

# SEEKING JUSTICE FOR AMERICA’S FORGOTTEN VICTIMS: REFORMING THE FOREIGN SOVEREIGN IMMUNITIES ACT TERRORISM EXCEPTION

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## INTRODUCTION

On the morning of February 25, 1996, Ira Weinstein, a 53-year-old native New Yorker and United States citizen, was riding on public bus Egged No.18 in Jerusalem.<sup>1</sup> When the bus arrived at one of its usual stops on Jaffa Street, a Palestinian suicide bomber named Magid Wardah boarded the bus and detonated an explosive hidden in his travel bag, killing twenty-six people and injuring forty-eight others.<sup>2</sup> Weinstein survived the blast and was fully conscious when he arrived at the Intensive Care Unit (ICU) of Hadassah Hospital.<sup>3</sup> His wife and their three children rushed to be by his side.<sup>4</sup>

During the bomb blast, entire portions of Weinstein's skin were ripped from his body.<sup>5</sup> He incurred second to fourth degree burns over thirty to thirty-five percent of his body and suffered from internal bleeding.<sup>6</sup> Because of the nails intentionally placed in Wardah's suicide belt,<sup>7</sup> Weinstein sustained numerous infections and his blood

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1. *Weinstein v. Islamic Republic of Iran*, 184 F. Supp. 2d 13, 15–16 (D.D.C. 2002).

2. *See id.* at 17; *see also Eisenfeld v. Islamic Republic of Iran*, 172 F. Supp. 2d 1, 4 (D.D.C. 2000).

3. *See Weinstein*, 184 F. Supp. 2d at 17.

4. *See id.* at 18–19.

5. *Id.* at 17.

6. *See id.* at 17–18 (explaining that Weinstein's abnormal bleeding led to extensive clotting, which required him to undergo a "very painful" procedure, on occasion "several times in an hour").

7. *Id.* at 17. ("Nails were placed in the bomb so that it would cause even more injuries than a typical bomb would inflict.").

pressure fell too low to safely administer pain medication.<sup>8</sup> As a result, Weinstein remained alert and unmedicated, suffering a much higher level of pain throughout his hospital stay than other bomb blast victims typically endure.<sup>9</sup> On April 13, 1996, after forty-nine agonizing days in the ICU, many skin grafts, two leg amputations, respiratory failure, and an unsuccessful abdominal surgery, Weinstein succumbed to his injuries.<sup>10</sup> His wife and children sat by his hospital bed for over seven weeks, watching him endure excruciating pain before he passed away.<sup>11</sup>

Unfortunately, members of the Weinstein family are not the only American citizens to lose loved ones to terrorist attacks. In recent years, the United States has been forced to grapple with the proper response to acts of terrorism against U.S. citizens. After the September 11th terrorist attacks, the United States began experimenting with innovative responses to terrorism on all fronts, with varying degrees of success.<sup>12</sup> In his first address before a joint session of Congress following the attacks, President George W. Bush proclaimed to thunderous applause, "Whether we bring our enemies to justice or bring justice to our enemies, justice will be done."<sup>13</sup> As politicians scrambled to fulfill the lofty aspirations of the President and simultaneously console grief-stricken victims, a steady torrent of legislation flooded through the congressional gate, reshaping U.S. counterterrorism strategy entirely.<sup>14</sup> The Foreign Sovereign Immunity Act (FSIA or the

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8. *See id.* at 18 (explaining that Weinstein's blood pressure was so low as a result of his infections that administering pain medication, which would further lower his blood pressure, could have killed him).

9. *Id.* at 17–18.

10. *See id.* at 18.

11. *See id.* at 17–19.

12. Much commentary has been made about these various responses, but discussion of such is beyond the scope of this paper. *See, e.g.*, Adam Klein, *The End of al Qaeda? Rethinking the Legal End of the War on Terror*, 110 COLUM. L. REV. 1865 (2010); Saad Gul & Katherine M. Royal, *Burning the Barn to Roast the Pig? Proportionality Concerns in the War on Terror and the Damadola Incident*, 14 WILLAMETTE J. INT'L L. & DISP. RESOL. 49, 52 (2006); Arsalan M. Suleman, *Strategic Planning for Combating Terrorism: A Critical Examination*, 5 CARDOZO PUB. L. POL'Y & ETHICS J. 567 (2007); *see also* David Cole, *Less Safe, Less Free: A Progress Report on the War on Terror*, 2008 J. INST. JUST. & INT'L STUD. 1.

13. President George W. Bush, Address Before a Joint Session of Congress Following the September 11th Attacks (Sept. 20, 2001), *available at* <http://www.americanrhetoric.com/speeches/gwbush911jointsessionspeech.htm>.

14. *See, e.g.*, Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, §§ 401–409, 115 Stat. 237–41 (2001) (codified as amended at 49 U.S.C. § 40101 (2006)) (creating the September 11th Victims Compensation Fund); Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified in scattered sections of U.S.C.) (expanding federal surveillance and

Act) terrorism provision, though not enacted specifically in response to the events of September 11th, was greatly enlarged in scope following the attacks.<sup>15</sup> This expansion continued the congressional trend of experimenting with civil litigation as a new counterterrorism strategy.<sup>16</sup> Traditionally, the executive shoulders the responsibility of directing U.S. counterterrorism efforts.<sup>17</sup> However, due to well-meaning (if perhaps overly ambitious) congressional legislating, the judicial branch now finds itself center stage in the counterterrorism arena, responsible for the tremendous task of compensating victims of terror through the attachment of foreign nations' funds under FSIA.<sup>18</sup>

In October 2000, four years after Weinstein's death, his widow and children initiated a wrongful death action on his behalf against the Islamic Republic of Iran in the District Court for the District of Columbia under FSIA's terrorism exception.<sup>19</sup> The court found by clear and convincing evidence that Magid Wardah had been acting under explicit instructions from Hassan Salamah, a senior Hamas operative who received training in suicide bombings and the use of explosives on an Iranian military base just outside of Tehran.<sup>20</sup> Iran is a primary source of funding, weapons, and training for Hamas and is therefore

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law enforcement authority); *see also* Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 (2006)) (authorizing use of force against "nations, organizations, or persons [President] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001").

15. *See* Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, § 201, 116 Stat. 2322, 2337; *see also* 28 U.S.C. § 1605A(g); National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 3 (2008).

16. Congress continually amended FSIA to help plaintiffs collect outstanding judgments against foreign states. *See infra* note 76 and accompanying text.

17. Article II of the Constitution appoints the President as "Commander in Chief of the Army and Navy of the United States" and delegates to the President the power to "make Treaties[,] . . . appoint Ambassadors, . . . [and] receive Ambassadors and other public ministers." U.S. CONST. art. II, § 2, cl. 1-3. The Constitution further requires that the President "take care that the Laws be faithfully executed," which has been interpreted to give the executive broad war powers. U.S. CONST. art. II, § 3.

18. *See* Debra M. Strauss, *Enlisting the U.S. Courts in a New Front: Dismantling the International Business Holdings of Terrorist Groups Through Federal Statutory and Common-Law Suits*, 38 VAND. J. TRANSNAT'L L. 679, 682 (2005).

19. Complaint, *Weinstein v. Islamic Republic of Iran*, 175 F. Supp. 2d 13 (D.D.C. 2002) (No. 100 CV 2601). The FSIA allows victims of terrorism and their families to sue state sponsors of terrorism and their instrumentalities in U.S. courts for civil damages. *See generally* Foreign Sovereign Immunities Act, 28 U.S.C. § 1605A (2006).

20. *Weinstein v. Islamic Republic of Iran*, 184 F. Supp. 2d 13, 19-20 (D.D.C. 2002) ("HAMAS publicly claimed credit for the February 25, 1996 attack on the Number 18 Egged bus shortly after the bombing.").

classified as a “state sponsor of terrorism” (SST) under FSIA.<sup>21</sup> Pursuant to FSIA, the district court asserted jurisdiction over Iran and granted the Weinstein family a default judgment of \$183,200,000 in damages.<sup>22</sup> However, due to political, procedural, and statutory constraints, the court was unable to attach any Iranian funds to satisfy the judgment.<sup>23</sup>

Over the next decade, the Weinstains brought five lawsuits in various jurisdictions attempting to collect their judgment,<sup>24</sup> but were unable to secure any compensation. Finally, in August 2010, the U.S. Court of Appeals for the Second Circuit upheld the attachment of real estate owned by the Iranian Bank Melli<sup>25</sup> in Queens, New York, worth only a fraction<sup>26</sup> of the original \$183 million judgment.<sup>27</sup> Since Ira Weinstein’s tragic death, his family has endured legal fees, stress, and disappointment through a decade of futile litigation.<sup>28</sup>

In this Note, I seek to examine the difficulties that courts face in implementing and enforcing the FSIA terrorism exception. FSIA’s

21. See *Campuzano v. Islamic Republic of Iran*, 281 F. Supp. 2d 258, 262 (D.D.C. 2003) (“ Hamas . . . has a close relationship with Iran,” which provides Hamas with “ongoing terrorist training and economic assistance . . . [amounting to] \$20,000,000–50,000,000 annually over the past decade.”); see also *State Sponsors of Terrorism*, U.S. DEP’T OF STATE, <http://www.state.gov/j/ct/c14151.htm> (last visited Mar. 30, 2012).

22. See *Weinstein*, 184 F. Supp. 2d at 22–25 (\$10 million pain and suffering, \$23 million solatium, and \$150 million punitive damages).

23. See, e.g., *Weinstein v. Islamic Republic of Iran*, 299 F. Supp. 2d 63, 76 (E.D.N.Y. 2004) (holding that bank accounts were not “blocked assets” under the TRIA).

24. *Weinstein v. Islamic Republic of Iran*, 609 F.3d 43 (2d Cir. 2010); *Weinstein v. Islamic Republic of Iran*, 624 F. Supp. 2d 272 (E.D.N.Y. 2009); *Weinstein v. Islamic Republic of Iran*, 299 F. Supp. 2d 63 (E.D.N.Y. 2004); *Weinstein v. Islamic Republic of Iran*, 274 F. Supp. 2d 53 (D.D.C. 2003); *Weinstein v. Islamic Republic of Iran*, 175 F. Supp. 2d 13 (D.D.C. 2001).

25. Bank Melli is an instrumentality of the government of Iran and has been designated by the U.S. State Department as a proliferator of weapons of mass destruction under Executive Order 13,382. See *Weinstein v. Islamic Republic of Iran*, 624 F. Supp. 2d 272, 273 (E.D.N.Y. 2009), *aff’d*, 609 F.3d 43 (2d Cir. 2010).

26. Bank Melli owned a single family home located at 135 75th Road, Forest Hills, NY 11375. This property was sold on April 5, 2011, for \$1,607,000. *Property Information for 135 75th Road*, NEIGHBORCITY, <http://www.neighborcity.com/property/135-75th-Road-Forest-Hills-NY-11375-Any-12954948/> (last visited Feb. 14, 2012).

27. See *Weinstein v. Islamic Republic of Iran*, 609 F.3d 43, 56 (2d Cir. 2010), *cert. denied*, No. 10-947, 2012 WL 2368690 (June 25, 2012).

28. See *Bank Melli Iran v. Weinstein*, 131 S. Ct. 3012 (2011); *Weinstein v. Islamic Republic of Iran*, 609 F.3d 43 (2d Cir. 2010); *Weinstein v. Islamic Republic of Iran*, 624 F. Supp. 2d 272 (E.D.N.Y. 2009); *Weinstein v. Islamic Republic of Iran*, 299 F. Supp. 2d 63 (E.D.N.Y. 2004); *Weinstein v. Islamic Republic of Iran*, 274 F. Supp. 2d 53 (D.D.C. 2003); *Weinstein v. Islamic Republic of Iran*, 175 F. Supp. 2d 13 (D.D.C. 2001).

legislative history indicates that Congress implemented the statute with two main objectives: deterring state sponsors of terrorism<sup>29</sup> and compensating victims. The terrorism provision was originally enacted “explicitly with the intent to alter the conduct of foreign states, particularly towards U.S. nationals traveling abroad.”<sup>30</sup> The stated purpose behind the various amendments to the terrorism exception is “to deal comprehensively with the problem of enforcement of judgments issued to victims of terrorism in any U.S. court by enabling them to satisfy such judgments from the frozen assets of terrorist parties.”<sup>31</sup>

This Note argues that the present terrorism exception fails to achieve either of its stated goals of deterrence of SSTs and compensation of victims. To better achieve these objectives, I propose replacing the FSIA terrorism exception with a legislative solution modeled after the 9/11 Victim Compensation Fund<sup>32</sup> and the Libyan Claims Resolution Act.<sup>33</sup> Part I of this Note describes the legislative history and public policy considerations behind the enactment of FSIA and its subsequent amendments. Part II, through an assessment of civil litigation damage awards in cases against Iran and its instrumentalities, demonstrates how the statute currently fails to meet its stated policy objectives. Part III recommends using an administrative agency instead of the judicial branch to oversee victim compensation and presents model legislation to guide Congress in reforming the Act. Part III also explains and evaluates the model legislation’s main components through a critical lens, once again using Iran as a discussion point.

