Berkeley Journal of International Law

Volume 22 | Issue 3 Article 6

2004

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INTRODUCTION

Although the events of September 11, 2001 painfully alerted the public to the risk of international terrorist attacks on U.S. citizens, terrorism is hardly a new issue for U.S. policymakers. Inherent in addressing international terrorism is the debate surrounding the limits and exceptions of sovereign immunity. The U.S. response to terrorism, as well as its application of sovereign immunity doctrine, has continued to evolve rapidly since the congressional adoption of the 1976 Foreign Sovereign Immunities Act (FSIA).[1]

Before the passage of the FSIA, the U.S. adhered to the classic theory of sovereign immunity; all states are equal sovereigns and one state cannot exercise jurisdiction over another state in its domestic courts.[2] However, this theory became less practical in the years before and after World War II, as foreign states increasingly became commercial actors. In response to this trend, many states began to follow the doctrine of "restrictive" sovereign immunity.[3] The United States also adopted a restrictive form of sovereign immunity after the State Department issued what became known as the "Tate Letter."[4] The State Department took this positive step after the Supreme Court deferred the question of sovereign immunity to the executive branch.[5]

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* J.D., 2004, University of California, Berkeley (Boalt Hall). The author would like to thank Professor Richard M. Buxbuam for his guidance on the article. She would also like to thank her article editor, Angela Howe, and the BJIL editorial staff for all their hard work editing the article.

1. Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified at 28 U.S.C. §§ 1330, 1332(a)(2)-(4), 1391(f), 1441(d), 1602-11(2004)).

2. The theory was first articulated in the United States by Chief Justice Marshall in *Schooner Exchange v. McFaddon*, 11 U.S. 116 (1812) (holding that a French warship, although formerly taken on the high seas from its rightful, American owner, was not subject to libel action when weather forced it into a U.S. port).

3. *See* Flatow v. Iran, 999 F. Supp. 1, 11 (D.D.C. 1998).

4. Changed Policy Concerning the Granting of Sovereign Immunity to Foreign Governments, Letter from Jack B. Tate, Acting Legal Advisor, to Philip B. Perlman, Acting Attorney General (May 19, 1952), *reprinted in* 26 Dep't St. Bull. 984 (1952).

5. *See, e.g., Ex parte* Republic of Peru, 318 U.S. 578 (1943) (holding that the judiciary will defer to the executive branch on questions of sovereign immunity).

In 1976, Congress shifted the burden of deciding whether sovereign immunity protected a given transaction or event from the executive branch to the judicial branch by codifying the restrictive sovereign immunity theory in the FSIA.[6] This gave the courts, rather than the executive, the power to determine relief for international commercial disputes. While the enactment of the FSIA was expected to be a major event in international commercial law, its impact on non-commercial areas, such as protection of human rights by national courts, was yet unclear.

As it stood in 1976, the FSIA did not permit suits against foreign states for state-sponsored crimes, including acts of torture and execution against U.S. citizens.[7] Congress amended the FSIA in 1996[8] to allow American victims of terrorist acts to sue countries designated as sponsors of terrorism. The same year, Congress passed legislation authorizing U.S. domestic courts to award money damages to victims of terrorism.[9] By passing the "State Sponsors of Terrorism" exception to sovereign immunity, Congress sought to achieve two primary purposes: ending terrorism and compensating American victims.[10] However, by placing the burden on U.S. courts to decide the proper compensation for terrorist victims, Congress failed to sufficiently meet either goal. Ironically, it appears now that attempts by U.S. courts to provide compensation for terrorist victims are actually undermining the executive branch's ability to fight terrorism through its foreign policy measures.

This dilemma is attributable to the incoherent nature of the FSIA. In the years since the terrorism exception was added to the FSIA, it has become clear that the inherent structure of the FSIA creates a difficult separation of powers problem. This article evaluates the state-sponsored terrorism exception to foreign sovereign immunity. Part I analyzes the development of legislation permitting suits against state sponsors of terrorism and the body of cases involving these suits, highlighting specific problems in victim compensation. Part II examines the foreign policy and diplomatic relations concerns raised by the executive branch surrounding the legality of the FSIA amendments in reference to international law. Part III highlights two recent cases where the federal district courts in the District of Columbia have begun to express their frustration at the incoherent legislation surrounding the FSIA and the way in which the statutory scheme leaves successful plaintiffs unable to collect compensation. Finally, this article specifically evaluates in part IV the separation of powers challenges to the constitutionality of the statute. It then proposes that recent development in

6. Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891.

7. *Flatow*, 999 F. Supp. at 11; *see also* H.R. REP. No. 103-702 (1994), *available at* 1994 WL 449323.

8. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 221, 110 Stat. 1214, 1241-43 (codified at 28 U.S.C. § 1605(a)(7) (2003)).

9. Civil Liability for Acts of State Sponsored Terrorism, Pub. L. No. 104-208, § 589, 110 Stat. 3009 (1996) (codified at 28 U.S.C. § 1605 note (2004)).

10. Recent Cases, *International Law - Foreign Sovereign Immunities Act - D.C. Circuit Holds That an International Agreement Bars Former Hostages' Suit Against Iran, Despite Legislation Aimed at Aiding the Suit*, Roeder v. Islamic Republic of Iran, 333 F.3d 228 (D.C. Cir. 2003), 117 Harv. L. Rev. 743, 747 n.39 (2003).

case law and foreign relations entreat an answer to a question left open by the Supreme Court: Whether there would be a constitutional issue — predicated on a supposedly illegal delegation to the executive branch of Congress' legislative power to define the jurisdiction of federal courts — in the event of a suit involving a country that was either added to or dropped from the executive branch's list of state sponsors of terrorism after the statute was enacted.

I.
EXCEPTIONS TO FOREIGN SOVEREIGN IMMUNITY: THE DEVELOPMENT OF LEGISLATION PERMITTING SUITS AGAINST STATE SPONSORS OF TERRORISM

The FSIA[11] is a complex legal instrument that subjects foreign states to the jurisdiction of U.S. courts in specific cases.[12] As originally enacted in 1976, the key exceptions to immunity included cases involving commercial activity, such as contracts involving the purchase of goods;[13] noncommercial torts, like car accidents;[14] and explicit and implicit waivers of immunity.[15] While the FSIA was expected to be a major event in international commercial law, the FSIA soon began to have an unanticipated impact on the protection of human rights by U.S. domestic courts.[16]

A. *1996 Amendments Allow Money Damages for Suits Against State Sponsors of Terrorism*

The FSIA became the sole vehicle for redressing international human rights violations, since the only way to obtain jurisdiction over a foreign state defendant in a U.S. court is to bring suit under one of the immunity exceptions listed in the FSIA.[17] As it stood in 1976, however, the FSIA did not permit suits against foreign states for state-sponsored crimes, including the torture and execution of U.S. citizens.[18] Before the FSIA was amended in 1996, U.S. courts thus routinely dismissed cases against foreign states brought by U.S. citizen plaintiffs who alleged serious violations of human rights or international law.[19]

11. Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891.

12. 28 U.S.C. §§ 1605, 1607; *see also* H.R. REP. NO. 94-1487, at 7 (1976).

13. 28 U.S.C. § 1605(a)(2); *see also* Keith Sealing, *"State Sponsors of Terrorism" is a Question, Not an Answer: The Terrorism Amendment to the FSIA Makes Less Sense Now Than It Did Before 9/11*, 38 TEX. INT'L L.J. 119, 122 (2003).

14. 28 U.S.C. § 1605(a)(5); *see also* Sealing, *supra* note 13, at 122.

15. 28 U.S.C. § 1605(a)(1); *see also* Sealing, *supra* note 13, at 122.

16. *See* Jennifer A. Gergen, *Human Rights and the Foreign Sovereign Immunities Act*, 36 VA. J. INT'L L. 765, 770-71 (1996) (implying that the FSIA was not intended as human rights legislation); *see also* H.R. REP. NO. 103-702 (1994), *available at* 1994 WL 449323 ("[T]he FSIA does not currently allow U.S. citizens to sue for gross human rights violations committed by a foreign sovereign on its own soil.").

17. Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 439 (1989); William P. Hoye, *Fighting Fire with. . . Mire? Civil Remedies and the New War on State-Sponsored Terrorism*, 12 DUKE J. COMP. & INT'L L. 105, 116 (2002).

18. *Flatow*, 999 F. Supp. at 11; *see also* H.R. REP. NO. 103-702, *available at* 1994 WL 449323.

19. Hoye, *supra* note 17, at 108-109.

For example, before 1996, the families of the victims of the bombing of Pan Am Flight 103 over Lockerbie, Scotland, were unable to successfully sue Libya for its involvement because international terrorist activities did not fall under one of the exceptions listed in the FSIA at that time.[20]

Individuals who found themselves blocked in the courts[21] turned to the legislature to expand the restrictive exceptions of the FSIA so as to enable a subsequent judicial remedy. Notably, the families of the victims of the bombing of Pan Am Flight 103 and other victims of terrorist actions, including the families of the 1995 Oklahoma City bombing victims, lobbied Congress[22] and secured the passage of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").[23]

The convergence of the two groups' objectives resulted in the "effective death penalty" component which narrowed the opportunities available to defendants for challenging their state convictions in federal courts,[24] while the "antiterrorism" component amended the FSIA to allow U.S. nationals to sue foreign states for violations of human rights deemed to be "terrorist activities."[25] Under this 1996 amendment to the FSIA, a foreign state is no longer immune from jurisdiction, specifically, where:

> money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources. . . . for such act if such an act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.[26]

The amendment thus allows a U.S. citizen to bring suit against a foreign state in a U.S. court for damages resulting from a state-sponsored act of terrorism.[27]

Congress enacted this legislation with two primary purposes: to provide victims of terrorist acts with previously elusive compensation,[28] and to make

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20. Smith v. Socialist People's Libyan Arab Jamahiriya, 886 F. Supp. 306 (E.D.N.Y. 1995), *aff'd*, 101 F.3d 239 (2d Cir. 1996).

21. The Supreme Court restricted the jurisdictional scope of the FSIA for potential human rights cases. *See, e.g.*, *Amerada Hess Shipping Corp.*, 488 U.S. at 428.

