Senate leaders, asking them to omit the provision.<sup>274</sup>

Even during the Clinton administration it was a stretch to conceive of diplomatic relations taking precedence with nations like Iran and Libya, with whom our relations were virtually non-existent. One key distinction is that Clinton was able to successfully avoid military action. Yet, President Bush still confronts the same issues faced by Clinton in this context, namely, balancing foreign policy interests with those of American victims. Tensions between the United States and many Middle Eastern nations are at an all-time high.<sup>275</sup> One danger in pursuing these suits, which was predicted both by the members of the legislature and the attorneys for the U.S. government, has been realized; the Iranian government has encouraged Iranian citizens to file suits against the United States in retaliation for the FSIA lawsuits brought here.<sup>276</sup> If and when relations with terrorist sponsoring states ever do normalize, the economic bargaining chips held in

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<sup>272</sup> See *Suing Saddam*, *supra* note 245 (quoting President George W. Bush upon signing Foreign Affairs Authorization Act, which will enable seven FSIA plaintiffs to be eligible for compensation under the Victims Protection Act (September 30, 2002)); see *supra* note 102.

<sup>273</sup> See *Suing Saddam*, *supra* note 245. Senators Bob Smith (R-N.H.) and Tom Harkin (D-Iowa) argued in a letter to the Chairman of the Banking Committee of the Senate that the provision "removes any ambiguity" about the Anti-Terrorism Act. *Id.*

<sup>274</sup> See *id.*

<sup>275</sup> As this comment is about to go to publication, the United States is preparing for a possible war with Iraq and is unsupported in this endeavor by its NATO allies. See Steven R. Weisman, *Threats And Responses: The Alliance; Fallout From Iraq Rift: NATO May Feel a Strain*, N.Y. TIMES, February 11, 2003, at A14.

<sup>276</sup> See Vitrano, *supra* note 25, at 241 (stating that the encouragement came in the form of exempting Iranian plaintiff's attorney's fees from income taxes).

frozen assets by the United States may be depleted by the execution of judgments.

President Bush is about to find himself in a serious political predicament. In a one *trillion* dollar law suit filed in a federal court in Washington<sup>277</sup> on behalf of nearly 3,000 9/11 families, there is speculation as to whether or not the Bush Administration will have the audacity to impede the suit.<sup>278</sup> Several major Saudi Arabian banks and charities and members of the Saudi royal family are implicated in the FSIA suit.<sup>279</sup> Because of escalating hostility toward the United States in the Middle East, Saudi Arabia has become a very important ally to our nation in recent days.<sup>280</sup> If Bush lawyers attempt to have the case dismissed, the perception by the American public of betrayal and hypocrisy by our government could have grave political ramifications at home. "The most frightening thing at this point is our own government," remarked one of the plaintiffs in the recent FSIA case, whose son was murdered by terrorists in the World Trade Center.<sup>281</sup> "We are doing what Bush said to do. That they might try to get this case dismissed... I just [can't] believe it."<sup>282</sup> If, on the other hand, Bush demonstrates allegiance to the 3,000 9/11 victims and allows the suit to continue against Saudi Arabian instrumentalities, critical foreign relations could disintegrate. Whether President Bush will break the political habit of legally opposing terrorist victims remains to be seen.

## CONCLUSION

The amendments to the FSIA have been justifiably castigated for their failure to achieve the lofty goals of effectuating domestic justice along with international crime-stopping. The main goal of the Anti-Terrorism Act, to hold state sponsors of terrorism accountable to compensate American victims, has thus

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<sup>277</sup> See Coyle, *supra* note 135 (citing *Burnett v. Al Baraka Investment & Dev. Corp.*, No. 02-1616).

<sup>278</sup> See *id.*

<sup>279</sup> *Id.*

<sup>280</sup> *Id.*

<sup>281</sup> *Id.* (quoting Liz Alderman, who sits on the lawsuit's client committee).

<sup>282</sup> Coyle, *supra* note 135 (quoting Alderman).

far failed.<sup>283</sup> Yet, there may be no better time in history for political influences to play a most welcomed role in the judicial process to redeem the tainted reputation of the FSIA.

Given the current American perspective, decidedly forever changed by the events of September 11<sup>th</sup>, it is confounding to reconcile the notion of any U.S. action either opposing an American plaintiff's quest for justice against terrorists or acting on behalf of terrorists in protecting their assets. In *Wagner v. Islamic Republic of Iran*, the court made reference to 9/11 in stating, "Now more than ever, this Court believes that the acts of terrorists and their sponsors must be punished to the full extent to which civil damages awards might operate to suppress such activities in the future."<sup>284</sup> It is not enough that the "courage and steadfastness" of the victims of terrorism pursuing litigation against terrorists and their efforts to "deter more tragic deaths and suffering of innocent Americans at the hands of those terrorists, are to be commended and admired."<sup>285</sup>

It is clear that the victims have done their part and that the courts have tried to do theirs. The legislature or the executive must act in order to obtain effective results under the FSIA because, as it stands, "There is the utter absence of any coherent policy" by the federal government.<sup>286</sup> Perhaps it is true that Congress failed to anticipate such resistance from the executive branch or to predict the judiciary's narrow construction of the FSIA exceptions to immunity.<sup>287</sup> Sadly, in the years following the passage of the Anti-Terrorism Act, the grim truth remains that "terrorism is here to stay."<sup>288</sup> Short of enacting further amendments to the statute, eliminating the legal blockades faced by FSIA plaintiffs, the task is now left to the executive branch to do the right thing, to stand up for American victims as it has so often publicly declared that it would. After having been attacked by terrorists, victims are now forced to fight their final legal adversary: the President of the

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<sup>283</sup> See Vitrano, *supra* note 25, at 242 (arguing that the recent amendments to the FSIA did "little more than respond to Congress' political need to placate the plaintiffs by paying them off").

<sup>284</sup> 172 F. Supp. 2d 128, 138 (D.D.C. 2001).

<sup>285</sup> *Eisenfeld v. Islamic Republic of Iran*, 172 F. Supp. 2d 1, 9 (D.D.C. 2000).

<sup>286</sup> *Coyle*, *supra* note 135 (quoting international litigator, Allan Mendelsohn).

<sup>287</sup> See Vitrano, *supra* note 25, at 222.

<sup>288</sup> *Coyle*, *supra* note 135 (quoting international litigator, Allan Mendelsohn).



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United States. The Clinton Congress might never have imagined the potential ramifications of the Anti-Terrorism Act in today's terror-ridden America. However, President Bush has been thoroughly briefed. Since President Bush has already picked up where his predecessor left off regarding FSIA suits, it is fairly certain that in the balance between foreign relations and domestic justice, the scales will remain dramatically tipped in disfavor of American plaintiffs.

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