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29. The State Department designates a country as a state sponsor of terrorism if a country’s government provides material support to terrorist groups by means of funds, weapons, materials, or by providing a safe haven for terrorists. *See Country Reports on Terrorism*, U.S. DEP’T OF STATE, <http://www.state.gov/j/ct/rls/crt/2011/195547.htm> (last visited Oct. 22, 2012). The State Department may add or remove a country from the list of state sponsors of terrorism at any time. *See id.* As of March 2012, the State Department has listed four countries as state sponsors of terrorism: Cuba, Iran, Sudan, and Syria. *State Sponsors of Terrorism*, *supra* note 21.

30. *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 25 (D.D.C. 1998).

31. 148 CONG. REC. S11528 (daily ed. Nov. 19, 2002) (statement of Sen. Harkin).

32. Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, §§ 401–409, 115 Stat. 230, 237–41 (2001) (codified as amended at 49 U.S.C. § 40101 (2006)).

33. Libyan Claims Resolution Act, Pub. L. No. 110-301, 122 Stat. 2999 (2008).

## I.

LEGISLATIVE HISTORY OF THE FOREIGN SOVEREIGN IMMUNITIES ACT  
TERRORISM EXCEPTION

For the greater part of U.S. history, foreign nations enjoyed a robust form of sovereign immunity and were rarely held accountable for their actions on American soil.<sup>34</sup> The executive branch exercised nearly full control over sovereign immunity determinations, supported by constitutional text,<sup>35</sup> historic proclamations,<sup>36</sup> and institutional endorsement.<sup>37</sup> However, in 1976, the passage of FSIA put greater pressure on foreign nations to answer to parties in U.S. courts by establishing narrow instances in which foreign countries would no longer be immune from suit.<sup>38</sup> Twenty years later, in 1996, Congress further amended FSIA by carving out a terrorism exception to sovereign immunity<sup>39</sup> and courts began adjudicating civil counterterrorism actions against foreign entities. Since then, Congress has amended the terrorism provision four times to better achieve the legislation's primary goals.<sup>40</sup> This section will provide an overview of the evolution of FSIA with a focus on the original terrorism exception, its subsequent amendments, and its implementation.

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34. *See, e.g.*, *Berizzi Bros. Co. v. The Pesaro*, 271 U.S. 562, 576 (1926) (holding a commercial ship owned and operated by the Italian government immune from jurisdiction of U.S. courts).

35. *See supra* note 17 and accompanying text.

36. The Founding Fathers—Thomas Jefferson in particular—expressed their belief that the President was the “only channel of communication between this country and foreign nations. [I]t is from him alone that foreign nations or their agents are to learn what is or has been the will of the nation . . . .” Thomas Jefferson, *Duty of Foreign Agents* (Nov. 22, 1793), in 1 *THE JEFFERSONIAN CYCLOPEDIA: A COMPREHENSIVE COLLECTION OF THE VIEWS OF THOMAS JEFFERSON* 342 (John P. Foley ed., 1900).

37. *See, e.g.*, *New York Times Co. v. United States*, 403 U.S. 713, 728–29 (1971) (Stewart, J., concurring) (“[T]he Constitution gives the Executive a large degree of unshared power in the conduct of foreign affairs . . . .”); *id.* at 756 (Harlan, J., dissenting) (acknowledging that the President has “constitutional primacy in the field of foreign affairs”); *see also* *Harlow v. Fitzgerald*, 457 U.S. 800, 812 n.19 (1982) (describing “such ‘central’ Presidential domains as foreign policy and national security, in which the President [has a] singularly vital mandate”). Many scholars have evaluated the merits of this authority over the years; however, that topic is beyond the scope of this paper.

38. Pub. L. No. 94-583, 90 Stat. 2892 (1976) (codified as amended at 28 U.S.C. § 1604 (2006)).

39. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 303(a), 110 Stat. 1214, 1250–53 (amending 18 U.S.C. § 113B by adding § 2339B).

40. *See infra* note 77 and accompanying text.

### A. *Backdrop to the Foreign Sovereign Immunities Act*

Until the mid-twentieth century, the United States followed the absolute theory of foreign sovereign immunity, which provided foreign nations with broad, but not unlimited,<sup>41</sup> immunity from being sued in U.S. courts.<sup>42</sup> The absolute immunity doctrine, as articulated by Chief Justice John Marshall,<sup>43</sup> was grounded in the theory of “perfect equality and absolute independence of sovereigns” on the rationale that a sovereign would “degrade the dignity of his nation, by placing [it] within the jurisdiction of another.”<sup>44</sup> In practice, the executive branch—specifically, the State Department—requested immunity in any action against friendly sovereigns,<sup>45</sup> and courts treated the request as a “conclusive determination by the political arm of the Government” and invariably granted the request.<sup>46</sup>

In 1952, Jack Tate, legal counsel to the State Department, advised the Attorney General in writing to adopt a restrictive theory of sovereign immunity.<sup>47</sup> The Tate Letter recommended granting immunity only for the public acts of a state, and not for the state’s private or commercial acts.<sup>48</sup> Yet the letter contained little guidance for distinguishing between public and private acts.<sup>49</sup> Instead, the State Depart-

41. See JOSEPH M. SWEENEY, U.S. DEP’T OF STATE, *THE INTERNATIONAL LAW OF SOVEREIGN IMMUNITY* 20–21 (1963) (noting that immunity from the judicial process of other states “was not granted when the litigation involved ownership or other interests in immovables in the territory or when it involved an interest in an estate locally administered.”), cited in Daveed Gartenstein-Ross, *A Critique of the Terrorism Exception to the Foreign Sovereign Immunities Act*, 34 N.Y.U. J. INT’L L. & POL. 887, 889 (2002).

42. See, e.g., *Berizzi Bros. Co. v. The Pesaro*, 271 U.S. 562, 571 (1926). The foundation for absolute immunity lies neither in the Constitution nor statute, but rather in the judicially-created concept of “grace and comity.” See *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983).

43. *The Schooner Exchange v. McFaddon*, 11 U.S. 116, 137 (1812) (denying two U.S. citizens’ claim to a French vessel seized in U.S. waters).

44. See *id.*

45. See *Republic of Austria v. Altmann*, 541 U.S. 677 (2004).

46. See *Ex parte Republic of Peru*, 318 U.S. 578, 589 (1943).

47. Letter from Jack B. Tate, Acting Legal Adviser, to Philip B. Perlman, Acting Att’y Gen. (May 19, 1952) [hereinafter Tate Letter], in 26 DEP’T ST. BULL. 984 (1952).

48. *Id.* at 984–85.

49. See *id.* The distinction between private acts and public acts is aptly stated by Margot Wuebbels. Private acts were originally defined as “acts of industrial, commercial, financial, or any other business enterprises in which private persons may engage, or an act connected with such an enterprise.” Margot C. Wuebbels, *Commercial Terrorism: A Commercial Activity Exception Under § 1605(a) (2) of the Foreign Sovereign Immunities Act*, 35 ARIZ. L. REV. 1123, 1125 (1993) (internal citations omitted). Meanwhile, public acts “are those acts arising from internal administrative acts of a

ment initiated an inconsistent case-by-case internal review process<sup>50</sup>—often influenced by foreign diplomatic pressure—to determine whether a claim involved a public or private act, either triggering or barring the defense of sovereign immunity.<sup>51</sup> Despite the State Department's lack of consistency, judges continued to embrace the pre-Tate Letter position once asserted by Justice Harlan Stone, namely that courts should refuse to exercise jurisdiction over foreign sovereigns when doing so would “embarrass the executive arm of the Government in conducting foreign relations.”<sup>52</sup> In practice, therefore, the Tate Letter standards were unclear and inconsistently applied.<sup>53</sup>

### B. *Establishment of the Foreign Sovereign Immunities Act*

In 1976, the inconsistencies created by the Tate Letter prompted Congress to codify the restrictive theory of sovereign immunity as a matter of federal law<sup>54</sup> under FSIA.<sup>55</sup> Like the Tate Letter, FSIA starts

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government, legislative acts, acts involving armed forces, acts involving diplomatic activity, and public loans.” *Id.*

50. The review process was as follows:

As in the past, initial responsibility for deciding questions of sovereign immunity fell primarily upon the Executive acting through the State Department, and the courts abided by ‘suggestions of immunity’ from the State Department . . . [F]oreign nations often placed diplomatic pressure on the State Department in seeking immunity. On occasion, political considerations led to suggestions of immunity in cases where immunity would not have been available under the restrictive theory.

*Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 487 (1983).

51. *See id.*; *see also* *Republic of Austria v. Altmann*, 514 U.S. 677, 690 (2004) (explaining that “the change in State Department policy wrought by the ‘Tate Letter’ had little, if any impact on federal courts’ approach to the immunity analyses”).

52. *See Ex parte Republic of Peru*, 318 U.S. 578, 588 (1943); *see also* *First Nat’l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 767 (1972) (stating that “this Court has recognized the primacy of the Executive in the conduct of foreign relations . . . [and] emphasized the lead role of the Executive in foreign policy.”). Ultimately, diplomatic pressure and political considerations influenced the determinations much more than the Tate Letter’s stated criteria. *See Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Admin. Law and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong. 26–27 (1976) (statement of Monroe Leigh, Legal Advisor, Dep’t of State) (“Leaving the diplomatic initiative in such cases to the foreign state places the United States at a disadvantage.”); H.R. REP. NO. 94-1487, at 7 (1976); David A. Brittenham, *Foreign Sovereign Immunity and Commercial Activity: A Conflicts Approach*, 83 COLUM. L. REV. 1440, 1455 (1983) (describing how “the continuing practice of politically motivated executive intervention precluded development of a [coherent] sovereign immunity doctrine”).

53. *See Altmann*, 514 U.S. at 690–91 (“Thus, sovereign immunity determinations were made in two different branches, subject to a variety of factors, sometimes including diplomatic considerations.”).

54. *See Garb v. Republic of Poland*, 440 F.3d 579, 586 (2d Cir. 2006) (noting that Congress intended to codify the restrictive principle of sovereign immunity in enact-

from a presumption that states are immune from liability, then creates exceptions to that rule, most of which deal with a state's commercial activity.<sup>56</sup> Most significantly, the Act grants judgment regarding sovereign immunity determinations to the courts, "ushering in a new era that sharply departed from nearly two hundred years of judicial deference to the executive branch's recommendations."<sup>57</sup> In doing so, Congress hoped that the courts, considered less susceptible to international political pressure than the executive branch, would make more impartial determinations.<sup>58</sup>

The Act grants a general foreign sovereign immunity to suit<sup>59</sup> and enumerates all circumstances under which the immunity defense does not apply.<sup>60</sup> The original seven exceptions to immunity under the Act were: (1) waivers of immunity, (2) commercial activity directly or indirectly affecting the United States, (3) expropriation, (4) property rights issues, (5) noncommercial torts occurring within the United

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ing FSIA); H.R. REP. NO. 94-1487, at 7 (1976) (same); see also Adam C. Belsky et al., *Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violators of Peremptory Norms of International Law*, 77 CALIF. L. REV. 365, 370 (1989) (explaining that FSIA sought to "clarify the governing legal standards and to establish uniform procedures for litigation against foreign states in U.S. courts").

55. The Act set forth the exclusive standards to be used in resolving questions of sovereign immunity raised by foreign states or their instrumentalities in cases before both federal and state courts. *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993) ("The FSIA provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country.") (internal citation omitted). It also preempted any other state or federal law (excluding any applicable international agreements) granting immunity to foreign sovereigns and their instrumentalities. See 14A CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3662 (3d ed. 1986) ("The FSIA provides a formal procedure for making service of process upon, giving notice to, and obtaining in personam jurisdiction over a foreign state or one of its instrumentalities in an action in a United States court.").

56. See Belsky et al., *supra* note 54, at 370.

57. Danica Curavic, *Compensating Victims of Terrorism or Frustrating Cultural Diplomacy? The Unintended Consequences of the Foreign Sovereign Immunities Act's Terrorism Provisions*, 43 CORNELL INT'L L.J. 381, 387-88 (2010).