22. *See, e.g.*, Aphrodite Tsairis, Chair, The Victims of Pan Am Flight 103, Comments from the Victims of Pan Am Flight 103 on proposed rulemaking (Dep't of Transp. Feb. 12, 1991) *at* http://dmses.dot.gov/docimages/pdf5/6523_web.pdf (last visited May 4, 2004); Laurie Kellman, *Families of Victims Seek to Limit Death-Row Appeals for Terrorists*, WASH. TIMES, May 24, 1995, at A3 ("Congress should enact legislation to speed the executions of convicted terrorists, according to the families of several Oklahoma City bombing victims."); Jim Myers, *Victims' Families Appeal to Senators*, TULSA WORLD, June 6, 1995, at N1, *available at* 1995 WL 5598440 ("Families of those killed in the Oklahoma City bombing made an emotional appeal Monday for Congress to speed up death sentences . . . .").

23. Pub. L. No. 104-132, 110 Stat. 1214 (1996), enacted at 28 U.S.C. § 1605(a)(7) (2003).

24. *See id.*

25. *See id.*

26. *Id.*

27. *Id.* The jurisdiction is further limited: courts can only utilize this exception if the foreign state is designated as a state sponsor of terrorism, if local remedies have been adequately exhausted, and if one of the parties is a U.S. national. *See, e.g.*, United States v. Yousef, 327 F.3d 56 (2nd Cir. 2003). *See also infra* text accompanying notes 88-89.

28. *See* Hoye, *supra* note 17, at 150.

foreign states more reluctant to sponsor acts of terror against U.S. citizens by forcing them to pay huge sums of money to those who won judgments.[29]

The AEDPA was accompanied a few months later by the Civil Liabilities for Acts of State Sponsored Terrorism Act ("Civil Liability Act"), passed as part of the 1997 Omnibus Consolidated Appropriations Act.[30] The Civil Liability Act, sometimes referred to as the "Flatow Amendment," creates a private cause of action for acts of state-sponsored terrorism, by providing, in relevant part, as follows:

> An official, employee, or agent of a foreign state designated as a state sponsor of terrorism . . . while acting within the scope of his or her office, employment, or agency shall be liable to a United State national. . . for personal injury or death caused by acts of that official, employee, or agent for which the courts of the United States may maintain jurisdiction under [28 U.S.C. § 1605(a)(7)] for money damages which may include economic damages, solatium, pain, and suffering, and punitive damages . . . .[31]

Together, the AEDPA and the Civil Liability Act broadened the scope for judicial actions and increased potential liability for acts of terrorism.[32] First, AEDPA's new exception to the FSIA lowered the threshold of causality; a foreign state, if it provided material support to terrorists, could now be subjected to U.S. jurisdiction even if it only indirectly caused the specific act of terrorism at issue. Second, the new exception adopted the principles of agency; a foreign state could be subjected to U.S. jurisdiction on the basis of an act of terrorism of one of its agents or employees, acting within his or her scope of authority. Third, under the Civil Liability Act, plaintiffs no longer needed to incorporate the provisions of the Alien Tort Claims Act for a cause of action against individual agents or employees of a terrorist state. Finally, the Civil Liability Act specifically allowed recovery for pain and suffering, economic damages, solatium, and punitive damages.

B. First Attempts at Suing State Sponsors of Terrorism

After the passage of the 1996 Amendments, the AEDPA and the Civil Liability Act, U.S. plaintiffs could now receive awards of damages—and, potentially, very high awards—for certain human rights abuses. The Civil Liability Act introduced an element that had theretofore not been part of the emerging legislative ensemble: allowing recovery for punitive damages. At the time, this represented a significant departure from earlier practices because the FSIA expressly prohibited awarding punitive damages in all other cases against foreign

29. *See Flatow*, 999 F. Supp. at 25 (stating that the terrorism exception "was enacted explicitly with the intent to alter the conduct of foreign states, particularly towards United States nationals traveling abroad").

30. Civil Liability for Acts of State Sponsored Terrorism, Pub. L. No. 104-208, § 589, 110 Stat. 3009 (1996) (codified at 28 U.S.C. § 1605 note (2004)).

31. 28 U.S.C. § 1605 note.

32. W. Michael Reisman & Monica Hakimi, *2001 Hugo Black Lecture: Illusion and Reality in the Compensation of Victims of International Terrorism*, 54 ALA. L. REV. 561, 567-68 (2003).

states.[33] However, until recently, this departure was more symbolic than practical because these new laws did not provide a means by which to satisfy those awards.[34] This section discusses the initial success by FSIA plaintiffs in procuring large-sum judgments against states designated as sponsors of terrorism.

The first case under the terrorism exception to the FSIA was brought in 1997 when three families sued the state of Cuba in *Alejandre v. Cuba*.[35] Cuba did not appear in the case, and the federal District Court for the Southern District of Florida found for the families of the men killed, awarding them $50 million in compensatory damages and $137 million in punitive damages.[36]

Following the plaintiffs' success in *Alejandre*, other victims of terrorism and their families initiated suits against state sponsors of terrorism. One of the most influential cases to be brought under the state-sponsored terrorism exception was *Flatow v. Iran*.[37] Pursuant to the state-sponsored terrorism exception and the "Flatow Amendment," Flatow's family filed suit against the government of Iran in the District Court for the District of Columbia.[38] Like Cuba, Iran did not appear in the proceedings.[39]

In *Flatow*, the court set precedent by broadly interpreting the terrorism-exception statutes. First, the court held that a plaintiff need only meet a minimum threshold of evidence to establish jurisdiction over a foreign state defendant. Specifically, a state's general sponsorship of the responsible terrorist group was enough to warrant jurisdiction under the state-sponsored terrorism exception,[40] and to establish agency.[41] Under this reasoning, the court found Iran responsible for Alisa Flatow's death and awarded her estate damages for lost earnings, pain and suffering, and compensation for emotional distress to her family—a total in excess of $20 million.[42] The court also awarded punitive damages in the amount of $225 million, or approximately three times Iran's annual expenditure for terrorist activities.[43]

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33. 28 U.S.C. § 1606 (2003). This provision specifically waives liability for punitive damages. *See* Richard Milin, *Suing Terrorists and Their Private State Sponsors*, N.Y.L.J., Oct. 29, 2001, at 1.

34. 28 U.S.C. § 1606 (2003).

35. Alejandre v. Cuba, 996 F. Supp. 1239 (S.D. Fla. 1997). This case arose after the Cuban Air Force shot down two planes belonging to the Florida-based exile Cuban group, Brothers to the Rescue, in 1996. The plaintiffs, the families of three men killed in the attack, alleged that the attack was a terrorist act sponsored by the Cuban government.

36. *Id.* at 1253-54.

37. Flatow v. Iran, 999 F. Supp. 1, 1 (D.D.C. 1998). *Flatow* was brought by the family of Alisa Flatow, a student at Brandeis University. In 1995, while she was on a study program in Israel, Alisa was killed in a suicide bomber attack. The Palestinian Islamic Jihad, an entity funded heavily by the Islamic Republic of Iran, claimed responsibility for the attack. *Id.*

38. *Id.* at 1-2.

39. *Id.* at 6 n.1.

40. *Id.* at 18.

41. *Id.* at 9-10.

42. *Id.* at 32.

43. *Id.* at 25-27, 33-34.

Flatow was the first of many cases against Iran.[44] Iraq and Libya have also been named as defendants in terrorist-exception cases.[45] Most plaintiffs who bring suit against state sponsors of terrorism easily win default judgments. As of January 2004, more than twenty cases have been decided against state sponsors of terrorism, and Iran, Iraq, Cuba, and Libya together owe hundreds of millions of dollars to plaintiffs.[46] Collecting these judgments, however, has been another matter.

C. *FSIA Amendments in 1998 and 2000: The Struggle between the Congress and the Executive over Frozen Assets*

While most of the plaintiffs who brought suits under the terrorist exception to the FSIA easily won default judgments, they were often unable to take the next step and collect the money awarded to them.[47] Recognizing this, Congress made several attempts, beginning in 1998, to amend the terrorist exception to help successful plaintiffs collect judgments levied against foreign states.

When Congress first decided to permit U.S. citizens to sue state sponsors of terrorism, it included a provision to also allow successful plaintiffs to attach diplomatic and other blocked assets in the United States belonging to the defendant state.[48] However, the executive branch resisted this attempt to facilitate collection by the successful plaintiffs.[49] The Clinton administration's position was that diplomatic assets could not be released because they were protected by international agreements,[50] and that frozen assets could not be released because

44. *See, e.g.*, Cronin v. Islamic Republic of Iran, 238 F. Supp. 2d 222 (D.D.C. 2002); Surette v. Islamic Republic of Iran, 231 F. Supp. 2d 260 (D.D.C. 2002); Weinstein v. Islamic Republic of Iran, 184 F. Supp. 2d 13 (D.D.C. 2002); Sutherland v. Islamic Republic of Iran, 151 F. Supp. 2d 27 (D.D.C. 2001); Jenco v. Islamic Republic of Iran, 154 F. Supp. 2d 27 (D.D.C. 2001); Wagner v. Islamic Republic of Iran, 172 F. Supp. 2d 128 (D.D.C. 2001); Anderson v. Islamic Republic of Iran, 90 F. Supp. 2d 107 (D.D.C. 2000); Eisenfeld v. Islamic Republic of Iran, 172 F. Supp. 2d 1 (D.D.C. 2000); Elahi v. Islamic Republic of Iran, 124 F. Supp. 2d 97 (D.D.C. 2000).

45. *See, e.g.*, Hill v. Republic of Iraq, 175 F. Supp. 2d 36 (D.D.C. 2001) (a group of plaintiffs secured judgment against Iraq for their detention and use as "human shields" at the beginning of the Gulf conflict in 1990); *Simpson v. Socialist People's Libyan Arab Jamahiriya*, 180 F. Supp. 2d 78 (D.D.C. 2001) (by cruise chip passengers held hostage in Libya after their ship was forced to stop in a Libyan port during a storm). For a discussion on recent case development in cases against Iraq and Libya, see *infra* part IV.

46. For a list of cases and detailed descriptions of damages awarded in each case, see Kristine Cordier Karnezis, Annotation, *Award of Damages under State-Sponsored Terrorism Exception to Foreign Sovereign Immunities Act (28 U.S.C.A.§ 1605(a)(7))*, 182 A.L.R. FED. 1 (2002).

47. David M. Ackerman, Congressional Research Service, *Suits Against Terrorist States*, at 6-21 (2002), *available at* http://fpc.state.gov/documents/organization/8045.pdf.

48. 28 U.S.C. § 1610(b)(2); *see also* Ackerman, *supra* note 47, at 4-5.