58. See H.R. REP. NO. 94-1487, at 7 (1976) (noting that the bill aimed to "reduc[e] the foreign policy implications of immunity determinations and assur[e] litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process"); see also *Altmann*, 541 U.S. at 699 (stating that two of FSIA's primary purposes are "clarifying the rules that judges should apply in resolving sovereign immunity claims and eliminating political participation in the resolution of such claims").

59. 28 U.S.C. § 1604.

60. *Id.* When a specified exception applies, "the foreign state shall be liable in the same manner and to the same extent as a private individual" under like circumstances. *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488-89 (1983) (citing 28 U.S.C. § 1606).

States, (6) international agreements, and (7) certain counterclaims.<sup>61</sup> When FSIA was first implemented, it barred suits against foreign states for acts of terrorism committed against U.S. nationals overseas,<sup>62</sup> and U.S. courts routinely dismissed cases against foreign states brought by U.S. citizen-plaintiffs who alleged serious violations of human rights or international law.<sup>63</sup> Thus, before Congress amended FSIA in 1996, families of victims of the infamous Pan Am Flight 103 Lockerbie bombing were unable to sue Libya for its involvement because international terrorist activities did not then fall under one of the enumerated exceptions.<sup>64</sup>

### C. *The 1996 Amendment to the Foreign Sovereign Immunities Act*

In 1996, Congress passed the Antiterrorism and Effective Death Penalty Act (AEDPA).<sup>65</sup> AEDPA added an exception to FSIA,<sup>66</sup> primarily in response to public outrage over the dismissal of cases against Libya for the bombing of Pan Am Flight 103.<sup>67</sup> Notably, this is the only exception ever added to the original seven in FSIA to date. It is the only exception that has required modification and has proven difficult to implement.<sup>68</sup>

The FSIA terrorism exception provides that U.S. citizens injured in a terrorist act, or their survivors if the attack is fatal, may file civil suit against a foreign state or its instrumentality<sup>69</sup> that either commit-

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61. Gartenstein-Ross, *supra* note 41, at 895 (2002) (citing 28 U.S.C. § 1605 and § 1607 to enumerate general sovereign immunity exceptions and detail exceptions for counterclaims).

62. *See id.*

63. *See, e.g., Saudi Arabia v. Nelson*, 507 U.S. 349, 351 (1993) (dismissing an action alleging personal injuries resulting from illegal detention and torture by the Saudi Arabian government); *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989) (dismissing an action, based on lack of jurisdiction, against the Argentine Republic under the Alien Tort Statute for destruction of an oil tanker on the high seas in violation of international law).

64. *See, e.g., Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239, 247 (2d Cir. 1996) (holding that, under pre-amendment FSIA, the district court could not exercise jurisdiction over Libya with relation to the Pan Am Flight 103 bombing).

65. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 303(a), 110 Stat. 1214, 1250-53 (codified at 18 U.S.C. § 2339(B) (2006)).

66. 28 U.S.C. § 1605.

67. *See* H.R. REP. NO. 105-48, at 2 (1997).

68. In fact, as demonstrated *infra* in Subparts C, D, and E, the terrorism exception has been amended no less than four times since its enactment. *See* 28 U.S.C. § 1610(f) (2010); 28 U.S.C. § 1605A(c) (2008); 28 U.S.C. § 1605A(g) (2008); 28 U.S.C. § 1610(a) (2008); 28 U.S.C. § 1606 (2002).

69. A foreign state "includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state." 28 U.S.C. § 1603(a) (2006). An agency or instrumentality is defined as any entity: (1) which is a separate legal person; (2) which is an organ of a foreign state or a majority of whose shares are owned by a foreign

ted the terrorist act or provided aid to a group that committed the act.<sup>70</sup> To subject a foreign sovereign to suit under the exception, a plaintiff must demonstrate that: (1) either the claimant or the victim was a U.S. national at the time of the act; (2) the foreign sovereign has been designated by the State Department as an SST;<sup>71</sup> (3) the foreign sovereign engaged in conduct that involves torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such acts; (4) the act or the provision of material support was engaged in by an official, employee, or agent of the foreign state acting within the scope of his or her duty;<sup>72</sup> and (5) if the act occurred in the foreign state against which the claim is brought, the claimant must have afforded the foreign state a reasonable opportunity to arbitrate the claim.<sup>73</sup> If all five requirements are met, the foreign state loses its immunity under the Act.<sup>74</sup>

In September of 1996, Stephen Flatow, an attorney whose twenty-year-old daughter Alisa was killed by a suicide bomber in Israel, lobbied Congress for further changes to the FSIA terrorism exception.<sup>75</sup> The Flatow Amendment<sup>76</sup> (also known as the Civil Liability for Acts of State Sponsored Terrorism Act) clarifies that the exception allows for private causes of action and the recovery of punitive damages against SSTs.<sup>77</sup> The Amendment creates the potential for enormous recoveries<sup>78</sup> to effectuate the terrorism exception's goal of deterrence.<sup>79</sup>

Although the Flatow Amendment created new possibilities for recovery, plaintiffs immediately faced challenges in collecting their

state; and (3) which is neither a citizen of a state of the United States nor created under the laws of any third country. 28 U.S.C. § 1603(b).

70. National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1083, 122 Stat. 3, 338 (2008).

71. See *supra* text accompanying note 29.

72. See 28 U.S.C. § 1605(a)(1); see also *Haim v. Islamic Republic of Iran*, 425 F. Supp. 2d 56, 68 (D.D.C. 2006), *superseded by statute*, National Defense Authorization Act for Fiscal Year 2008, 122 Stat. at 338-44 (regarding separate issue of punitive damages).

73. National Defense Authorization Act for Fiscal Year 2008, 122 Stat. at 338-39; see also Gartenstein-Ross, *supra* note 41, at 897.

74. 28 U.S.C. § 1605A.

75. *Id.*; see also *In re Islamic Republic of Iran Terrorism Litig.*, 659 F. Supp. 2d 31, 43 (D.D.C. 2009).

76. National Defense Authorization Act of Fiscal Year 2008 § 1083.

77. 28 U.S.C. § 1605A(c).

78. Damages include "economic damages, solatium, pain and suffering, and punitive damages." 28 U.S.C. § 1605A(c); see, e.g., *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 32, 34 (D.D.C. 1998) (awarding \$27 million in compensatory damages and \$225 million in punitive damages to victim's family).

79. See *Flatow*, 999 F. Supp. at 25.

judgments, largely because the executive branch would not allow courts to attach defendants' blocked assets.<sup>80</sup> Blocked assets are frozen by the United States, and their transfer or use is prohibited without explicit permission from the government.<sup>81</sup> The Office of Foreign Assets Control (OFAC) blocks assets as a form of economic sanction on a foreign government "to accomplish foreign policy or national security goals."<sup>82</sup>

In 1998, Congress addressed this problem by amending FSIA to make blocked assets subject to execution and attachment.<sup>83</sup> The amendment also requires the Departments of State and Treasury to assist in locating and executing judgments against property owned by the foreign state.<sup>84</sup> The day after signing the bill, however, President Clinton exercised an executive waiver of its requirements, immediately frustrating congressional intent to help victims collect judgments.<sup>85</sup> Various efforts ensued to help victims receive compensation,<sup>86</sup> but plaintiffs still could not access the blocked assets of foreign states to satisfy their judgments.<sup>87</sup>

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80. See David M. Ackerman, CONG. RESEARCH SERV., RL 31258, *SUITS AGAINST TERRORIST STATES 8* (2002) [hereinafter *SUITS AGAINST TERRORIST STATES*], available at <http://fpc.state.gov/documents/organization/8045.pdf>. The Clinton Administration argued that blocked assets "are useful . . . as leverage in working out foreign policy disputes." *Id.* at 7. The administration was also worried that "numerous other U.S. nationals had legitimate (and prior) non-terrorist claims against these countries that would be frustrated if the assets were used solely to compensate the victims of terrorism." *Id.*

81. *Frequently Asked Questions and Answers*, OFFICE OF FOREIGN ASSETS CONTROL, <http://www.treasury.gov/resource-center/faqs/Sanctions/Pages/answer.aspx> (last updated Aug. 24, 2012) ("Blocking immediately imposes an across-the-board prohibition against transfers or dealings of any kind with regard to the property.").

82. *Sanctions Programs and Country Information*, OFFICE OF FOREIGN ASSETS CONTROL, <http://www.treasury.gov/resource-center/sanctions/Programs/Pages/Programs.aspx> (last updated July 31, 2012). This year, the President signed two executive orders, on February 5, 2012 and July 30, 2012, authorizing additional sanctions with respect to Iran. See *Frequently Asked Questions and Answers*, *supra* note 81.

83. Assets could be attached unless a natural person held title to the property when it was seized by the foreign state. Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1998, Pub. L. No. 105-277, § 117, 112 Stat. 2681 (codified as amended at 28 U.S.C. § 1610 (2006)).

84. See 28 U.S.C. § 1610(f)(2)(A).

85. Presidential Determination No. 99-1, 63 Fed. Reg. 59,201 (Oct. 21, 1998). Clinton explained, in part, "[i]f this section were to result in attachment and execution against foreign embassy properties, it would encroach on my authority under the Constitution to 'receive Ambassadors and other public ministers.'" Presidential Statement on Signing Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, 39 WEEKLY COMP. PRES. DOC. 2108 (Nov. 2, 1998).

86. See Terrorism Risk Insurance Act § 201, 116 Stat. at 2322.

87. See discussion of TVPA *infra* Part II.B; see also *SUITS AGAINST TERRORIST STATES*, *supra* note 80, at 15 ("Except as otherwise provided in § 2002 [of the

*D. The 2002 Amendment to the Foreign Sovereign Immunities Act*

In 2002, under tremendous pressure after the September 11th attacks, Congress adopted the Terrorism Risk Insurance Act (TRIA).<sup>88</sup> According to Senator Tom Harkin, the bill's sponsor, the TRIA was intended to "provide a new, powerful disincentive for any foreign government to continue sponsoring terrorist attacks on Americans."<sup>89</sup> Despite this bold statement, the TRIA was limited to removing some of the barriers to victims' collection of compensatory but not punitive damages.<sup>90</sup> TRIA did not create a blanket waiver of the attachment of all blocked assets, instead it required the President to make "an asset-by-asset determination that a waiver is necessary in the national security interest."<sup>91</sup> However, because the TRIA restricted but did not wholly eliminate the waiver, the executive branch continued to prevent the unfreezing of assets and many plaintiffs still remained unable to successfully collect on their judgments.<sup>92</sup> Other efforts to secure damages often involved unsuccessful litigation attempting to force the executive branch and State Department to designate frozen assets as "blocked" under the TRIA, which would subject them to attachment in civil terrorism litigation.<sup>93</sup>

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TVPA], the bar to the attachment of the diplomatic property and the blocked assets of terrorist states to satisfy judgments against those states continues to be in place.").

88. Terrorism Risk Insurance Act § 201, 116 Stat. at 2322.

89. See *Hegna v. Islamic Republic of Iran*, No. 02 C 8643, 2003 WL 25952462, at \*6 (N.D. Ill. Aug. 11, 2003) (quoting 148 CONG. REC. S11524, S11527 (daily ed. Nov. 19, 2002) (statement of Sen. Harkin)).

90. Terrorism Risk Insurance Act § 201, 116 Stat. at 2322–37 (stating that blocked assets "shall be subject to execution or attachment in aid of execution in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable").

91. *Id.* § 201(b)(1). Now, even if invoked, the presidential waiver only protected certain limited types of diplomatic property specifically subject to the Vienna Convention. See *id.* § 201(b)(2). Not all types of diplomatic property under the Vienna Convention can be protected. For example, any property that has been used "for any nondiplomatic purpose," such as rental property, can be attached. *Id.* § 201(b)(2)(A); see also Jeewon Kim, *Making State Sponsors of Terrorism Pay: A Separation of Powers Discourse Under the Foreign Sovereign Immunities Act*, 22 BERKELEY J. INT'L L. 513, 522 (2004).

92. See, e.g., *Weinstein v. Islamic Republic of Iran*, 299 F. Supp. 2d 63, 76 (E.D.N.Y. 2004) (finding that Iranian assets held in U.S. accounts were not "blocked assets" under the TRIA and therefore not attachable); see also *Bennett v. Islamic Republic of Iran*, 618 F.3d 19, 26 (D.C. Cir. 2010) (rejecting attachment of property and noting that, in its brief, the Government expressed concern that "permitting attachment under any circumstances could have significant implications for U.S. foreign policy").