49. Ackerman, *supra* note 47, at 6-7; *see also* Bill Miller, *Terrorism Victims Set Precedent; U.S. to Pay Damages, Collect from Iran*, WASH. POST, Oct. 22, 2000, at A1. I will argue in the following sections that the Clinton administration had legitimate reasons for opposing so vehemently the collection of payments for terrorism victims using frozen assets. *See* discussion *infra* part II.

50. Ackerman, *supra* note 47, at 6-7. The administration specifically pointed to the Vienna Convention and the Iran-United States Claims Tribunal agreements as prohibiting the release of blocked assets. *Id.*

they were a valuable foreign policy tool and possibly subject to other claims by U.S. nationals.[51]

In response to "executive stonewalling,"[52] Congress again amended the FSIA in 1998 to facilitate compensation for the growing number of successful plaintiffs.[53] The resulting legislation specifically stated that frozen and diplomatic assets of foreign states could be attached to satisfy a judgment for a claim brought under the terrorist exception.[54] However, this legislation also included a provision that authorized the president to waive the requirements of this section "in the interest of national security," thereby protecting all frozen assets from attachment.[55] President Clinton signed the legislation, but then immediately invoked the waiver.[56] The frozen assets of terrorist states thus remained immune from attachment and beyond the reach of successful plaintiffs.[57]

After the 1998 amendment failed to help plaintiffs collect judgments, Congress passed section 2002 of the Victims of Trafficking and Violence Protection Act in 2000.[58] Under this act, specified claimants were to be paid compensatory, but not punitive, damages won in terrorism-exception suits against Iran and Cuba only.[59] In return, a claimant had to agree to relinquish rights to attach certain property of the defendant state.[60] Essentially, this act allowed payment of damages from the liquidation of frozen assets and the assistance of the U.S. Treasury in one case against Cuba and ten cases against Iran.[61]

The families who prevailed against Cuba in the *Alejandre* case arguably benefited the most from the new legislation because they were paid directly from frozen Cuban assets.[62] In 2001, the U.S. government liquidated approximately half of Cuba's $193.5 million in frozen assets to pay the three families.[63]

However, the Clinton administration held steadfast in its refusal to release Iran's frozen assets.[64] Instead, the U.S. Treasury paid over $350 million to par-

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51. *Id.* at 7. For a discussion of other preexisting claims on Cuban and Iranian assets, see generally Roger Parloff, *Deep Freezing Terror's Assets*, AM. LAW., June 2002.

52. Allison Taylor, Note, *Another Front in the War on Terrorism? Problems with Recent Changes to the Foreign Sovereign Immunities Act*, 45 ARIZ. L. REV. 533, 540 (2003).

53. Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, 117, 112 Stat. 2681 (1998) (codified as amended at 28 U.S.C. § 1610(f)(2)(A) (2003)).

54. *Id.*; *see also* Ackerman, *supra* note 47, at 8.

55. 28 U.S.C. § 1610(f)(3) (2003).

56. Pres. Determination No. 99-1, 63 Fed. Reg. 59, 201 (Oct. 21, 1998) (invoking the waiver).

57. *See* Ackerman, *supra* note 47, at 9-10 (citing Statement by President William J. Clinton Upon Signing H.R. 4328, 34 WEEKLY COMP. PRES. DOC. 2108 (Nov. 2, 1998), *reprinted in* 1998 U.S.C.C.A.N. 576).

58. Pub. L. No. 106-386, 2002, 114 Stat. 1464 (2000) (codified as amended in 28 U.S.C. § 1606, 1610 (2003)).

59. *Id.*

60. *Id.*

61. Ackerman, *supra* note 47, at 10, 14-17 (*see* Appendix I for the list of cases); *see also* Joel Mowbray, *So You Want to Sue the Saudis?*, NAT'L REV., Nov. 25, 2002, *available at* 2002 WL 1177725.

62. *See Alejandre*, 996 F. Supp. at 1239.

63. Ackerman, *supra* note 47, at 17; Mowbray, *supra* note 61; *see also* Parloff, *supra* note 51.

64. *See* Sean K. Mangan, Note, *Compensation for "Certain" Victims of Terrorism Under Section 2000 of the Victims of Trafficking and Violence Protection Act of 2000: Individual Payments at an Institutional Cost*, 42 VA. J. INT'L L. 1037, 1052-54 (2002).

tially satisfy judgments in nine of the ten cases against Iran.[65] In just one of the cases against Iran, *Sethem v. Islamic Republic of Iran*,[66] the District Court for the District of Columbia awarded plaintiffs over $28 million in compensatory damages and $300 million in punitive damages.

Although some plaintiffs received payment, many other plaintiffs who had been awarded judgments did not. Because President Clinton was unwilling to sign legislation that would have made all frozen assets of designated terrorist states vulnerable to attachment,[67] Congress compromised and permitted only a few designated plaintiffs to receive payment.[68] Other plaintiffs, including those pursuing suits against Iraq and Libya, were not mentioned in the legislation, and were thus denied payment for their successful judgments.

Congress compromised even on the payments to the plaintiffs with claims against Iran. Rather than attempting to collect successful judgment awards from Iran, the 2000 legislation placed upon the executive branch the responsibility for collecting the money from the defendant foreign state, and in the meantime, Iran's judgment payments were funded by the U.S. Treasury.[69] Recalling Congress's dual purpose in introducing the terrorism exception to the FSIA, using taxpayer funds to compensate terrorism victims is problematic. While such a practice may achieve the goal of compensating select plaintiffs, it will have no deterrent effect against Iran at all—since Iran does no pay, the U.S. Treasury does—and arguably "defeats the whole purpose" of the suits under the terrorism exception.[70]

D. Terrorism Risk Insurance Act of 2002: Piecemeal Legislation, Piecemeal Compensation

Still struggling with the risk of future terrorism and loss allocation, Congress adopted most recently the Terrorism Risk Insurance Act of 2002 (TRIA).[71] This legislation was designed to "provide a new, powerful disincentive for any foreign government to continue sponsoring terrorist attacks on Americans."[72]

The act sought to help successful terrorism plaintiffs collect judgments by removing *some* barriers to the attachment of blocked assets.[73] It did this by

65. Neely Tucker, *Damages Awarded to Terror Victim's Family*, WASH. POST, Feb. 7, 2002, at A26. Tucker notes that the United States "has paid about $350 million from the general treasury to satisfy some claims" against Iran. *Id.*; *see also* Barry E. Carter, *Terrorism Supported by Rogue States: Some Foreign Policy Questions Created by Involving U.S. Courts*, 36 NEW ENG. L. REV. 933, 937 (2002).

66. Sethem v. Islamic Republic of Iran, 201 F. Supp. 2d 78 (2002).

67. *CBS News: 60 Minutes* (CBS television broadcast, Jan. 13, 2002), *available at* 2002 WL 8424859 [hereinafter *60 Minutes*].

68. *Id.*

69. Miller, *supra* note 49, at A1, A10.

70. Shawn Zeller, *Hoping to Thaw Those Frozen Funds*, NAT'L J., Oct. 27, 2001 (quoting Terry Southerland, former hostage).

71. Pub. L. 107-297, 116 Stat. 2322 (codified at 15 U.S.C. § 6701 note, 28 U.S.C. §§ 1606, 1610 (2003)).

72. 148 CONG. REC. S11, 524, S11, 527 (2002) (statement of Sen. Harkin).

73. Terrorism Risk Insurance Act § 201(b).

barring the president from waiving the attachment of *all* blocked assets in the interest of national security.[74] Instead, the TRIA requires the president to make "an asset-by-asset" determination that "a waiver is necessary in the general national security interest."[75] Furthermore, even if invoked, the presidential waiver can only protect certain limited types of diplomatic property specifically subject to the Vienna Convention.[76] All other types of blocked assets may be attached.[77] A conference report on the bill explains that the new act "eliminates the effect of any [previous] presidential waiver . . . making clear that all such judgments are enforceable" against blocked assets.[78]

The act also provides for the payment of some judgments against Iran.[79] However, this compensation is disbursed arbitrarily; payment is contingent upon the speed with which the plaintiffs were able to secure judgments. First, the act prioritizes payment to a few plaintiffs who secured judgments on specific dates.[80] Other successful plaintiffs are next in line, followed by those with decisions currently pending.[81] Future plaintiffs will theoretically be paid with whatever remains of Iran's frozen assets.[82] The result is that some plaintiffs will receive legislative priority and collect more than others, while the fate of future victims of terrorism who may bring suit in the coming years is uncertain at best.[83] Moreover, the system of payment under TRIA ensures that no plaintiff will receive the full amount of the judgment awarded by the courts since judgments will be paid on a by-share basis and payments are limited to compensatory damages only.[84] Also, the 2002 legislation fails to mention punitive damages.[85]

Although well-intentioned, this latest modification to plaintiffs' remedies is far from sufficient in addressing the problems with the terrorist exceptions to the FSIA. While the new legislation gives some plaintiffs the promise of payment, efforts to secure payment will continue to involve uphill battles as plaintiffs try to force the U.S. government to release frozen assets. This is because the act only limits but does not eliminate the presidential waiver, making it still difficult for terrorism victims to access frozen assets.[86] For example, the President could

74. *Id.*

75. *Id.* § 201(b)(1).

76. *Id.* Not all types of diplomatic property under the Vienna Convention can be protected. For example, any property that has been used "for nondiplomatic purposes," such as "rental property," can be attached. *Id.* § 201(b)(2)(A).

77. *Id.* § 201(a).

78. 148 CONG. REC. H8722, H8728 (2002).

79. Terrorism Risk Insurance Act § 201(c)-(d).

80. *Id.* § 201(c); Marcia Coyle, *Helping the Victims, Congress Drops Barriers to Seizing Foreign Assets by Lawsuit Winners*, NAT'L L.J., Nov. 25, 2002, at A1 [hereinafter Coyle, *Helping the Victims*].

81. Terrorism Risk Insurance Act § 201(d).

82. *Id.*

83. 148 CONG. REC. S11, 528 (statement of Sen. Harkin). At the same hearings, Senator Kyl noted that the remaining Iranian funds ($30 million not disbursed after the 2000 legislation) would be divided up among two plaintiffs, leaving everyone else with nothing. *Id.* at S11, 527.

84. Terrorism Risk Insurance Act § 201(c)-(d).

85. *See id.*

86. Coyle, *Helping the Victims, supra* note 80, at A7.

continue to hold on to a particular frozen asset if foreign policy goals so dictated. Further, the State Department strongly opposed permitting the attachment of blocked assets, and the State Department continues to intervene in litigation to prevent the unfreezing of assets.[87]

The terrorist exception to the FSIA and its subsequent amendments—including the TRIA—are particularly flawed in that they treat a select few plaintiffs very favorably, while other similarly situated plaintiffs are not even provided with a cause of action. This problematic unequal treatment of potential terrorism-exception plaintiffs is exacerbated by the fact that the FSIA only permits suits against the seven countries designated by the State Department as state sponsors of terrorism.[88] The seven countries designated by the U.S. State Department as state sponsors of terrorism are Sudan, Cuba, Iran, Iraq, North Korea, Syria, and Libya. As the State Department acknowledges, this list of "state sponsors of terrorism," has not changed since 1993 — although in 2003, President Bush suspended, with respect to Iraq, all sanctions applicable to state sponsors of terrorism, which had the practical effect of putting Iraq on a par with nonterrorist states.[89] These nations are not currently the world's only sponsors of terrorism. Some even argue that these seven countries have been singled out for policy reasons.[90]

Many victims of terrorism are therefore left without a remedy simply because some terrorist-sponsoring states do not happen to be on the State Department's list.[91] The plight of the September 11th plaintiffs highlights this problem, since the attacks on the Word Trade Towers have not been clearly connected to any of the seven designated states. Although the September 11th plaintiffs might be able to bring suit against non-state actors, such as al Qaeda, they cannot bring a successful FSIA suit because neither Afghanistan nor Saudi Arabia, the home of Osama Bin Laden, has been designated a state sponsor of terrorism.[92] Several lawsuits have been filed alleging the involvement of Iraq and Sudan, but no court has yet held either nation liable for the September 11th

87. *Id.*

88. Sealing, *supra* note 13, at 135-38.

89. *See* Introduction, U.S. Dep't of State, Patterns of Global Terrorism 1999 (Apr. 2000) *available at* http://www.state.gov/www/global/terrorism/1999report/intro.html (last visited June 19, 2004) [hereinafter Patterns of Global Terrorism 2003]. Although President Bush suspended sanctions against Iraq since May 7, 2003, Iraq remains "technically" a state sponsor of terrorism according to the State Department's annual report on terrorism released on April 29, 2004. *See* Overview of State-Sponsored Terrorism, U.S. Dep't of State, Patterns of Global Terrorism 2003 (Apr. 2004), *available at* http://www.state.gov/s/ct/rls/pgtrpt/2003/31644.htm (listing the same seven states) (last visited June 19, 2004) [hereinafter Patterns of Global Terrorism 2004].

90. Sealing, *supra* note 13, at 135-36. *See also* Peter G. Danchin, *U.S. Unilateralism and the International Protection of Religious Freedom: The Multilateral Alternative*, 41 COLUM. J. TRANSNAT'L L. 33, 115 (2002) (arguing that the countries designated as state sponsors of terrorism may have been selected as such because of their hostility toward religious freedom).

91. For example, at least one U.S. citizen has attempted to sue Saudi Arabia for state-sponsored terrorist acts including kidnapping and torture. Saudi Arabia v. Nelson, 507 U.S. 349 (1993). The U.S. Supreme Court dismissed the suit, holding that the Court had no jurisdiction over Saudi Arabia because the case did not come under any of the exceptions for immunity under the FSIA. *Id.* at 361.

92. *Foreign Policy by Lawsuit*, WASH. POST, Dec. 9, 2002, at A22.

attacks.[93] Stating that the lawsuit would harm "bilateral relations," the State Department has already intervened by seeking the dismissal of the September 11th plaintiffs' $1 trillion suit against the Saudi royal family.[94]

Another difficulty with the terrorist state exception is that even the terrorist victims who win cases will probably feel less than satisfied with their judgments. The current policy of using blocked assets to compensate terrorism victims is unworkable because it undercompensates plaintiffs who have been awarded favorable judgments. Remedies to these plaintiffs are limited by the availability of funds.[95] Although the total value of blocked assets of the seven countries that can be sued for acts of terrorism is approximately $3 billion, most of that amount comes from only two states: Iraq and Libya.[96] The most commonly sued state, Iran, has only $251.9 million in frozen assets,[97] and the State Department has warned that Iran's blocked assets are not sufficient to pay even compensatory damages for existing judgments.[98] The total number of judgments won or pending in all terrorism-exception cases is more than $2 billion,[99] and hundreds more U.S. citizens might still bring claims.[100] Distributing frozen assets to the first plaintiffs to win judgments would create "gross inequities in the amounts of compensation received by similarly situated U.S. nationals with claims against foreign governments" because there will simply not be enough funds to go around.[101] The blocked assets will eventually run out and leave future victims and their families without compensation.[102] Such a situation would likely increase the frustration of successful plaintiffs rather than provide the compensation and closure that the terrorism exception was intended to give victims and their families.

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93. Marcia Coyle, *A Case of Terrorism: How Two Lawyers Brought a Suit They Just Might Win*, NAT'L L. J., Nov. 11, 2002, at A1; Alan Dowd, *Keep Legal Battles Off the Battlefield*, AM. ENTERPRISE, Jan. 1, 2003, at 38.

94. Mowbray, *supra* note 61.

95. Carter argues that "countries that might run athwart of U.S. foreign policy learned not to leave large assets in the United States after the United States froze about $12 billion of Iranian assets during the 1979-1981 hostage crisis." Carter, *supra* note 65, at 937.

96. U.S. Dep't of the Treasury, Office of Foreign Assets Control, Terrorist Assets Report: Calendar Year 2001 Annual Report to the Congress on Assets in the United States of Terrorist Countries and International Terrorist Program Designees, at 1, 10, *available at* http://www.treas.gov/offices/enforcement/ofac/reports/tar2001short.pdf [hereinafter Terrorist Assets Report 2001]. However, Pamela Falk contends that up to $7 billion lie in "much murkier reach" belonging to foreign terrorist organizations. *See* Coyle, *Helping the Victims*, *supra* note 80, at A7.

97. Terrorist Assets Report, *supra* note 96, at 10.

98. Coyle, *Helping the Victims*, *supra* note 80, at A7.

99. *Morning Edition: Congress Passes Legislation Making it Easier for Victims of Foreign Terrorism to Collect Money* (National Public Radio broadcast, Nov. 21, 2002), *available at* 2002 WL 3190264.

100. *Terror Victims Able to Collect Judgments*, FORT WORTH STAR-TELEGRAM, Nov. 27, 2002, at 18.

101. Victims' Access to Terrorist Assets: Hearing on Amendments to the Foreign Sovereign Immunities Act Before the Senate Comm. on the Judiciary, 106th Cong. (1999), *available at* 1999 WL 979521 (prepared statement of Stuart E. Eizenstat, Deputy Secretary, Department of the Treasury) [hereinafter Victims' Access Hearings].

102. *All Things Considered: New Federal Law Says Victims of Terrorism Can Lay Claim to Frozen Assets* (National Public Radio broadcast, Jan. 31, 2002), *available at* 2003 WL 5577935; 148 CONG. REC. S11, 528 (2002) (statement of Sen. Kyl).

This problem of unequal compensation becomes more complicated when one considers other claims by U.S. citizens against the same foreign states. For example, in opposing the release of blocked Cuban assets to the Brothers to the Rescue plaintiffs, former Treasury Secretary Stuart Eizenstat explained that thousands of other U.S. citizens have also lodged claims against Cuba.[103] Awarding half the total amount of blocked Cuban assets to only the three Brothers to the Rescue families would be unfair.[104]

Overall, the terrorism-exception suits create widely divergent results, leaving some plaintiffs with huge settlement payments and others with nothing. These inequities, along with other complications in securing payment, have left some plaintiffs understandably frustrated. As shown above, Congress has tried to alleviate this frustration by repeatedly passing legislations that attach blocked assets to pay terrorism victims. However, this creates a serious separation of powers problem of encroachment. Part II analyzes the foreign policy concerns caused by these multi-million dollar judgments against foreign sovereigns—albeit rogue states.

II.
Foreign Policy and Diplomatic Leverage Concerns of the Executive Branch

In addition to the concerns of failing to provide equitable and efficient compensation, the mere fact that U.S. domestic courts are playing a role in securing compensation for international terrorism victims is problematic. Fighting terrorism and procuring diplomatic relations are traditionally within the powers of the executive branch. By placing the burden on U.S. courts to decide the proper compensation for terrorist victims, Congress is allowing the courts to disturb the delicate separation of powers construct.

Perhaps the most significant problem with permitting lawsuits against a few designated states is that the suits intrude on one policy area long considered outside the province of courts: U.S diplomacy.[105] At least one commentator argues that it is unwise at best to permit lawyers to act as "private secretar[ies] of state," who determine when and how to confront state sponsors of terrorism.[106]

Allowing domestic courts to adjudicate cases brought by terrorist victims is especially problematic because few foreign states have appeared to defend any aspect of the cases brought under the terrorist exception.[107] Despite the fact that judges must hear evidence before entering judgment, the fairness of these de-

103. Parloff, *supra* note 51.

104. *Id.*; *see also 60 Minutes*, *supra* note 67.

105. Anne-Marie Slaughter & David Bosco, *Plaintiff's Diplomacy*, Foreign Aff., Sept.-Oct. 2000, at 102 (analyzing new forms of litigation against states for violations of international law).

106. Parloff, *supra* note 51.

107. Slaughter & Bosco, *supra* note 105, at 114. See *infra* part VI for a discussion of cases where Libya and Iraq appeared in U.S. courts to raise constitutional challenges to the state-sponsored terrorism exception.

fault proceedings is questionable.[108] Judges who hear cases brought under the terrorist exception run the risk of becoming politicized and drawn into taking sides on foreign policy questions, thereby sacrificing their impartiality in their desire to bring justice to victims of terrorism.[109] The nature of these suits against designated pariah states gives foreign state defendants little incentive to participate in these trials, let alone pay any part of the huge default judgments routinely awarded to plaintiffs.[110]

A. *Compensation Using Blocked Assets of Foreign States Raises Foreign Policy Concerns*

Except for Libya, which has only very recently entered settlement negotiations to pay the victims of Pan Am Flight bombing, discussed in part IV.B., no foreign state defendant has yet paid any part of the judgments pending against it. Congress thus constructed the terrorist exception to provide for victim compensation by unfreezing blocked assets of states that sponsor terrorism. However, paying plaintiffs with the blocked assets of these foreign states creates a set of foreign policy problems when the depletion of blocked assets consequently reduces the executive branch's leverage over rogue states. Allowing the courts to render multi-million dollar judgments to terrorism-suit plaintiffs thus interferes with the foreign policy obligations of the executive and raises a constitutional question of separation of powers.