93. See *Bennett*, 618 F.3d at 26; see also *Rubin v. Islamic Republic of Iran*, No. 03 CV 9370, 2007 WL 2219105, at \*1 (N.D. Ill. July 26, 2007) (suit seeking attachment of Iranian assets under the TRIA); *infra* note 193 and accompanying text.

*E. The 2008 Amendment to the Foreign Sovereign Immunities Act*

Although Congress passed the terrorism exception to provide victims of terrorism with monetary compensation for their suffering and to deter foreign states from engaging in terrorist activity, the Act continued to fail on both counts.<sup>94</sup> In 2008, Congress responded by amending FSIA “to overrule court decisions that had limited plaintiffs’ abilities to collect against foreign states,”<sup>95</sup> and to allow plaintiffs to bring money damages claims directly against state sponsors of terrorism.<sup>96</sup> FSIA now explicitly provides that “[t]he property in the United States of a foreign state . . . shall not be immune from attachment in aid of execution . . . upon a judgment entered by a court.”<sup>97</sup> Congress also added a provision that creates an automatic lien on a defendant state’s real or tangible personal property upon the filing of a lawsuit.<sup>98</sup>

The changes received widespread support from both political parties and academia.<sup>99</sup> Legal commentators “hailed the amendments as a ‘novel approach to the problem of terrorism’” and urged other countries to adopt similar legislation.<sup>100</sup> Despite this popular support, in 2012, victims are still unable to collect their judgments in many civil terrorism cases.<sup>101</sup> As demonstrated in Part II, the FSIA terrorism ex-

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94. *See, e.g.*, *Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024, 1032–33 (D.C. Cir. 2004) (interpreting §1605 of FSIA as a jurisdictional vehicle that does not confer a private right of action against a foreign state and limiting the Flatow Amendment to providing a cause of action against officials, employees, and agents of the foreign state in their individual capacity); *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 234 n.3 (D.C. Cir. 2003) (“[I]t is ‘far from clear’ that a plaintiff has a substantive claim against a foreign state under the Foreign Sovereign Immunities Act.”) (internal citation omitted); *see also* Alicia M. Hilton, *Terror Victims at the Museum Gates: Testing the Commercial Activity Exception Under the Foreign Sovereign Immunities Act*, 53 VILL. L. REV. 479, 480 (2008) (noting that “more than ten years after the attacks, the plaintiffs in [*Rubin*] have yet to realize any meaningful recovery”).

95. Curavic, *supra* note 57, at 389; *see also* National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-81, § 1083, 122 Stat. 3, 338.

96. Curavic, *supra* note 57, at 389; *see also* 28 U.S.C. § 1605A (Sup. III 2009).

97. 28 U.S.C. § 1610(a).

98. 28 U.S.C. § 1605A(g)(1).

99. Curavic, *supra* note 57, at 389 (citing David M. Herszenhorn, *After Veto, House Passes a Revised Military Policy Measure*, N.Y. TIMES, Jan. 17, 2008, at A28).

100. *Id.* (citing Debra M. Strauss, *supra* note 18, at 307–08).

101. According to a July 2012 opinion, “Iran is racking up quite a bill from its sponsorship of terrorism. After this opinion, this Court will have issued over \$8.8 billion in judgments against Iran as a result of the 1983 Beirut bombing.” *See* Estate of Brown v. Islamic Republic of Iran, No. 08-CV-531 RCL, 2012 WL 2562368, at \*6 (D.D.C. July 3, 2012). While it is not possible to obtain information regarding each case, there appear to be at least fifty victims with outstanding judgments against Iran. *See, e.g.*, *Weinstein v. Islamic Republic of Iran*, 609 F.3d 43 (2d Cir. 2010); *Rubin v. Islamic*

ception remains a muddled creature of Congress. The executive branch stymies efforts by courts to implement the provision, which ultimately fails to compensate victims and allows SST defendants to evade all liability.

## II.

### THE CURRENT STATE OF DAMAGE AWARDS AND RECOVERY UNDER THE FOREIGN SOVEREIGN IMMUNITIES ACT

As described in Part I, Congress passed the terrorism exception to FSIA in order to create a standardized judicial system for deterring state sponsors of terror while providing victims with compensation.<sup>102</sup> This Part will discuss how the terrorism provision's current formulation operates as an obstacle to achieving its twin goals of deterrence and compensation, as demonstrated by examining past judgments entered against the Islamic Republic of Iran in civil lawsuits under FSIA. While there are four countries currently designated as SSTs,<sup>103</sup> this Note focuses on FSIA litigation and damage awards against Iran and its instrumentalities.<sup>104</sup> To determine the current deterrent effect of FSIA on SSTs, Subpart A analyzes punitive damages in civil counterterrorism cases. To measure success in the area of victim compensation, Subpart B discusses attempts by plaintiffs to collect compensatory damage awards.

#### A. *Punitive Damages Fail to Deter SSTs*

Punitive damages are generally intended to deter and punish defendants, rather than to compensate victims.<sup>105</sup> According to the Su-

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Republic of Iran, No. 03 CV 9370 2007 WL 2219105, at \*1 (N.D. Ill. July 26, 2007) ("To review, the plaintiffs obtained a multi-million dollar judgment against Iran for injuries they suffered as a result of a suicide bombing in Israel. Iran has not paid the judgment, so the plaintiffs instituted this suit seeking execution or attachment against Iranian assets in the United States.") (internal citations omitted).

102. See *supra* Part I.E.

103. See *State Sponsors of Terrorism*, *supra* note 21.

104. As of November 4, 2012, a search run on WestlawNext shows that the number of cases filed against Iran substantially outnumber those filed against any other SST. While it is difficult to provide precise numbers, the search yielded over 100 civil cases against Iran and indicated that over fifty victims of Iranian-sponsored terrorism have outstanding judgments, while there are fewer than twenty claims (past and present) against the other three SSTs combined. In 2012, a federal court awarded damages against Syria for the first time in a case of this kind. *Family Wins \$323 Million Against Iran, Syria over Terrorist Attack*, NBC NEWS (May 16, 2012), [http://us-news.msnbc.msn.com/\\_news/2012/05/16/11733643-family-wins-323-million-against-iran-syria-over-terrorist-attack?lite](http://us-news.msnbc.msn.com/_news/2012/05/16/11733643-family-wins-323-million-against-iran-syria-over-terrorist-attack?lite).

105. See *Gates v. Syrian Arab Republic*, 580 F. Supp. 2d 53, 74 (D.D.C. 2008) ("The purpose of punitive damages is two-fold: to punish those who engage in outrageous

preme Court, “[r]egardless of the alternative rationales over the years, the consensus today is that punitive damages are aimed not at compensation but principally at retribution and deterring harmful conduct.”<sup>106</sup> In most modern American jurisdictions, therefore, juries are customarily instructed on the twin goals of punitive damage awards: deterrence and punishment.<sup>107</sup> FSIA explicitly immunizes a foreign state from liability for punitive damages.<sup>108</sup> However, as described above,<sup>109</sup> FSIA was amended under the Flatow Amendment to provide that an “agency or instrumentality” of a foreign state may be held liable for such damages.<sup>110</sup>

Both the litigation and the legislative history behind the Flatow Amendment demonstrate its undisputed aim to deter SSTs through punitive damage awards.<sup>111</sup> During legislative hearings on the Amendment, the sponsor, Congressman Jim Saxton, stated that the Amendment was necessary for the terrorism exception to have the desired deterrent effect.<sup>112</sup> According to Saxton, the Flatow Amendment sought “to alter the conduct of foreign states by imposing massive civil liability on foreign state sponsors of terrorism whose conduct results in the death or personal injury of U.S. citizens.”<sup>113</sup> Saxton also

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conduct and to deter others from similar conduct in the future.”), *aff'd*, 646 F.3d 1 (D.C. Cir. 2011).

106. *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 492 (2008).

107. *See id.* at 492–93 (citing Cal. Jury Instr.–Civ. 14.72.2 (2008) (“You must now determine whether you should award punitive damages against defendant[s] . . . for the sake of example and by way of punishment.”) and N.Y. Pattern Jury Instr.–Civ. 2:278 (2007) (“The purpose of punitive damages is not to compensate the plaintiff but to punish the defendant . . . and thereby to discourage the defendant . . . from acting in a similar way in the future.”)).

108. 28 U.S.C. § 1606; *see also* 14A WRIGHT, MILLER & COOPER, *supra* note 55, at § 3662 (“Punitive damages are available only against an agency or instrumentality of a terrorist-sponsoring state, not against the state itself.”).

109. *See supra* Part I.C.

110. 28 U.S.C. § 1606 (2006); *see also* *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 25 (D.D.C. 1998) (“Prior to the state sponsored terrorism amendments, the FSIA absolutely prohibited the award or recovery of punitive damages against the foreign state itself.”).

111. Stephen Flatow successfully lobbied to have punitive damages incorporated into the terrorism exception as part of §1605, in an effort to “seek justice for victims of state-sponsored terrorism.” Joseph Keller, *The Flatow Amendment and State-Sponsored Terrorism*, 28 SEATTLE U. L. REV. 1029, 1031 (2005); *see also* *Flatow*, 999 F. Supp. at 25 (“The Flatow Amendment. . . departs from the prior enactment by expressly providing a cause of action for punitive damages for state sponsored terrorism.”); discussion *supra* Part I.C.

112. *Flatow*, 999 F. Supp. at 25.

113. Ruthanne M. Deutsch, *Suing State-Sponsors of Terrorism Under the Foreign Sovereign Immunities Act: Giving Life to the Jurisdictional Grant After Cicippio-Puleo*, 38 INT’L LAW 891, 901–02 (2004) (internal quotation marks omitted).

argued that compensatory damages for wrongful death cannot approach a measure of damages required to make a foreign state take notice.<sup>114</sup>

Saxton sponsored the Flatow Amendment to make the “availability of punitive damages undisputable.”<sup>115</sup> Although the Amendment only applies to “agents” of a foreign state, “agents” is not limited to individual, non-governmental actors, but rather, may also include governmental entities.<sup>116</sup> When *Flatow v. Islamic Republic of Iran*, the first case brought under the amended FSIA, was litigated, the district court, emphasizing the deterrent purpose of punitive damages,<sup>117</sup> calculated the “level of Iran’s annual expenditures in support of international terrorism and applied a treble damages principle, awarding \$225 million in punitive damages.”<sup>118</sup>

Since *Flatow*, punitive damages have become a standard component of civil counterterrorism litigation. The typical punitive damage award for each case is \$300 million, which reflects the expert testimony of Dr. Patrick Clawson of the Washington Institute for Near East Policy.<sup>119</sup> Dr. Clawson routinely testifies that most of Iran’s terrorist funding (nearly \$100 million annually) is channeled through its Ministry of Information and Security, and he recommends punitive damages of three times that amount.<sup>120</sup> Based on Dr. Clawson’s testi-

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114. *Id.* at 901.

115. *Id.*

116. *Flatow*, 999 F. Supp. at 26 (“A governmental unit of a foreign state can act as an agent of the foreign state, if, for example, it acts with the authority of the government, but not within the scope of its dedicated function.”).

117. *Id.* at 33 (“This cost functions both as a direct deterrent, and also as a disabling mechanism: if several large punitive damage awards issue against a foreign state sponsor of terrorism, the state’s financial capacity to provide funding will be curtailed.”).

118. Richard T. Micco, *Putting the Terrorist-Sponsoring State in the Dock: Recent Changes in the Foreign Sovereign Immunities Act and the Individual’s Recourse Against Foreign Powers*, 14 TEMP. INT’L & COMP. L.J. 109, 130 (2000); see also *Flatow*, 999 F. Supp. at 34.

119. See *Polhill v. Islamic Republic of Iran*, No. 00-1798, 2001 U.S. Dist. LEXIS 15322 (D.D.C. Aug. 23, 2001); see also Patrick Clawson, WASHINGTON INST. FOR NEAR E. POLICY, <http://www.washingtoninstitute.org/experts/view/clawson-patrick> (last visited Oct. 22, 2012) (noting that Dr. Clawson has served as an expert witness in more than thirty federal cases against Iran).

120. In *Flatow*, Dr. Clawson stated that in his opinion, a factor of three times its annual expenditure for terrorist activities would be the minimum amount that would affect the conduct of the Islamic Republic of Iran. 999 F. Supp. at 34; see also *Polhill*, 2001 U.S. Dist. LEXIS 15322, at \*10 n.2 (noting that Clawson’s expert testimony indicated that Iran’s Ministry of Information and Security is the principal agency of the Iranian government responsible for supporting terrorism abroad). In every subsequent case against Iran under FSIA, the U.S. District Court for the District of Columbia has followed Dr. Clawson’s recommendation. See *Wagner v. Islamic Republic of*

mony, courts consistently find that \$300 million is the closest approximation to an appropriate punitive damages award.<sup>121</sup> As a result, in nearly every civil counterterrorism lawsuit initiated under FSIA against Iran since 1996, courts have awarded the plaintiffs approximately \$300 million in punitive damages.<sup>122</sup>

Dr. Clawson's testimony makes sense from the perspective of a traditional deterrence rationale. The tort system—and punitive damage awards in particular—traditionally serves to correct behavior when the regulatory system fails to do so. For example, in *Grimshaw v. Ford Motor Co.*, the infamous “exploding Pinto case,” the plaintiff presented evidence at trial that Ford Motors had knowledge of a dangerous design defect in the Pinto that the company could have fixed at minimal cost.<sup>123</sup> The California Court of Appeals upheld a punitive

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Iran, 172 F. Supp. 2d 128, 132 (D.D.C. 2001); *Polhill*, 2001 U.S. Dist. LEXIS 15322, at \*16–17; *Jenco v. Islamic Republic of Iran*, 154 F. Supp. 2d 27, 39 (D.D.C. 2001); *Sutherland v. Islamic Republic of Iran*, 151 F. Supp. 2d 27, 53 (D.D.C. 2001); *Elahi v. Islamic Republic of Iran*, 124 F. Supp. 2d 97, 99, 115 (D.D.C. 2000); *Eisenfeld v. Islamic Republic of Iran*, 172 F. Supp. 2d 1, 9 (D.D.C. 2000) (dividing the \$300 million between two decedents' estates); *Anderson v. Islamic Republic of Iran*, 90 F. Supp. 2d 107, 114 (D.D.C. 2000).

121. See, e.g., *Polhill*, 2001 U.S. Dist. LEXIS 15322, at \*16–17 (concluding, based on Dr. Clawson's testimony, “that an award of thrice the amount of [Iran's Ministry of Information and Security's] maximum annual budget for terrorist activities, or \$300 million, is the closest approximation . . . to an appropriate [punitive damages] award.”).

122. See *Wagner*, 172 F. Supp. 2d at 130, 138 (awarding over \$316 million, including \$300 million in punitive damages, for murder of Navy officer stationed in Beirut by a Hezbollah suicide bomber); *Polhill*, 2001 U.S. Dist. LEXIS 15322, at \*2–4, \*17–18 (awarding over \$331 million, including \$300 million in punitive damages, for kidnapping, detention, and torture of teacher at Beirut University College); *Jenco*, 154 F. Supp. 2d at 29, 40 (awarding estate and family of Catholic priest over \$314 million, including \$300 million in punitive damages, for his kidnapping, detention, and torture by Hezbollah); *Sutherland*, 151 F. Supp. 2d at 30–31, 53 (awarding over \$353 million, including \$300 million in punitive damages, for American academic's kidnapping and torture by Hezbollah); *Elahi*, 124 F. Supp. 2d at 99, 115 (awarding over \$311 million, including \$300 million in punitive damages, to brother of dissident university professor assassinated by Iranian government); *Eisenfeld*, 172 F. Supp. 2d at 4, 10–11 (awarding almost \$350 million, including \$300 million in punitive damages, to families of two students in Israel killed by Hamas suicide bombing); *Anderson*, 90 F. Supp. 2d at 108, 114 (awarding journalist Terry Anderson over \$341 million, including \$300 million in punitive damages, for his kidnapping and nearly seven years of imprisonment by Hezbollah). *But see* *Cicippio v. Islamic Republic of Iran*, 18 F. Supp. 2d 62, 63–64, 70 (D.D.C. 1998) (awarding \$65 million for plaintiffs' kidnapping, imprisonment, and torture by Hezbollah).

123. *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348, 361 (Ct. App. 1981) (describing the relatively low costs of remedying the Pinto's design defects); see also Robert S. Peck, *The Victim Compensation Fund: Born from a Unique Confluence of Events Not Likely to Be Duplicated*, 53 DEPAUL L. REV. 209, 212–13 (2003).

damages award of \$3.5 million against Ford,<sup>124</sup> finding that Ford had exhibited the “malice” requisite to impose punitive damages.<sup>125</sup> The record showed that Ford “was aware of the risks to consumers, ‘but decided to defer correction of the shortcomings by engaging in a cost-benefit analysis balancing human lives and limbs against corporate profits.’”<sup>126</sup> The jury and court awarded tremendous punitive damages to deter such “objectionable corporate policies.”<sup>127</sup>

Notwithstanding any law and economics arguments that may exist repudiating this decision,<sup>128</sup> the decision undoubtedly served its deterrent function. According to Ford’s own calculations, adherence to regulations would have resulted in \$88 million of additional costs to the company.<sup>129</sup> After *Grimshaw*, Ford and other manufacturers must balance these relatively low costs against the potential for much heavier court penalties, ensuring that these companies will not be so callous with human lives in the future.<sup>130</sup> Tort actions, particularly those with high punitive damage awards, can also generate publicity that brings product risks to consumers’ attention and stimulates an appropriate market reaction.<sup>131</sup> *Grimshaw* illustrates that punitive damages in tort law can promote responsible behavior amongst actors who may otherwise be incentivized to act counter to societal needs. For automobile manufacturers, and particularly for an American manufacturer like Ford, the deterrent effect of litigation can alter an entire industry’s behavior.<sup>132</sup>

In civil counterterrorism litigation, however, punitive damages are unable to perform a deterrent function like that in *Grimshaw*. Defendants’ distance and autonomy from the United States, combined with the limitations on attaching their assets, cause SSTs to remain undeterred by the tremendous damage awards that are entered against

124. *Grimshaw*, 174 Cal. Rptr. at 388.

125. *Id.* at 384.

126. *Thompson v. Better-Bilt Aluminum Prods. Co.*, 832 P.2d 203, 210 (Ariz. 1992) (en banc) (quoting *Grimshaw*, 174 Cal. Rptr. at 384).

127. *See Grimshaw*, 174 Cal. Rptr. at 382 (“Deterrence of such ‘objectionable corporate policies’ serves one of the principal purposes of Civil Code section 3294.”).

128. Some scholars have suggested that the *Grimshaw* decision goes against a traditional cost-benefit rationale and was, therefore, wrongly decided. *See, e.g.*, W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?*, 52 STAN. L. REV. 547, 588 (2000) (“If the costs of the safety measure exceed the benefits, the company is not negligent in failing to adopt it, much less guilty of reckless behavior that would warrant punitive damages.”).

129. Peck, *supra* note 123, at 213.

130. *See id.*

131. Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377, 385 (1994).

132. *See Viscusi, supra* note 128, at 570.

them each year in U.S. courts. Typically, in a civil terrorism lawsuit against an Iranian entity, a defendant from over six-thousand miles away will fail to answer the complaint or make a court appearance.<sup>133</sup> From the start, the defendant does not experience the discomfiture and disturbance that a lawsuit creates. In a defendant's absence, the court will usually enter a tremendous default judgment based solely on the allegations in the complaint.<sup>134</sup>

A default judgment is problematic for two reasons. First, the facts in the plaintiff's complaint in a default judgment are taken to be true, without the additional scrutiny that a contested complaint receives. The judgment therefore lacks the legitimacy of a fully litigated case. Second, because SSTs are government entities in distant countries with distinct laws, rather than individual defendants who are haled into court, SSTs often remain wholly unaffected, both financially and psychologically, by the tremendous damages award handed down (if they are even aware of the final judgments). For years, a default judgment was a dead end, since courts had no way to attach any property or force a defendant to answer a complaint.<sup>135</sup> Plaintiffs would be left with a worthless court "victory" and, having exhausted all avenues of the litigation system, no further recourse.<sup>136</sup>

Now, because of the 2008 FSIA amendment, a court might be able to attach some property<sup>137</sup>—provided that there exists property to attach within the court's jurisdiction—but the value of such property will likely be insignificant compared to the actual damages award. The most recent decision in *Weinstein v. Islamic Republic of Iran* is a perfect example of this scenario: the Second Circuit upheld attachment of a piece of property worth under \$2 million in partial satisfaction of a \$183 million judgment, and even that decision was appealed to the

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133. See, e.g., *Wagner v. Islamic Republic of Iran*, 172 F. Supp. 2d 128, 131 (D.D.C. 2001) (awarding default judgment after Iran failed to answer plaintiff's complaint); *Polhill v. Islamic Republic of Iran*, No. 00-1798, 2001 U.S. Dist. LEXIS 15322, at \*1 n.1 (D.D.C. Aug. 23, 2001) (same); *Jenco v. Islamic Republic of Iran*, 154 F. Supp. 2d 27, 29 (D.D.C. 2001) (same); *Sutherland v. Islamic Republic of Iran*, 151 F. Supp. 2d 27, 30 (D.D.C. 2001) (same); *Elahi v. Islamic Republic of Iran*, 124 F. Supp. 2d 97, 99–100 (D.D.C. 2000) (same); *Eisenfeld v. Islamic Republic of Iran*, 172 F. Supp. 2d 1, 3 (D.D.C. 2000) (same); *Anderson v. Islamic Republic of Iran*, 90 F. Supp. 2d 107, 109 n.1 (D.D.C. 2000) (same); *Cicippio v. Islamic Republic of Iran*, 18 F. Supp. 2d 62, 64 (D.D.C. 1998) (same).

134. See cases cited *supra* note 133; see also *supra* note 122 for examples of judgment amounts.

135. See *supra* Part I.D (discussing the inability of plaintiffs to collect on judgments under the 2002 amendment to FSIA).

136. This scenario excludes the ten plaintiffs who received compensation under the Trafficking and Violence Protection Act of 2000. See discussion *infra* Part II.B.

137. See *supra* Part I.E (discussion of the 2008 FSIA amendment).

Supreme Court.<sup>138</sup> On one hand, attachment of property solves the absent defendant problem because it forces the defendant to take action or forfeit property.<sup>139</sup> Yet, because the amount courts can attach tends to be so low,<sup>140</sup> it is unclear that the potential for attachment will actually deter SSTs. Further, it is possible that practical or political limitations may ultimately thwart victims from collecting on their judgments at all.<sup>141</sup>

Because of the existing obstacles to collecting judgments, SST defendants within the American tort system are similar to judgment-proof bankrupt or insolvent defendants. These kinds of defendants are “problematic because the tort system cannot effectively deter them from engaging in tortious conduct.”<sup>142</sup> As described by Steven Shavell,<sup>143</sup> a prominent law and economics scholar, judgment-proof persons have diminished incentives to take efficient precautions because their maximum exposure to tort liability is less than their expected damages for causing harm.<sup>144</sup> In the worst scenario, potential tortfeasors may have no incentive to take precautions at all if they are

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138. *Weinstein v. Islamic Republic of Iran*, 609 F.3d 43, 54–56 (2d Cir. 2010), *cert. denied*, No. 10-947, 2012 WL 2368690 (June 25, 2012).

139. For example, Bank Melli took action in *Weinstein* by filing a petition for certiorari. Petition for Writ of Certiorari, Bank Melli Iran N.Y. Representative Office v. Weinstein, 2012 WL 2368690 (June 25, 2012) (No. 10-947). Until the attachment of real property, the bank did not feel threatened enough by the judgment to file an appeal. *See Bank Melli Iran v. Weinstein*, 184 F. Supp. 2d 13 (D.D.C. 2002), *appeal dismissed*, No. 03-5235, 2004 WL 57521 (D.C. Cir. Jan. 9, 2004) (appeal voluntarily dismissed by the appellant-petitioner); *see also Weinstein v. Islamic Republic of Iran*, 299 F. Supp. 2d 63 (E.D.N.Y. 2004) (no appeal filed).

140. A recent report states that Iran owns eleven blocked properties located in California, Illinois, Maryland, New York, Texas, and Washington, D.C. *See OFFICE OF FOREIGN ASSET CONTROL, TERRORIST ASSETS REPORT: CALENDAR YEAR 2011 TWENTIETH ANNUAL REPORT TO THE CONGRESS ON ASSETS IN THE UNITED STATES RELATING TO TERRORIST COUNTRIES AND INTERNATIONAL TERRORISM PROGRAM DESIGNEES* (2011) [hereinafter *TERRORIST ASSETS REPORT*], *available at* <http://www.treasury.gov/resource-center/sanctions/Programs/Documents/tar2011.pdf>. While the report does not list the location or value of these properties, it seems improbable that they can total the \$8.8 billion the District of Columbia court mentions. *See supra* note 101 and accompanying text.