From the beginning, the Clinton administration strenuously objected to legislation allowing terrorist-suit plaintiffs to attach blocked assets, reasoning that the President's control over foreign assets is a necessary component of a flexible and responsive foreign policy.[111] As former Deputy Treasury Secretary Eizenstat argued, the loss of frozen assets would "seriously weaken" the President's ability to deal with "threats to our national security."[112] By permitting courts to interfere with U.S. foreign policy, suits against state sponsors of terrorism could potentially jeopardize U.S. relations with other nations and efforts to stabilize regions like the Middle East.

A second foreign policy problem presented by the terrorist-exception suits is that both the suits and the liquidation of blocked assets could hinder efforts to normalize relations with the designated state sponsors of terrorism. For example, at least one commentator has argued that a nation like Iran may feel unable

108. *Id.*

109. *Id.*

110. Carter, *supra* note 65, at 937.

111. *See* Mangan, *supra* note 64, at 1052-54. Congress had recognized the importance of frozen assets by giving the president statutory authority over frozen assets with two acts: the International Emergency Economic Powers Act, 50 U.S.C. § 1701-06 (2003), and the Trading with the Enemy Act, 50 U.S.C. App. §§ 1-6, 7-39, 41-44 (2003). For a discussion of the use of frozen assets in fighting terrorism, see Rudolph Lehrer, Comment, *Unbalancing the Terrorists' Checkbook: Analysis of U.S. Foreign Policy in its Economic War on International Terrorism*, 10 TUL. J. INT'L & COMP. L. 333 (2002).

112. Victims' Access Hearings, *supra* note 101, at 4 (prepared statement of Stuart E. Eizenstat, Deputy Secretary, Department of the Treasury).

or unwilling to pay the billions it owes due to terrorism suits, thereby preventing normalization of relations with the United States, no matter how desirable.[113]

This foreign policy concern is one of the main reasons for the U.S. government opposing payment to terrorist suit victims using blocked assets. As recently as April of 2004, Justice Department attorney Gregory Katsas argued for the D.C. Circuit to void the district court judge's award for U.S. POWs alleging torture by saying that "foreign policy interests were at stake, and that the POWs' claims should be handled through diplomatic channels rather than the courts."[114]

B. The Executive Leverage over Diplomatic Relations Undermined by the Questionable Legality of the FSIA under International Law

The courts' incursion into foreign policy is but one of several troubling problems with these lawsuits. Not only does the terrorist exception to the FSIA raise foreign policy concerns, its legality under international law is questionable. Suits against state sponsors of terrorism permit domestic courts to interfere with U.S. treaty obligations, thereby undermining U.S. diplomatic relations and jeopardizing international treaty obligations.

Allowing plaintiffs to attach defendant states' frozen assets permits courts to act in a way that violates U.S. treaty obligations, especially with respect to assets that are directly controlled by international agreements. The Vienna Convention on Diplomatic Relations requires the United States to protect the premises of diplomatic and consular missions, along with their personal and real property and archives.[115] Nonetheless, in direct contravention of the United States' international obligations, section 201 of the Terrorism Risk Insurance Act permits plaintiffs to attach some of this property.[116]

The most notable example of this issue is the group of suits against Iran. Congress and the courts have ignored specific international agreements that protect many Iranian assets. In order to secure the release of U.S. citizens who were held hostage in Iran for 444 days from 1979 to 1981, the United States signed the Algiers Accords, which expressly forbade suits against Iran for damages arising from the hostage crisis.[117] Pursuant to this agreement, all claims between the United States and Iran are now subject to the Iran-United States Claims Tribunal in the Hague.[118] Despite this binding bilateral agreement, U.S. plaintiffs have sued and won judgments against Iran through the FSIA terrorist exception.[119]

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113. Carter, *supra* note 65, at 938.

114. *White House Seeks to Void Judge's Award to POWs*, L.A. TIMES, April 8, 2004, at A11.

115. Victims' Access Hearings, *supra* note 101, at 6 (prepared statement of Stuart E. Eizenstat).

116. Terrorism Risk Insurance Act § 201.

117. Sean D. Murphy, *Lawsuit by U.S. Hostages Against Iran*, 96 AM. J. INT'L L. 463, 464 (2002). Bush encouraged the courts to act "in a manner consistent with the obligation of the U.S. under the Algiers Accords," but Congress states in a conference report that the former hostages have a claim against Iran "notwithstanding any other authority." *Id.*

118. Victims' Access Hearings, *supra* note 101, at 7 (prepared statement of Stuart E. Eizenstat).

119. *See* discussion *supra* part I; *see also* discussion *infra* part III.A for recent development in this issue, specifically surrounding suits against Iran.

Another problem with the terrorism-exception cases is that attempts by U.S. courts to compel distribution of foreign states' frozen assets could leave the United States vulnerable to retaliatory actions by other nations. For example, by ignoring the obligation to protect diplomatic property of other nations, U.S. property abroad becomes increasingly vulnerable. U.S. property abroad is valued at $12 to $15 billion.[120] If the United States refuses to guarantee protection to the diplomatic property of other nations, then other countries could also target U.S. diplomatic property in retaliation if relations with the United States deteriorate.[121] Given these foreign policy and diplomatic concerns, it is not only understandable that the executive branch opposes the payment of terrorism victims under the FSIA state sponsors exception, but it demonstrates how the Congress has unduly encroached upon the paramount powers of the president over foreign relations.

III.
THE COURTS AS THE BATTLEGROUND OF THE TERRORIST EXCEPTION EXPERIMENT:RECENT DECISIONS IN THE COURTS REFLECT THE TERRORISM VICTIMS' FRUSTRATION

The separation of powers concerns established above brought an ironic result in the courts: when Congress amended the terrorist exception to allow unfreezing of foreign defendants' blocked assets, the executive branch felt compelled to intervene against the U.S. plaintiffs because of concerns about foreign policy and reduced leverage over diplomatic relations. This created an odd situation where the U.S. plaintiffs found themselves litigating against the U.S. State Department on the side of the defendant state sponsor of terrorism. This counter-intuitive result did not go unnoticed in the courts. In recent cases, notably in *Roeder v. Islamic Republic of Iran*,[122] and *Acree v. The Republic of Iraq*,[123] the District Court for the District of Columbia has expressed frustration at the incoherent legislation that leaves successful plaintiffs unable to collect.[124] The court criticized lawmakers, stating that both the President and Congress have failed to provide effective compensation for the terrorist victims. Evident in the dialogue between the courts' articulation of frustration and Congress's legislative response are the missed opportunities for confronting the constitutionality of the terrorism exception to the FSIA.

120. Victims' Access Hearings, *supra* note 101, at 7 (prepared statement of Stuart E. Eizenstat).

121. Slaughter & Bosco, *supra* note 105, at 113.

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

123. Acree v. The Republic of Iraq, 271 F. Supp. 2d 179 (D.D.C. 2003) [hereinafter *Acree* I], *related proceeding at* Acree v. Snow 276 F. Supp. 2d 31 (D.D.C. 2003), *motion denied by* Acree v. Republic of Iraq, 276 F. Supp. 2d 95 (D.D.C. 2003) [hereinafter *Acree* II], *rev'd and vacated by* 2004 U.S. App. LEXIS 10972 (D.C. Cir. June 4, 2004) [hereinafter *Acree* III].

124. *Roeder*, 195 F. Supp. 2d at 145.

A. *Roeder v. Islamic Republic of Iran*

The facts surrounding the *Roeder* case highlight how the FSIA terrorist exception places the three branches of the U.S. government at odds. In *Roeder*, when the former hostages attempted to sue Iran under the terrorist exception, the United States intervened in the case, pointing out that the Algiers Accord expressly barred the suit.[125] While the decision regarding whether to permit the suit to go forward was still pending, the former hostages petitioned Congress to create a way for them to bring suit against Iran.[126] In response, Congress tried to make an end-run around the Algiers Accords, amending part of the terrorism-exception statute to specifically permit the hostages' suit.[127] The court took a dim view of Congress' attempt to interfere in the litigation and dismissed the case, stating that Congress had failed to clearly abrogate the Algiers Accords.[128]

The U.S. Court of Appeals for the D.C. Circuit unanimously affirmed the dismissal of the action against Iran, reasoning that it lacked the power to grant relief in the absence of an unambiguous statement by Congress overriding the executive agreement with Iran that barred such an action.[129] Given Congress's explicit reference to the *Roeder* case by docket number in a subsequent amendment to the FSIA, recognizing the clear legislative intent would have forced the court to ask whether Congress had impermissibly attempted to legislate the outcome of the *Roeder* case in favor of the plaintiffs.[130] Instead the court chose to read ambiguity into the legislation instead of confronting the difficult separation of powers concerns raised by the *Roeder* riders. The court thereby missed an

125. *Id.* at 144-46.

126. Murphy, *supra* note 117, at 465.

127. *Roeder*, 195 F. Supp. 2d at 152-54 (citing H.R. CONF. REP. No. 107-350, at 422-23). In riders to two appropriations acts passed in November and December 2001, Congress amended the FSIA to remove Iran's immunity from suit in the pending *Roeder* case, and in that case alone. *See* Department of Justice Appropriations Act of 2002, Pub. L. No. 107-77, 626(c), 115 Stat. 748, 803 (2001). This rider contained a typographical error in the case number, which was fixed in another rider passed as part of the Department of Defense Appropriations Act of 2002, Pub. L. No. 107-77, 208, 115 Stat. 2230, 2299 (2002).

128. *Roeder*, 195 F. Supp. 2d at 145. Describing Congress' attempt to legislate a cause of action for the former hostages, the court stated: "[R]ather than proceed with the requisite clarity and assurance of purposes needed when legislating in the realm of foreign affairs, Congress chose to enact two provisions about which only one thing is clear: Congress' intent to interfere with ongoing litigation." *Id.*

129. Roeder v. Islamic Republic of Iran, 333 F.3d 228, 238-39 (D.C. Cir. 2003) (holding that Congress's intent to override the immunity created by the Algiers Accords was not explicit enough to trump the executive agreement that it challenged implicitly). The court observed that Congress had acknowledged in its joint explanatory statements regarding the riders that "notwithstanding any other authority, [the *Roeder* plaintiffs] had a claim against Iran." *Id.* at 237 (quoting H.R. CONF. REP. No. 107-350, at 422 (2001)). The court noted that "this statement . . . is the type of language that might abrogate an executive agreement—if the statement had been enacted. But Congress did not vote on the statement and the President did not sign a bill embodying it." *Id.* The court announced that, in the absence of any such clear message, it could not hold that Congress had meant to abrogate an executive agreement; the Algiers Accords thus remained a substantive bar to judgment against Iran. *Id.* at 237-38.

130. *See* United States v. Klein, 80 U.S. 1128 (1871) (holding that Congress may not direct the outcome of a case before an Article III court by prescribing a rule of decision).

opportunity to signal to Congress that it had gone too far in its selective and inconsistent attempts to assist terrorist plaintiffs.

Commentators have argued that the *Roeder* riders represent the "unfortunate and inequitable trend" in which Congress selectively provides remedies for only a certain number of terrorist victims,[131] and that the courts since *Roeder* have shied away from adjudicating the possible separation of powers concerns.[132] However, what is more remarkable in a larger context of the development of FSIA exceptions is that the *Roeder* decision departs from a line of D.C. district court cases which uniformly recognize and honor Congress's intent to assist terrorism plaintiffs. For example, just a year earlier, the same court in *Price v. Socialist People's Libyan Arab Jamahiriya*[133] had treated the Flatow Amendment as creating a federal cause of action against foreign states although the language in the Flatow Amendment was even more ambiguous than that of the *Roeder* riders.[134] *Roeder* thus signified a decreased willingness on the part of the court to entertain terrorism victims as successful FSIA plaintiffs and consequently reflect a departure from the line of "easy" default judgments for terrorist-suit plaintiffs.

In sum, owing to the lack of a workable system of the payment of judgments, victims of terrorism have a cause of action under U.S. law but few remedies in practice. The *Roeder* court, while dismissing the terrorist-exception suit, has also expressed frustration at the incoherent legislation that leaves successful plaintiffs unable to collect.[135] The District Court for the District of Columbia criticized lawmakers, stating 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."[136] Although the court specifically referred to the 1979 to 1981 hostages,[137] its criticism seems to apply to all plaintiffs who have yet to receive the payment they were promised. Thus, the many attempts to fix the terrorism exception have served more to placate some plaintiffs with partial payments but have failed to address significant problems with terrorist-exception suits.

B. Acree v. The Republic of Iraq

Following the disappointment of terrorism victim plaintiffs in *Roeder*, the D.C. Circuit overturned a district court ruling, in one of the most recent decisions on state-sponsored terrorism, and held that seventeen former U.S. prison-

131. Recent Case, *Roeder*, *supra* note 10, at 749.

132. *Id.* at 747.

133. Price v. Socialist People's Libyan Arab Jamahiriya, 294 F.3d 82, 87 (D.C. Cir. 2002). This holding was essentially overruled by Cicippio v. Islamic Republic of Iran, 353 F.3d 1024 (D.C. Cir. 2004) (holding that the Flatow Amendment does not create a cause of action against foreign states themselves). See discussion *infra* in part III.B.

134. The Flatow Amendment only referred to "an official, employee, or agent of a foreign state," and not directly to foreign states. *See* Civil Liability for Acts of State Sponsored Terrorism Act, Pub. L. No. 104-208, § 589, 110 Stat. 3009 (1996).

135. *Roeder*, 195 F. Supp. 2d at 145.

136. *Id.*

137. *Id.*

ers of war and thirty-seven family members were not entitled to damages under the FSIA.[138] The line of cases in *Acree v. The Republic of Iraq*, shows the courts' increasing refusal to recognize the validity of FSIA terrorist exception in giving redress to terrorism victims, considering the important foreign policy interests at stake.

In *Acree* I,[139] former prisoners of war (POWs) during the Gulf War in 1991 and their close family members filed a lawsuit under the FSIA seeking damages for injuries from the torture inflicted on the POW plaintiffs while in Iraqi captivity. On July 7, 2003, the district court found that the subject matter jurisdiction requirements contained in section 1605(a)(7) were satisfied, and awarded punitive damages as well as compensatory damages against defendants Republic of Iraq, Saddam Hussein, and the Iraqi Intelligence Service.[140]

On July 21, 2003, two weeks after the district court entered its judgment for plaintiffs, the United States filed a motion to intervene for the purpose of contesting the district court's subject matter jurisdiction. The United States argued that recently enacted provisions of the Emergency Wartime Supplemental Appropriations Act [EWSAA][141] made the terrorism exception to the FSIA inapplicable to Iraq and thereby stripped the district court of its jurisdiction over plaintiffs' suit. The district court denied the United States' motion to intervene as untimely.[142]

Just before the United States moved to intervene, plaintiffs filed a second suit against the Secretary of the Treasury, seeking to satisfy their newly won judgment against Iraq by attaching funds from seized Iraqi bank accounts, pursuant to section 201 of the TRIA. In this proceeding, *Acree v. Snow*,[143] the plaintiffs were denied payment for the successful judgment in *Acree* I. On July 30, 2003, the same district court, which, less than a month before, had entered a judgment in favor of the plaintiffs, now denied the plaintiffs' motion to *collect* their judgment. The *Acree* court based its denial on the government's opposition to the attachment and held that the defendant was entitled to summary judgment on plaintiffs' TRIA claim because Congress and the president had acted to make the TRIA inapplicable to Iraq.[144]

This, the district court reasoned, was because in April of 2003, Congress had enacted the EWSAA to authorize the President to "make inapplicable with respect to Iraq . . . any other provision of law that applied to countries that supported terrorism."[145] On May 7, 2003, the President exercised the authority granted to him by Congress in the act and issued a Presidential Determination

138. *Acree* III, 2004 U.S. App. LEXIS 10972.

139. *Acree* I, 271 F. Supp. 2d at 179.

140. The district court awarded damages against Iraq totaling over $959 million. *See Id.*

141. Pub. L. No. 108-11. § 1503, 117 Stat. 559, 579 (2003).

142. *See Acree* II, 276 F. Supp. 2d 95.

143. Acree v. Snow, 276 F. Supp. 2d 31 (D.D.C. 2003). In *Acree v. Snow*, Plaintiffs were awarded judgment in the amount of $653,070,000 in compensatory damages and $306 million in punitive damages. *Id.*

144. *Id.*

145. *Id.* at 32 (quoting Emergency Wartime Supplemental Appropriations Act § 1503, Pub. L. No. 108-11, 117 Stat. 559 (2003)).

making "inapplicable with respect to Iraq . . . any other provision of law that applies to countries that have supported terrorism."[146] The court found that the new law affected the application of section 201 of TRIA to Iraq as a designated state sponsor of terrorism.[147] Since the act that had passed in April gave congressional authorization for the president to make TRIA prospectively inapplicable to Iraq, and the president exercised that authority when he issued his determination in May, the court thus held that TRIA was no longer an available mechanism for plaintiffs to use in order to satisfy their judgment in July.[148]

While noting that the U.S. government's position making the POWs unable to recover any portion of the judgment "seems extreme,"[149] the court implied that its hands were tied by the law. Judge Roberts, the presiding judge, ended his Memorandum Opinion with the quote: "Though the penalty is great and [the] responsibility heavy, [the Court's] duty is clear."[150] Judge Roberts was quoting from the last line of the 1953 Supreme Court opinion that vacated the stay of execution for the Rosenberg spies who had been convicted of espionage during the early days of the Cold War.[151] Much like Chief Justice Vinson in the *Rosenberg* case, Judge Roberts and the *Acree* court may have intended to comment on the nature of the judiciary and how the legislature and the executive branch can restrain as well as shape the duty of the court. In doing so, however, the court chose to avoid its duty to challenge the constitutional question of separation of powers as presented by the structure of victim compensation in the terrorism exception amendments to the FSIA.[152]

Upon appeal, the D.C. Circuit affirmed the district court's exercise of jurisdiction under FSIA and the "Flatow Amendment." When section 1503 is read in the context of other provisions of the EWSAA and its legislative history, that provision is best understood as applying only to legal restrictions on assistance and funding for the new Iraqi government. And thus, finding that section 1503 did not alter the jurisdiction of the federal courts under the FSIA, the district court properly exercised jurisdiction to hear the case under the FSIA.

However, having concluded that jurisdiction in the case was proper, the three-judge panel of the D.C. Circuit held that the plaintiffs failed to state a

146. *Snow*, 276 F. Supp. 2d at 32; *see also* Pres. Determination No. 2003-23, 68 Fed. Reg. 26,459 (May 16, 2003).

147. "Indeed, in his 'Message to Congress Reporting the Declaration of a National Emergency With Respect to the Development Fund for Iraq' issued May 22, 2003, the President stated specifically that the Determination made § 201 of TRIA inapplicable to Iraq." *Snow*, 276 F. Supp. 2d at 33.

148. *Id.*

149. *Id.* (referring to the defendant Secretary of Treasury's position).

150. Rosenberg v. United States, 346 U.S. 273, 296 (1953), *quoted in* Acree v. Snow, 276 F. Supp. 2d at 33.

151. *See Rosenberg*, 346 U.S. at 296.