141. *See, e.g., Weinstein*, 299 F. Supp. 2d at 74–76 (reasoning that Iranian bank accounts are not “blocked assets” under the TRIA and, therefore, are not subject to attachment); *see also Weinstein v. Islamic Republic of Iran*, 274 F. Supp. 53 (D.D.C. 2003) (holding, in part, that the attachment of certain assets was barred by sovereign immunity and that certain other assets were immune from attachment).

142. Stephen G. Gilles, *The Judgment-Proof Society*, 63 WASH. & LEE L. REV. 603, 609–10 (2006).

143. *See Faculty Directory: Steven M. Shavell*, HARVARD LAW SCH., <http://www.law.harvard.edu/faculty/directory/index.html?id=66> (last visited Feb. 21, 2012).

144. *See Gilles, supra* note 142, at 609.

completely judgment-proof or litigation-proof.<sup>145</sup> Currently, SSTs typically do not even answer civil counterterrorism complaints, let alone pay damages.

Unlike Ford during the *Grimshaw* litigation, SSTs do not suffer from bad publicity, judicial admonishment, or real financial repercussions.<sup>146</sup> Civil litigation may even serve to inspire radicals, since they can incite reactions to the damage they cause without any repercussions. When asked whether punitive damages have had a deterrent effect on SSTs, Stephen Flatow replied, “[n]ot really, since we have not been able to recover punitives and hit sponsors in the pocketbook.”<sup>147</sup> Thus, punitive damages awarded in civil terrorism litigation under FSIA do not fulfill the goals of retribution and deterrence.

### *B. Compensatory Damages Fail to Compensate Victims*

Compensatory damages are intended to redress the concrete loss that plaintiffs suffer because of defendants’ wrongful conduct.<sup>148</sup> Unlike criminal sanctions or punitive damages, compensatory damages are not a form of punishment.<sup>149</sup> Rather, their purpose is to make aggrieved parties whole to the extent that their injuries are measurable in monetary terms.<sup>150</sup> Since the terrorism exception of FSIA was instituted, however, various obstacles have prevented victims of terror from collecting any form of damages, compensatory or otherwise.<sup>151</sup> As described below, the main obstacle to compensation is the same as one of the main obstacles to deterrence of SSTs: political roadblocks. Thus, compensatory damages do not make plaintiffs whole in terrorism cases.

Legislators, judges, and terrorism victims have expressed their frustration with their inability to collect damages. During legislative hearings for one proposed solution, the Justice for Victims of Terrorism Act (JVTA), Senator Orrin Hatch said:

Unfortunately for [victims’ families], the Administration continues to fight the victims’ efforts in court—in effect taking a seat next to the terrorist states at the defense table in defending these actions. Now, not only must these families fight the terrorist states—they

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145. *Id.* at 609–10.

146. *See* discussion *supra* Part II.A.

147. Email Interview with Stephen Flatow, Founder, Alisa Flatow Memorial Fund (Feb. 5, 2012, 20:22 EST) (on file with author).

148. *See* 22 AM. JUR. 2D *Damages* § 27 (2012).

149. *Id.*

150. *Id.*

151. *See supra* Parts I.C–I.E (discussing the obstacles to collecting damages).

must also fight the Administration that had promised to support their efforts to obtain just compensation.<sup>152</sup>

Representative Bill McCollum, the sponsor of the JVTA in the House of Representatives, stated that “[r]ather than waging a war on terrorism, it appears the administration is fighting the victims of terrorism.”<sup>153</sup>

Another proponent of change is Judge Royce C. Lamberth of the District Court for the District of Columbia, who has presided over a number of private actions against Iran resulting in awards of multi-million dollar judgments for victims of state-sponsored terrorism.<sup>154</sup> Despite these decisions, Judge Lamberth comments that only political, not judicial, methods will provide victims with realistic prospects for obtaining compensation.<sup>155</sup> Judge Lamberth observed that the political branches, in enacting the terrorism exception, were “overlooking the proverbial elephant in the room—and that is the fact that these judgments are largely unenforceable due to the scarcity of Iranian assets within the jurisdiction of the United States courts.”<sup>156</sup> Fifteen years after the passage of the Amendment that bears his name, Flatow expresses a similar sentiment, lamenting that the government’s lack of support has greatly dulled the effectiveness of the civil suit as a “tool in the anti-terrorism arsenal.”<sup>157</sup>

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152. See SUITS AGAINST TERRORIST STATES, *supra* note 80, at 11 (citing *Terrorism: Victims’ Access to Terrorist Assets: Hearing Before the S. Comm. on the Judiciary*, 106th Cong. (1999) (statement of Sen. Hatch)). This Act was never passed, but would have amended FSIA to allow attachment of all assets of SSTs. See *id.*

153. See *id.* (citing *Justice for Victims of Terrorism Act: Hearing Before the Subcommittee on Immigration and Claims of the House Committee on the Judiciary*, 106th Cong. (2000) (statement of Rep. McCollum)).

154. See, e.g., *Beer v. Islamic Republic of Iran*, 789 F. Supp. 2d 14 (D.D.C. 2011); *Valore v. Islamic Republic of Iran*, 700 F. Supp. 2d 52 (D.D.C. 2010); *Acosta v. Islamic Republic of Iran*, 574 F. Supp. 2d 15 (D.D.C. 2008); *Estate of Heiser v. Islamic Republic of Iran*, 466 F. Supp. 2d 229 (D.D.C. 2006); *Blais v. Islamic Republic of Iran*, 459 F. Supp. 2d 40 (D.D.C. 2006); *Bodoff v. Islamic Republic of Iran*, 424 F. Supp. 2d 74 (D.D.C. 2006); *Stern v. Islamic Republic of Iran*, 271 F. Supp. 2d 286 (D.D.C. 2003); *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1 (D.D.C. 1998).

155. James P. Kreindler & Megan W. Benett, *Finding Justice for Victims of State-Sponsored Terrorism*, L.A. LAW., July–Aug. 2010, at 18, 18.

156. *Id.* at 18–20.

157. See Email Interview with Steven Flatow, *supra* note 147. According to Judge Lamberth, “what the Court sees in [Section 1605A] is not so much meaningful reform, but rather the continuation of a failed policy and an expansion of the empty promise that the FSIA terrorism exception has come to represent.” Kreindler & Benett, *supra* note 155, at 20.

In 2000, in an attempt to resolve this compensation issue, Congress enacted legislation<sup>158</sup> to pay portions of eleven selected judgments—ten against Iran and one against Cuba.<sup>159</sup> The legislation provided that, with respect to the judgment against Cuba, payment would be made out of Cuban assets in the United States that had been blocked since 1962.<sup>160</sup> With respect to the ten judgments against Iran, Congress directed that payment be made out of U.S. funds (up to a specified ceiling) and that the U.S. would then be entitled to seek reimbursement from Iran.<sup>161</sup> This limited compensation program drew much criticism. The Department of Treasury, rather than using Iranian blocked assets, used over \$350 million in U.S. funds to satisfy judgments, absolving Iran of its accountability and creating an unsustainable financial solution for the United States.<sup>162</sup> The legislation also failed to provide any procedure for claimants in suits other than those identified to satisfy their judgments.<sup>163</sup> For example, although there were six thousand legitimate outstanding claims against Cuba dating back to 1960, the government used \$96.7 million of the \$193.5 million of Cuba's frozen assets to provide compensation for a single terrorist act.<sup>164</sup> Since then, various members of Congress have submitted legislative proposals to continue fulfilling outstanding claims, but none have been adopted.<sup>165</sup> Today, claims remain unpaid and many victims remain uncompensated.

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158. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, §§ 2002–2003, 114 Stat. 1464, 1541–48 (2000) (codified as amended in scattered sections of 8, 20, 22, 27, 28, 42 U.S.C.).

159. See SUITS AGAINST TERRORIST STATES, *supra* note 80, at 17 (noting that these were cases that would reach final judgment after July 27, 2000: Wagner v. Islamic Republic of Iran, 172 F. Supp. 2d 128 (D.D.C. 2001); Polhill v. Islamic Republic of Iran, No. 00-1798, 2001 U.S. Dist. LEXIS 15322 (D.D.C. 2001); Jenco v. Islamic Republic of Iran, 154 F. Supp. 2d 27 (D.D.C. 2001); Sutherland v. Islamic Republic of Iran, 151 F. Supp. 2d 27 (D.D.C. 2001); Higgins v. The Islamic Republic of Iran, No. 1:99CV00377, 2000 WL 33674311 (D.D.C. Sept. 21, 2000); Eisenfeld v. Islamic Republic of Iran, 172 F. Supp. 2d 1 (D.D.C. 2000); Anderson v. Islamic Republic of Iran, 90 F. Supp. 2d 107 (D.D.C. 2000); Cicippio v. Islamic Republic of Iran, 18 F. Supp. 2d 62 (D.D.C. 1998); Flatow, 999 F. Supp. 1 (D.D.C. 1998); Alejandre v. Republic of Cuba, 996 F. Supp. 1239 (S.D. Fla. 1997).

160. See SUITS AGAINST TERRORIST STATES, *supra* note 80, at 1.

161. *Id.*

162. *See id.*

163. *See id.* There are approximately fifty outstanding judgments against Iran today. *See infra* note 104 and accompanying text.

164. *See* Alejandre v. Republic of Cuba, 996 F. Supp. 1239 (S.D. Fla. 1997) (awarding \$96 million out of the \$193.5 million available of blocked Cuban assets), *cited in* SUITS AGAINST TERRORIST STATES, *supra* note 80, at 1.

165. Congress directed the administration to submit a legislative proposal to establish “a comprehensive program to ensure fair, equitable, and prompt compensation for all United States victims of international terrorism” with its proposed budget, but none

## III.

PROPOSED LEGISLATION TO REPLACE THE  
FOREIGN SOVEREIGN IMMUNITIES ACT  
TERRORISM EXCEPTION

Since the FSIA terrorism exception was enacted, courts and Congress have attempted to compensate victims and deter SSTs through traditional tort damage awards.<sup>166</sup> These judicial efforts have gone unrealized, indicating that the courtroom may not be the appropriate forum to achieve such goals. With this in mind, I propose model legislation, the Foreign Sovereign Immunities Reform Act (FSIRA), to reform and revitalize FSIA, making it a practical piece of legislation that will promote Congress's original intent of compensation for victims and their families and deterrence of future terrorism. The legislation, found in the Appendix, is modeled after the 2008 Libyan Claims Resolution Act and the 9/11 Victim Compensation Fund, and is intended to serve as an example of a feasible alternative to the current FSIA terrorism exception.

A. *Model Legislation*

By eliminating the FSIA terrorism exception and implementing the proposed legislation in its place, Congress can greatly ameliorate the current problems with FSIA. Below, I provide a summary of the legislation, followed by a discussion of the three main objectives of FSIRA: to meet public policy goals, to streamline the system of relief, and to put victims' needs first.

1. *Summary of the Foreign Sovereign Immunities Reform Act of 2012*

The Foreign Sovereign Immunities Reform Act<sup>167</sup> replaces 28 U.S.C. §§1605A, 1605(a)(7), and 1610 with a comprehensive claims settlement system for all victims of state-sponsored terrorism who

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was offered. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 2002, Pub. L. No. 107-77, § 626, 115 Stat. 748, 803 (2002). In 2003, Senator Lugar proposed an administrative procedure to provide compensation to victims of international terrorism. *See Benefits for U.S. Victims of International Terrorism: Hearing on S. 1215 and S. 1275 Before the S. Comm. on Foreign Relations*, 108th Cong. (2003), available at <http://www.gpo.gov/fdsys/pkg/CHRG-108shrg90764/html/CHRG-108shrg90764.htm>. The bill was the subject of a hearing by the Senate Committee on Foreign Relations, but no further action was taken. *Id.*

166. *See* discussion *supra* Part II.A.