152. There is also the canon of constitutional avoidance, a fundamental principle of American public law that courts should decide constitutional issues only when necessary. *See* Ashwander v. Tennessee Valley Authority., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). This might also explain the courts' reluctance to strike down a legislative act as unconstitutional. For more discussion on this specific question on constitutionality of the terrorist state exception, see *infra* part IV.

cause of action.[153] The court reasoned that it would be "utterly unseemly" to ignore the intervening decision in *Cicippio*.[154] Although the *Cicippio* decision was rendered three months after the district court's decision in *Acree* I, the circuit court in *Acree* III found that this qualified as an "exceptional circumstances" where a Court of Appeals may consider a non-jurisdictional question that have not been raised by the parties or passed on by the district court, considering the stakes: "appellees have obtained nearly a billion dollar default judgment against a foreign government whose present and future stability has become a central preoccupation of the United States' foreign policy."[155]

Given these high stakes, the court held that the *Acree* plaintiffs failed to state a legal cause of action. In *Acree* I, plaintiffs premised their claim of liability, and the district court similarly relied on section 1605(a)(7) and the Flatow Amendment, finding that those provisions "create a federal cause of action against officials, employees and agents of a foreign state, as well as the state and its agencies and instrumentalities themselves." This reading of the FSIA was contradictory to the intervening decision by the D.C. Circuit in *Cicippio*,[156] where the Court held that neither section 1605(a)(7) nor the Flatow Amendment, nor the two together, creates a cause of action against foreign states themselves. *Cicippio* also made clear that any suit against an official of a foreign state must be a suit in that official's personal capacity.[157] Thus, the *Acree* court in its decision on June 4, 2004, decided that the FSIA only allows lawsuits for pain and suffering if they are filed against *agents and officers* of those foreign states responsible for terrorism who are not acting on behalf of their government.[158]

In order to arrive at this new conclusion, departing from the line of FSIA cases since 1996, the D.C. Circuit frequently entertained the "weighty interests" of the U.S. foreign policy.[159] The court found it particularly important to note that the district court failed to weigh the importance of the case to the foreign policy interests when it dismissed the Justice Department's motion to intervene. Government's sole purpose in intervening was to raise a highly tenable challenge to the subject matter jurisdiction in a case with "undeniable impact" on the Government's conduct of foreign policy and to preserve that issue for appellate review.[160] In light of its clear foreign policy interests, the United States was entitled to intervene.[161] The court thus reaffirmed the decision in *Cicippio*, and held that FSIA does not give rise to a cause of action against a foreign state in its official capacity. Judge Harry Edwards stated in the opinion, "We are mindful of the gravity of the [POWs'] allegations in this case. That appellees endured this suffering while acting in service to their country is all the more sober-

153. *Acree* III, 2004 U.S. App. LEXIS 10972, at *49-50.
154. *Id.* at *52. *See Cicippio*, 353 F.3d 1024.
155. *Acree* III, at *51.
156. *Cicippio*, 353 F.3d 1024 at 1033.
157. *Id.* at 1034.
158. *Acree* III, 2004 U.S. App. LEXIS 10972, at *53-57.
159. *Id.* at *26.
160. *Id.*
161. *Id.* at *27, citing *Roeder*, 33 F.3d at 233 (permitting the United States to intervene in a case implicating foreign policy concerns).

ing."[162] The three-judge panel of the D.C. Circuit thought it more important, however, to narrow the reading of the state-sponsored terrorism exception in order to protect the U.S. foreign policy interests as raised by the executive branch. In holding so, however, the *Acree* court still failed to directly address the separation of powers concern, and no constitutionality question was raised. Part IV will examine the cases where the constitutional challenges were brought to the courts' attention.

IV.
A Separation of Powers Discourse: Constitutionality of the State-Sponsored Terrorism Exception to the FSIA

The constitutionality of the state-sponsored terrorism exception to the FSIA has been consistently upheld as to the question of whether the Congress may create subject matter jurisdiction for federal courts through the FSIA.[163] However, the question has been left open as to whether there would be a constitutional issue in the event of a suit involving a country that was either added to or dropped from the executive branch's list of state sponsors of terrorism after the statute was enacted. This part will argue that the Second Circuit in the case of *Rein v. Socialist People's Libyan Arab Jamahiriya* failed to realize the shortsightedness of the "static" view of the list of state sponsors of terrorism (that the membership in the list will not change) and concludes that the U.S. Supreme Court may soon be asked to answer whether there is a separation of power violation in the case that the State Department removes Iraq or Libya from the list.

A. *Previous Challenges to the Constitutionality of the State-Sponsored Terrorism Exception*

In *Rein v. Socialist People's Libyan Arab Jamahiriya*,[164] one of the rare cases where a state designated as a state sponsor of terrorism appeared in U.S. courts to defend itself against a FSIA suit, Libya challenged the constitutionality of the FSIA exception under the separation of powers doctrine. The Second Circuit found that there was no unconstitutional delegation in allowing the exis-

162. *Acree* III, 2004 U.S. App. LEXIS 10972, at *56.

163. Although the Congress of the United States is a legislature of enumerated and specific powers, and can only act in accordance with the limitations imposed by the Constitution, see *Marbury v. Madison*, 5 U.S. 137 (1803), the Constitution imposes no such limitation on the ability of Congress to waive the sovereign immunity of foreign countries: "Foreign sovereign immunity is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution." Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 486 (1983). The Constitution grants Congress the power to create subject matter jurisdiction for federal courts through the FSIA: "The jurisdictional grant is within the bounds of Article III, since every action against a foreign sovereign necessarily involves application of a body of substantive federal law, and accordingly 'arises under' federal law, within the meaning of Article III." *Id.* at 497. Thus, the constitutionality of the state-sponsored terrorism exception has been held not to violate the provision of Article III of the Constitution limiting federal court jurisdiction to matters arising under federal law. *See* Price v. Socialist People's Libyan Arab Jamahiriya, 110 F. Supp. 2d 10 (D.D.C. 2000).

164. 162 F.3d 748 (2d Cir. 1998), *cert. denied*, 527 U.S. 1003 (1999).

tence of subject matter jurisdiction over foreign sovereigns to depend on the State Department's determinations of whether particular foreign sovereigns are sponsors of terrorism.[165] The court thus rejected Libya's contention that the State Department's designations affect sovereign immunity and results in an unconstitutional delegation of a core legislative power: the power to determine the subject matter jurisdiction of the federal courts.[166] The *Rein* court based its reasoning in large part on a Supreme Court decision from 1890, which upheld the existence of federal court jurisdiction even though that jurisdiction depended on a factual determination that had been delegated to the Department of State.[167]

More importantly, although the court acknowledged that the Seventh and Eleventh Circuits "expressed doubts as to whether Congress can constitutionally delegate such a core power as the power to control the jurisdiction of the federal courts,"[168] the court did not engage in reconciling those concerns because in the particular case before it, "there was no delegation at all."[169] In *Rein*, the decision to subject Libya to U.S. jurisdiction under section 1605(a)(7) was made by Congress itself rather than by the State Department. This was because at the time that section 1605(a)(7) was passed, Libya was already on the list of state sponsors of terrorism. The *Rein* court found it persuasive that no decision whatsoever of the Secretary of State was needed to create jurisdiction over Libya for its alleged role in the destruction of Pan Am 103; "That jurisdiction existed the moment that the AEDPA amendment became law."[170]

Adopting the same reasoning as the *Rein* decision, the District Court for the District of Columbia also rejected Iraq's challenge of the state-sponsored terrorism exception as unconstitutional violation of separation of powers.[171] Since Iraq was also already on the list of states designated as state sponsors of terrorism at the time the AEDPA was enacted, the *Daliberti* court reasoned, "Congress simply chose to define the members of the class of 'terrorist states' by reference to a separate determination made by the Secretary of State. . . .The delegation by Congress of this decision to the Secretary of State does not violate separation of powers."[172]

This reasoning, however, is limited to the circumstances where the foreign sovereign subjected to a suit under the FSIA exception was already designated

165. *Id.* at 762-64.

166. *Id.* at 764.

167. *Id.* at 763, *citing* Jones v. United States, 137 U.S. 202 (1890). The *Rein* court also found relevant the reasoning in the Second Circuit decision in *Matimak Trading Co. v. Khalily*, 118 F.3d 76 (2nd Cir. 1997) (denying jurisdiction on the basis of an analogous finding by the executive branch).

168. *Rein*, 162 F.3d at 763.

169. *Id.* at 764.

170. *Id.*

171. Daliberti v. Republic of Iraq, 97 F.Supp. 2d 38, 49-51 (D.D.C. 2000). Iraq appeared in this § 1605(a)(7) case essentially to challenge the applicability of this FSIA exception on a motion to dismiss, and was unsuccessful. Iraq then appeared no further in the case, and a different judge held a hearing and entered a default judgment against Iraq. Daliberti v. Republic of Iraq, 175 F.Supp. 2d 36 (2001). Iraq did not appear in a later section (a)(7) case. Hill v. Republic of Iraq, 175 F.Supp. 2d 36 (2001).

172. *Daliberti*, 97 F.Supp. 2d at 50.

as a state sponsor of terrorism by the State Department at the time section 1605(a)(7) was passed. In its decision in *Rein*, the Second Circuit recognized that the issue of delegation might be presented in the event of a suit involving a country that was either added to or dropped from the executive branch's list of state sponsors of terrorism after the statute was enacted.[173] The subsequent section demonstrates how recent changes in Iraq and Libya may lead to the State Department's removal of the countries from the list.

B. Recent Changes in the Foreign Relations Regarding Iraq and Libya

As discussed above, the list of state sponsors of terrorism, has not changed since 1993, whereas the AEDPA amendment to the FSIA was passed in 1996. That is to say, every foreign sovereign subjected to the FSIA suit under section 1605(a)(7) so far was already on the list of state sponsors of terrorism when the amendment was enacted in 1996. Consequently, the courts could avoid answering the question of whether there was unconstitutional delegation of legislative power—as long as the list remained "static" and unchanged. However, for the first time since 1996, the landscape in foreign relations relating to state-sponsored terrorism is about to change drastically; Iraq and Libya may soon be removed from the list of state sponsors of terrorism.

In 1998 and 2000, U.S. courts were able to deny Iraq and Libya's motion to dismiss because Iraq and Libya were on the list and there was "no delegation at all" by the Congress in 1996. However, as discussed above, President Bush suspended in 2003, with respect to Iraq, all sanctions applicable to state sponsors of terrorism, which had the practical effect of putting Iraq on a par with non-terrorist states.[174] The State Department conclusively reports in its 2004 annual report on "Patterns of Global Terrorism" that "[t]he ousting of Saddam Hussein regime by Coalition forces removed a longstanding sponsor of terrorism in the Middle East region."[175] It further notes that "[Iraq's] name can be removed from the state sponsors list when the Secretary of State determines that it has fulfilled applicable statutory requirements, which include having a government in place that pledges not to support acts of terrorism in the future."[176] After months of "war" and U.S. military occupation of Iraq, sovereignty will be returned to Iraq on June 30, 2004.[177] Although it is unclear what form of Iraqi government will be in place July 1,[178] "such hypothetical cases" that the *Rein* court refused to entertain in 1998[179] may soon be brought before U.S. courts.

Libya may also be removed from the list of state sponsors of terrorism. On February 6, 2004, senior U.S. and Libyan officials met to discuss U.S. oil companies' return to Libya after years of stringent sanctions against the government

173. *Rein*, 162 F.3d at 764.
174. *See* Patterns of Global Terrorism 2004, *supra* note 89.
175. *Id.*
176. *Id.*
177. Paul Richter & Sonni Efron, *U.S. Firm on Iraq Handoff*, L.A. TIMES, Apr. 7, 2004.
178. *Id.*
179. *Rein*, 162 F.3d at 764.

of Libya.[180] Congress also sent a congressional delegation recently to visit Libya.[181] Under a contemplated compensation agreement, Tripoli will pay out $2.7 billion to families of victims of the Pan Am Flight 103 bombing in 1988 provided that the United Nations and the U.S. lift sanctions and Washington removes Libya from the list of state sponsors of terrorism.[182]

C. *Consequences of the Distincion Between the "Active" and "Static" View of the List*

If either Iraq or Libya is removed from the list of state sponsors of terrorism, a curious result will follow: As the *Rein* court hinted, the *plaintiff* to the FSIA suit may put forth a claim of unduly delegated authority.[183] This is interesting because the U.S. plaintiff will be raising the same argument to enforce a FSIA judgment against Iraq and Libya that Iraq and Libya unsuccessfully raised as a defense against a FSIA suit in *Rein* and *Daliberti*; that Congress may not delegate a core legislative power to the executive branch, the power to determine the subject matter jurisdiction of the federal courts.[184]

The failure to take account of the changing nature of foreign relations illustrates how the *Rein*'s reasoning in upholding the constitutionality of the FSIA exception based on a "static" view of the list is erroneous. The facts in *Rein* and *Daliberti* (Libya and Iraq were already on the list when the Congress designated them as state sponsors of terrorism subject to federal jurisdiction under the FSIA) provide a possible explanation for the courts' outcome (holding that there was no delegation of congressional power at all, since the Congress may use the State Department's factual determination to grant Art. III jurisdiction).[185] An explanation, however, does not mean the courts correctly decided the case in terms of constitutional law. The court's broad jurisdiction in determining Arti-

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180. *US-Libya Meeting Could Open Door to US Oil Companies' Return*, THE OIL DAILY, Feb. 6, 2004, at No. 24, Vol. 54.

181. *Id.*

182. *Id.* At time of press, this agreement has not yet been reached nor entered into effect. The State Department names Libya as one of the countries that took significant steps to cooperate in the global war on terrorism:

> In 2003, the Libyan Government reiterated assurances to the UN Security Council that it had renounced terrorism, undertook to share intelligence on terrorist organizations with Western intelligence services, and took steps to resolve matters related to its past support of terrorism. In September 2003, Libya addressed the requirements of the United Nations relating to the bombing of Pan Am Flight 103, accepting responsibility for the actions of its officials and agreeing to a compensation package for the victims' families. As a result, UN sanctions, suspended since 1999, were lifted.

Patterns of Global Terrorism 2003, *supra* note 89.

183. *Rein*, 162 F.3d at 764. The hypothetical case would proceed like this. Iraq (or Libya) is removed from the list of state sponsors of terrorism. A terrorism victim is now denied the subject matter jurisdiction to sue Iraq under the FSIA terrorist exception since Iraq is no longer designated as a state sponsor of terrorism, as required under § 1605(a)(7). The executive branch has in fact removed the U.S. federal jurisdiction that the Congress had granted against Iraq in 1996 under AEDPA. The plaintiff then may bring a constitutional challenge to the FSIA exception arguing that there was an unconstitutional delegation of a core legislative power.

184. *See, e.g.*, *Rein*, 162 F.3d at 762-63.

185. *Id.*

cle. III subject matter jurisdiction did not provide an adequate excuse for its holding in *Rein.* Instead of upholding the delegation of congressional power to the executive branch because the Congress considered the same list of countries as state sponsors of terrorism, *at the time* AEDPA was passed, the court should have reached the conclusion that the FSIA terrorist exception unduly violated the separation of powers principle. The Supreme Court denied certiorari in *Rein.*[186] Once the list membership changes with the State Department determination that either Iraq or Libya is no longer a terrorist state, the U.S. Supreme Court may revisit the Second Circuit's reasoning in *Rein.*

The question of constitutional law posed in *Rein* had implications beyond whether the Congress may delegate a factual determination to the executive branch while granting federal jurisdiction over FSIA suits. As the courts recognized in *Roeder* and *Acree,*[187] considering the impact of the encroachment by the judicial branch into the executive branch's foreign policy should be at the forefront of any question of separation of powers concerning the state sponsors of terrorism exception. Given the courts' mandate to only consider cases based on facts before the court, the *Rein* court was perhaps not the appropriate forum for deciding this particular question of constitutional law. However, if Iraq and Libya are removed from the list of state sponsors of terrorism, the U.S. Supreme Court may be asked to answer the separation of powers challenge based on the "active" nature of the list. The question would be: Whether there is an unconstitutional delegation of congressional power when the executive branch removes (or adds) states from the list of state sponsors of terrorism. Once the State Department finalizes the removal of Iraq or Libya from the list of state sponsors of terrorism, the Supreme Court will have to consider these constitutional challenges in the light of their "undeniable impact" on the government's conduct of foreign policy.[188]

CONCLUSION

In response to international terrorism, the application of sovereign immunity has evolved rapidly since the congressional adoption of the FSIA in 1976. Since the inception of the Flatow Amendment in 1996, Congress has made various attempts at formulating the terrorist exception, in order to accomplish the twin goals of ending terrorism and compensating American victims. However, by placing the burden of deciding the proper compensation of victims in the hands of the U.S. courts, neither goal was satisfactorily met. While the legislature intended the courts to determine and award compensation to successful terrorist-suit plaintiffs, foreign policy and diplomatic concerns posed by the executive branch constrained the judiciary. This struggle between the legislative, executive, and the judiciary, leaves successful plaintiffs unable to collect, deprives the executive of its foreign policy prerogatives, and encourages legisla-

186. *Rein*, 1999 U.S. LEXIS 4043 (June 14, 1999) (denying certiorari).

187. *See, e.g.*, Acree III, 2004 U.S. App. LEXIS 10972, at *26 (recognizing the "undeniable impact" the FSIA suits have on foreign policy).

188. *Acree* III, 2004 U.S. App. LEXIS 10972, at *26.

tive interference in judicial determination of pending litigation. Most troubling is the fact that this separation of powers issue was born when Congress first shifted the burden of deciding sovereign immunity determination from the executive branch to the judicial branch by codifying the restrictive sovereign immunity theory in the FSIA in 1976.

As witnessed in the aftermath of September 11th, the war on terrorism is far from over. On June 2, 2004, President Bush described the war on terrorism as "the great challenge of our time, the storm in which we fly."[189] The emphasis placed on foreign relations before the 2004 presidential election shows how the war on terrorism is one of the central issues for the candidates and for the voters.[190]

Politics interplay with the President and the Congress's framing of the response to state sponsors of terrorism. The domestic political condition as evidenced by campaign politics as well as the diplomatic and economic policy considerations surrounding these "state sponsors of terrorism" are constantly changing. The government may take into consideration that particularly today, post-9/11, the national sentiment and support for fellow Americans is undeniable.[191]

"Politics as usual,"[192] however, is no excuse for failure to address the original goals of FSIA amendments. Legislative amendments to the terrorist exception will constitute only "cheap talk"[193] if no real compensation is made available to terrorism victims and there are no deterrence effects on international terrorism. Framing a coherent application of the sovereign immunity principles and developing an equitable, efficient response to terrorism is critical. There is an urgent need today for effective policy-making to actually tackle the separation of powers concerns in these matters.

James Madison in the Federalist No. 51 argued that the purpose of separating powers between two governments as well as within the federal government was to create a system "where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other — that the private interest of every individual may be the sentinel over the public rights."[194] Within the separation of powers jurisprudence there is the notion that separate branches of government should not encroach upon the duties assigned

189. Dan Balz, *Kerry Uses Iraq to Make Case*, THE WASH. POST, June 6, 2004, at A6.

190. *Id.*

191. Mona Conway, Comment, *Terrorism, the Law and Politics as Usual: A Comparison of Anti-Terrorism Legislation before and after 9/11*, 18 TOURO L. REV. 735, 767 (2002).

192. *Id.* at 773.

193. For a discussion on "cheap talk," distinguishable from the legislature's "sincere statements," see Barry Friedman, *Symposium: The New Federalism After* United States v. Lopez*: Panel II: Legislative Findings and Judicial Signals: A Positive Political Reading of* United States v. Lopez, 46 CASE W. RES. L. REV. 757, 780 (1996).

194. The Federalist No. 51, "The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments," [James Madison], *available at* http://www.constitution.org/fed/federa51.htm (last visited June 19, 2004).

other branches.[195] The court may invoke the separation of powers principle to strike down laws that threaten the balance of power between the three branches of the federal government.[196] Once membership in the list of state sponsors of terrorism is changed, which may happen in the imminent future with respect to Iraq and Libya, the U.S. Supreme Court will have the opportunity to revisit the reasoning in *Rein*. The Supreme Court then may not shy away from the separation of powers challenge and the issue of delegation, but must contemplate the "hypothetical case" that the *Rein* court refused to answer.[197]

The post-9/11 emotional pulse of the United States now defines an act of terrorism as something "evil."[198] The U.S. faces a difficult task in balancing this desire to make the "evil" state sponsors of terrorism "pay," with the government's commitment to the Constitution.[199]

195. For further discussion on the encroachment upon a coordinate branch's power, see Matthew Thomas Kline, Comment, *The Line Item Veto Case and the Separation of Powers*, 88 CALIF. L. REV. 181, 205-207 (2000).

196. *See* Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 COLUM. L. REV. 531, 535, 565 (1998). Her scholarship proceeds from the first principle that the Framers' notion of the primary goal of government was to "protect the liberty of the people from government invasion." *Id. at 535.* All government structures then, she argues - from the separation of power to popular participation in representative democracy - were designed to serve that end. *See id.* at 535-38, 570-77.

197. *Rein*, 162 F.3d at 764.

198. *See* Serge Schmemann, *U.S. Attacked; President Vows to Exact Punishment for "Evil"*, N.Y. TIMES, Sept. 12, 2001, at A1.

199. As government lawyers have explained, "a commitment to the rule of law should not be mistaken for weakness in the face of terrorist violence." Bill Miller & John Mintz, *Once-Supportive U.S. Fights Family Over Iranian Assets*, THE WASH. POST, Sept. 27, 1998, at A8.