167. *See infra* Appendix. This proposal replaces the legislation, rather than providing an alternative, to promote efficiency in the judicial system.

qualify for compensation.<sup>168</sup> Under Section 5 of the proposed Act, an officer from within the Office of Foreign Assets Control (OFAC) will administer the compensation program, promulgate all procedural and substantive rules for the administration of the Act, and employ and supervise hearing officers and other administrative personnel to perform the duties of the Administrator.<sup>169</sup> Section 6 of the proposed Act allows a claimant to file a compensation claim for injuries sustained by a “terrorist attack” as it is defined by the proposed Act, using a standardized claim form developed by the Administrator.<sup>170</sup>

The proposed Act’s compensation scheme diverges from the current litigation system in three significant ways. First, under Section 6, victims are not eligible to recover punitive damages and claims are limited to the losses enumerated and defined within Section 4.<sup>171</sup> Recovery will be limited to the amount determined by the Administrator.<sup>172</sup> Second, by replacing the FSIA terrorism exception, the FSIRA substitutes the right to file a civil action for damages sustained as a result of a terrorist attack in federal or state court with the right to file a claim before the Administrator, and the Administrator’s decision is not appealable or reviewable by a court of law.<sup>173</sup> Finally, all claimants will receive written notice of the Administrator’s determination of their compensation amounts within 120 days of filing their claims and will be compensated within 120 days of receipt of the determination.<sup>174</sup> While plaintiffs—like the Weinstains—that bring suit under the FSIA exception may endure years of litigation without compensation,<sup>175</sup> claimants filing under the FSIRA will receive compensation within eight months. This time frame should be feasible because, once the Administrator determines the approximate amount OFAC will award per claim, claim settlement should become a fairly routine process.

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168. FOREIGN SOVEREIGN IMMUNITIES REFORM ACT OF 2012, §§ 3, 7(A) (Proposed Draft 2012) [hereinafter FSIRA].

169. The OFAC Director will appoint the Administrator. *See* FSIRA, *infra* Appendix, at § 5(A).

170. *See* FSIRA, *infra* Appendix, at §§ 4, 6(A)(1).

171. *See* FSIRA, *infra* Appendix, at §§ 4, 6(B)(2).

172. *Id.*

173. *See* FSIRA, *infra* Appendix, at §§ 5(A)(2), 6(B)(2). FSIRA could also be revised so as to not completely replace the FSIA terrorism exception and to allow the right to file a claim with the Administrator as an alternative to a civil damages suit.

174. *See* FSIRA, *infra* Appendix, at §§ 6(B)(2), 7(D).

175. *See supra* notes 24–28 and accompanying text.

## 2. *Meeting the Twin Policy Goals of Deterrence and Compensation*

The tort system can serve as a useful deterrent,<sup>176</sup> but as discussed in Part II it does not effectively deter SSTs because they are essentially judgment-proof under the existing FSIA.<sup>177</sup> Yet where litigation fails, legislation may succeed. Although the FSIRA eliminates punitive damages,<sup>178</sup> it may be able to deter SSTs more than tort damages have thus far. The amount per claim will be much lower than the \$300 million judgment in civil cases. Yet, as long as OFAC actually distributes Iranian frozen assets to victims, SSTs' blocked assets will, little by little, be affected by each claim. This approach can have an even stronger deterrent effect on "repeat players": SSTs that continuously sponsor terrorist attacks. These repeat tortfeasors have, thus far, been under-deterred by the tort system because they believe that they can act time and again without experiencing any financial consequences.<sup>179</sup> Once SSTs are required to pay compensatory damages to all victims of every terrorist attack, their behavior may realign accordingly.<sup>180</sup> Although it is difficult to predict what can truly deter terrorism, the proposed legislation offers a significant improvement over the current state of affairs by creating a viable threat to SSTs' financial resources.<sup>181</sup>

In terms of compensating victims, the amount granted to claimants will be less than they would receive through the tort system. As a comparison, the average award amount from the 9/11 Fund was \$1.49 million and the median award was \$1.23 million.<sup>182</sup> The 268 families of Lockerbie victims each received \$10 million from the Libyan gov-

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176. See *supra* Part II.A.

177. *Id.*

178. See FSIRA, *infra* Appendix, at § 6(B).

179. This concept is derived from Saul Levmore's theory of probabilistic recoveries. Although Levmore focuses on the area of products liability, his general proposition that tortfeasors who continually avoid liability are under-deterred by the tort system unless special measures are taken applies here. See generally Saul Levmore, *Probabilistic Recoveries, Restitution, and Recurring Wrongs*, 19 J. LEGAL STUD. 691, 696-98 (1990).

180. Of course, in the products liability context, the optimal level of deterrence may vary based on different factors and circumstances, while with terrorism, the "optimal" level of activity is clearly zero attacks.

181. See *supra* notes 140-41 and accompanying text.

182. Kelly A. Atherton, *Compensating Victims Under the "Terrorism-Exception" of the Foreign Sovereign Immunities Act: A State-Sponsored Victim's Compensation Fund*, 12 WILLAMETTE J. INT'L L. & DISP. RESOL. 158, 174 (2004).

ernment.<sup>183</sup> Yet, the exchange of a symbolic victory for a guarantee of actual payment may provide more satisfaction to some victims. When presented with the proposal, Stephen Flatow thought that a legislative solution was an “excellent idea” that “would save families many thousands of dollars in legal fees and upfront expenses.”<sup>184</sup> If implemented, the FSIRA will likely achieve the same results as the 9/11 Victim Compensation Fund, with similar limitations, in that a process intended to provide timely compensation for enormous harm cannot “fully replicate remedies provided by the slower, more cumbersome tort system or bring about a complete healing to those who have experienced heartbreaking loss.”<sup>185</sup> The proposed legislation, therefore, should be viewed as an improved mechanism to achieve FSIA’s original goals.

### 3. *Streamlining the System: OFAC as the Administrator of the Fund*

The Director of OFAC is a natural and efficient choice for the Administrator of distributing foreign funds to victims of terror. OFAC is the branch of the U.S. Department of the Treasury that “administers and enforces economic and trade sanctions” on foreign countries based on U.S. national security goals.<sup>186</sup> As an administrative agency, OFAC acts under executive powers “to impose controls on transactions and freeze assets under U.S. jurisdiction.”<sup>187</sup> OFAC also monitors various sanctions programs, including the Specially Designated Nationals List (SDN List),<sup>188</sup> Counter Terrorism Sanctions, and Iranian Sanctions.<sup>189</sup> Under Executive Order 13,224, *Blocking Property and Prohibiting Transactions with Persons who Commit,*

183. *Libya Pays \$1.5 Billion to Settle Terrorism Claims*, CNN (Oct. 31, 2008), [http://articles.cnn.com/2008-10-31/world/libya.payment\\_1\\_disco-bombing-moammar-gadhafi-lockerbie-case/2?\\_s=PM:WORLD](http://articles.cnn.com/2008-10-31/world/libya.payment_1_disco-bombing-moammar-gadhafi-lockerbie-case/2?_s=PM:WORLD).

184. Email Interview with Steven Flatow, *supra* note 147.

185. Robert M. Ackerman, *The September 11th Victim Compensation Fund: An Effective Administrative Response to National Tragedy*, 10 HARV. NEGOT. L. REV. 135, 139 (2005).

186. *Office of Foreign Assets Control (OFAC)*, U.S. DEP’T OF THE TREASURY, <http://www.treasury.gov/about/organizational-structure/offices/Pages/Office-of-Foreign-Assets-Control.aspx> (last visited Apr. 9, 2012).

187. *Id.* For example, following the entry of China into the Korean War, President Truman, through OFAC, blocked all Chinese and North Korean assets subject to U.S. jurisdiction. *Id.*

188. *Specially Designated Nationals List*, U.S. DEP’T OF THE TREASURY, <http://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx> (last updated Feb. 26, 2012).

189. *Office of Foreign Assets Control (OFAC)*, U.S. DEP’T OF THE TREASURY, <http://www.treasury.gov/about/organizational-structure/offices/Pages/Office-of-Foreign-As->

*Threaten to Commit, or Support Terrorism*, OFAC already has a mechanism in place from which to draw funding for the victim repayment fund.<sup>190</sup> By designating OFAC as the agency to oversee distribution of funds, Congress could create an efficient “one-stop shop” for blocking SSTs’ assets and distributing them directly to victims.<sup>191</sup>

Currently, the judicial system is an inefficient and ineffective distributor of foreign assets to victims. The *Weinstein* line of cases epitomizes this problem.<sup>192</sup> For years following their original favorable 2001 decision, the Weinstein family was unable to collect their outstanding judgment and sought different means of payment.<sup>193</sup> After the enactment of the Terrorism Risk Insurance Act,<sup>194</sup> the Weinsteins brought suit in the Eastern District of New York to attach assets that defendant Bank Melli had in the Bank of New York.<sup>195</sup> The entire 2004 litigation turned on whether OFAC considered the assets in the Bank of New York to be “blocked assets” under the TRIA that could therefore be seized by the court to satisfy the outstanding judgment.<sup>196</sup> While OFAC had the capacity to easily block the Bank’s assets, the Director submitted a statement of interest asserting that the Banks’ assets are not subject to attachment under the TRIA.<sup>197</sup> The court ruled in accordance with OFAC that these specific assets could not be attached.<sup>198</sup>

For the next three years, the Weinsteins could not collect any money. Then, on October 25, 2007, OFAC formally designated Bank Melli as a proliferator of weapons of mass destruction under Execu-

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sets-Control.aspx (last visited Apr. 9, 2012) (providing information, under the “Resources” tab, about OFAC’s sanctions programs).

190. See OFFICE OF FOREIGN ASSETS CONTROL, WHAT YOU NEED TO KNOW ABOUT U.S. SANCTIONS 1 [hereinafter WHAT YOU NEED TO KNOW ABOUT U.S. SANCTIONS], available at <http://www.treasury.gov/resource-center/sanctions/Programs/Documents/terror.pdf>.

191. The simultaneous control and distribution of blocked assets should not present any administrative agency issues. The system would be similar to an organization such as the Department of Housing and Urban Development, which controls government funds and distributes grants. See *CPD Laws and Regulations*, U.S. DEP’T OF HOUS. & URBAN DEV., [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/comm\\_planning/lawsregs](http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/lawsregs) (last visited Mar. 30, 2012).

192. *Weinstein* is an especially interesting case in this regard, because the defendant is actually an instrumentality of Iran and, more specifically, a bank with a branch in the United States.

193. See *Weinstein v. Islamic Republic of Iran*, 299 F. Supp. 2d 63, 65 (E.D.N.Y. 2004).

194. See discussion *supra* note 88.

195. *Weinstein*, 299 F. Supp. 2d at 63–64.

196. See *id.* at 64.

197. *Id.*

198. *Id.* at 76.

tive Order 13,382.<sup>199</sup> After that designation, it took the Weinstains two more years to find real estate property that was suitable for attachment and to get back into court.<sup>200</sup> Once the district court upheld the attachment, the Weinstains had to wait another year for the Second Circuit to affirm the judgment, a determination identical to the one that OFAC likely would have reached, but after over a decade of costly litigation.<sup>201</sup> Because OFAC already essentially serves as the final arbiter of foreign asset allocation, it is sensible and efficient to use the agency as the primary mechanism for distribution of funds to terror victims.

#### 4. *Victims First: Modeling the Foreign Sovereign Immunities Reform Act After the 9/11 Compensation Fund and the Libyan Claims Resolution Act*

Ultimately, the 9/11 Victim Compensation Fund, the Libyan Claims Resolution Act, and the proposed FSIRA have one key feature in common: they all put victims of terror first. These three pieces of legislation all make the important and necessary statement that American terrorism victims matter more than transnational politics and appeasing rogue states. As FSIA currently stands, bureaucracy, politics, and inefficient resource allocation all interfere with the goal of making victims whole. Following the lead of the 9/11 Fund and the Libyan Claims Act, Congress could demonstrate that it has not forgotten about American victims of international terrorism by enacting the FSIRA.<sup>202</sup>

The 2008 Libyan Claims Resolution Act serves as an excellent example of how restructuring a reparations model can repair an ineffective compensation system.<sup>203</sup> In 1988, the terrorist bombing of Pan Am Flight 103 over Lockerbie, Scotland killed 270 people, including 189 Americans.<sup>204</sup> Tremendous pressure from victims' families helped spawn the 1996 AEDPA amendment to FSIA to allow families to sue

199. See *Weinstein v. Islamic Republic of Iran*, 624 F. Supp. 2d 272, 273 (E.D.N.Y. 2009), *aff'd*, 609 F.3d 43 (2d Cir. 2010).

200. See *id.*

201. *Weinstein v. Islamic Republic of Iran*, 609 F.3d 43 (2d Cir. 2010); see also *Bank Melli Iran v. Weinstein*, No. 10-947, 2011 WL 220712 (U.S. Jan. 18, 2011).

202. During my interview with Mr. Flatow, he lamented, "We viewed a civil suit as another tool in the anti-terrorism arsenal; we thought, wrongfully it turns out, that the government would be glad to see us do this and help us in any way it could." Email Interview with Steven Flatow, *supra* note 147.

203. See *Libyan Claims Resolution Act*, Pub. L. No. 110-301, 122 Stat. 2999 (2008).

204. Elise Labott, *U.S., Libya Deal Closes Book on Lockerbie*, CNN (Aug. 14, 2008), [http://articles.cnn.com/2008-08-14/world/lockerbie\\_1\\_lockerbie-victims-libya-deal-jim-kreindler?\\_s=PM:WORLD](http://articles.cnn.com/2008-08-14/world/lockerbie_1_lockerbie-victims-libya-deal-jim-kreindler?_s=PM:WORLD).

Libya in federal courts.<sup>205</sup> Just like today's terrorism victims, the families were unable to collect their judgments.<sup>206</sup> After twenty years of futile civil litigation against Libya, diplomatic and judicial negotiations finally came to a close when the United States and Libya signed a deal for the State Department to create a \$1.8 billion compensation fund to finalize payments to victims of the bombing.<sup>207</sup> Tripoli sought the legislation to encourage U.S. companies to invest in Libya without fear of being sued by terrorism victims or their families.<sup>208</sup> Following the resolution, Kara Weipz, whose twenty-year-old brother Richard was killed in the attack,<sup>209</sup> stated, that "For many years, we were the forgotten victims of terrorism. Today is historic because Libya has finally fulfilled 100% justice to the Pan Am 103 families."<sup>210</sup> Senator Frank Lautenberg, the New Jersey Democrat who sponsored the original legislation to allow compensation, added, "Libya will finally be held accountable . . . [o]ur bill becoming law means these victims and their families can get the long overdue justice they deserve."<sup>211</sup> The success of the Libya settlement demonstrates that the best (and perhaps the only) way to obtain cooperation from a foreign government that has sponsored terrorism is through legislative, rather than judicial, efforts.<sup>212</sup>

In order to serve as the most efficient system for victims seeking speedy resolution of their claims, the procedural aspects of FSIRA mirror those of the 9/11 Fund's. As described above, like the 9/11 Fund, FSIRA has an appointed Administrator, whose task involves specifically adhering to a strict deadline by which to resolve claims, in contrast to the cumbersome litigation system.<sup>213</sup> Claims under FSIRA

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205. See discussion *supra* Part I.C.

206. See, e.g., *Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239, 247 (2d Cir. 1996).

207. *Libya Pays \$1.5 Billion to Settle Terrorism Claims*, CNN (Oct. 31, 2008), [http://articles.cnn.com/2008-10-31/world/libya.payment\\_1\\_disco-bombing-moammar-gadhafi-lockerbie-case?\\_s=PM:WORLD](http://articles.cnn.com/2008-10-31/world/libya.payment_1_disco-bombing-moammar-gadhafi-lockerbie-case?_s=PM:WORLD).

208. See *id.*

209. Edward Colimore, *For Lockerbie Families, A Sense of Justice—and Work Still Undone*, THE INQUIRER, Oct. 21, 2011, [http://articles.philly.com/2011-10-21/news/30305607\\_1\\_libyan-people-moammar-gadhafi-megrahi](http://articles.philly.com/2011-10-21/news/30305607_1_libyan-people-moammar-gadhafi-megrahi).

210. *Lockerbie Families Claim Victory*, BBC NEWS (Nov. 21, 2008), <http://news.bbc.co.uk/2/hi/americas/7741017.stm>.

211. *Bush Passes Law Allowing Libyan Compensation Deal*, DAILY TIMES (Lahore), Aug. 6, 2008, [http://www.dailytimes.com.pk/default.asp?page=2008\08\06\story\\_6-8-2008\\_pg4\\_6](http://www.dailytimes.com.pk/default.asp?page=2008\08\06\story_6-8-2008_pg4_6).

212. Kreindler & Benett, *supra* note 155, at 20.

213. See September 11th Victim Compensation Fund of 2001, Pub. L. No. 107-42, §§ 401–409, 115 Stat. 237, 237–41 (codified at 49 U.S.C. § 40101 (2006)); see also Ackerman, *supra* note 185, at 220–21.

are far more limited than tort actions brought in the courts, but the swift payments will provide victims the opportunity to “reconstruct their lives[ ] and provide an element of closure,” without the expense and inconvenience that plagues the tort system.<sup>214</sup>

In addition, the legislative model recognizes victims of terror as an important constituency in counterterrorism. Victims of international terrorism may experience collective action problems that the victims of the 9/11 and Libyan attacks did not face. By legitimizing these victims and giving them access to effective remedies, the FSIRA empowers plaintiffs in seeking what is rightfully theirs. Just as the September 11th and Lockerbie victims are valuable voices within the current counterterrorism dialogue, victims of state-sponsored terrorism deserve to be introduced into the conversation.

### *B. Potential Criticisms of the Foreign Sovereign Immunities Reform Act*

Critics may find fault with the above legislative method for reforming FSIA. The primary critiques would likely be political pushback, diplomacy disruptions, and feasibility concerns. In this Subpart, I will address each concern in turn.

#### *1. Political Pushback*

Critics may argue that it would take a tremendous amount of political capital to roll back the FSIA amendments. For the most part, Congress acted with great fervor and unity in the face of the September 11th terrorist attacks to pass some of these provisions<sup>215</sup> and it is possible that some current members of Congress may be reluctant to revoke the terrorism exception.

However, many members of Congress are likely dissatisfied with the direction that civil counterterrorism litigation has taken since the enactment of these amendments. Many people who initially supported the FSIA terrorism amendments now find themselves disappointed by the judicial process as a mechanism for relief.<sup>216</sup> Even those still in favor of the amendments may be persuaded to adopt the legislation in an attempt to achieve the original goals of FSIA. FSIRA will still deter state sponsors of terrorism through the administrative law system, but victims will be compensated more quickly and adequately. Members

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214. See Ackerman, *supra* note 185, at 228.

215. See *supra* Part I.

216. When asked about the success of civil litigation, Flatow offered a candid response: “[W]e thought it would work but ultimately failed.” E-mail Interview with Steven Flatow, *supra* note 147.

of Congress seeking to protect victims' interests, therefore, might be persuaded to exchange symbolic victory against SSTs for actual compensation. FSIRA may also appeal to legislators eager to keep foreign policy in the hands of the executive branch (and who may have opposed amending FSIA in the first place).

Assuming that Congress would be willing to adopt legislation in place of the FSIA terrorism exception, FSIRA is also more likely to be adopted than previously proposed legislation. Unlike the compensation scheme enacted in 2000,<sup>217</sup> which spent a large amount of U.S. funds to compensate very few victims, FSIRA limits the recovery on each claim to a sum determined by an OFAC Administrator. This sum will be linked to the amount of blocked assets OFAC is realistically willing to put toward victim compensation. By limiting claim amounts, this legislation has the potential to succeed in paying victims using SST assets where other proposals have not.

## 2. *Diplomacy Considerations*

Congress and the executive branch cannot ignore diplomatic concerns, especially given the United States' precarious relationship with Iran.<sup>218</sup> In fact, diplomacy has always been in the background of negotiations between the executive and Congress regarding the compensation of victims.<sup>219</sup> It would be irresponsible for Congress to simply freeze and distribute Iranian assets freely, without concern for the consequences.<sup>220</sup> In some ways, it seems quite unrealistic to put victims first when there is legitimate fear of retaliation from Iran.<sup>221</sup> The United States may also wish to retain frozen Iranian assets as a "carrot" in the ongoing dialogue on Iranian sanctions.

Yet FSIRA does not necessarily thwart these valid diplomatic objections. First, the model legislation gives OFAC, through its Admin-

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217. See discussion *supra* Part II.B (discussing the 2000 TVPA provision).

218. See *Iran*, U.S. DEP'T OF STATE, <http://www.state.gov/r/pa/ei/bgn/5314.htm> (last visited Feb. 23, 2012) ("Sanctions have been imposed on Iran because of its sponsorship of terrorism, its refusal to comply with international obligations on its nuclear program, and its human rights violations.").

219. See *supra* note 91 and accompanying text.

220. See *Justice for Victims of Terrorism Act: Hearing Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 106th Cong. 101 (2000) (statements of Stuart E. Eizenstat, Treasury Deputy Sec'y, Walter Slocombe, Defense Dep't Undersec'y for Policy, and Thomas Pickering, State Dep't Undersec'y for Policy) ("[B]locking of assets of terrorist states is one of the most significant economic sanctions tools available to the President.").

221. See *U.S. Relations with Iran*, U.S. DEP'T OF STATE (Aug. 22, 2012), <http://www.state.gov/r/pa/ei/bgn/5314.htm> ("The United States has long-standing concerns over Iran's nuclear program, sponsorship of terrorism, and human rights record.").

istrator, the flexibility to attach assets in ways that need not incite the Iranian government but will still adequately compensate victims.<sup>222</sup> For example, while Bank Melli is technically an instrumentality of the Iranian government, it is also a financial institution that has been independently designated a sponsor of terrorism.<sup>223</sup> Attachment of the Bank's funds, therefore, seems distant enough from the transnational stage to remove the concern of retaliation while at the same time deterring future quasi-private sponsors of terrorism like the Bank. By designating OFAC as the ultimate arbiter over the claims process, the executive branch will be able to maintain control over which assets are used as sanctions, incentives, and victim compensation.

It is also worth noting that embedded in the diplomatic conversation is a fundamental misstep. It would be disingenuous of the United States to encourage victims to spend money on litigation, allow courts to award them millions of dollars in punitive damages, and never have any intention of actually fulfilling judgments because of political concerns. If this is indeed the case, by passing this legislation, Congress forces the executive branch to either compensate victims or openly acknowledge its lack of commitment to victims of terrorism.

### 3. *Feasibility Concerns*

Some may raise the concern that OFAC will not be able to adequately compensate each victim under the Fund. It is difficult to determine precisely how much money would be available for the Fund based on information from OFAC's 2011 Terrorist Assets Report.<sup>224</sup> According to the data presented, however, it seems that there are sufficient assets to satisfy victims' claims.<sup>225</sup> In the report, OFAC states that there are over \$520 million in SST assets located in the United States.<sup>226</sup> Currently, \$398 million of those assets are deemed "blocked," although OFAC may redesignate unblocked assets as "blocked" at any time.<sup>227</sup> The report mentions in a footnote that "OFAC is also aware of non-blocked debt securities relating to Iran with a nominal value of approximately \$2 billion custodized in New

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222. OFAC retains a list of blocked and non-blocked assets and if the agency wishes to redesignate an entity as blocked, it has discretion to do so. *WHAT YOU NEED TO KNOW ABOUT U.S. SANCTIONS*, *supra* note 190.

223. *See supra* note 199 and accompanying text (discussing Bank Melli's designation as a "proliferator of weapons of mass destruction").

224. *TERRORIST ASSETS REPORT*, *supra* note 140.

225. *See id.* at 14.

226. *See id.*

227. For example, Bank Melli's assets were redesignated as "blocked" in 2007. *See supra* note 199 and accompanying text.

York. The securities and related assets are subject to litigation and have been restrained by court order.”<sup>228</sup>

Additionally, OFAC’s report does not itemize or include the value of the real estate properties of SSTs and their instrumentalities located in the United States.<sup>229</sup> For example, Bank Melli’s property attached in the *Weinstein* case is not included in OFAC’s report. Theodore Olson, a former U.S. Solicitor General, and attorney for Daniel Miller, a plaintiff in *Rubin v. Iran*, even went as far as accusing the U.S. State Department of “aiding and abetting Iranian terrorism by supporting Iran’s attempts to conceal its assets” by refusing plaintiff creditors’ discovery requests regarding Iranian assets.<sup>230</sup> As discussed above, the proposed legislation would likely result in awards to victims on a scale similar to the average award from the 9/11 Fund—about \$1.5 million per claim.<sup>231</sup> Using a payment pattern similar to that of the 9/11 Fund, it should be feasible for OFAC to find sufficient assets to compensate these victims under the fund with assets left over for diplomatic purposes.

This situation is distinct from the idiosyncratic nature of both the Lockerbie bombing and the September 11th attacks. Both of those attacks were solitary occurrences and thus had a set number of victims. Meanwhile, the ongoing threat of international terrorism makes it likely that new claimants will come forward to recover under FSIRA, so the FSIRA fund must be carefully monitored to avoid depletion. Furthermore, the United States financed the 9/11 Fund, and the Libyan Claims Resolution arose out of diplomatic negotiations with the Libyan government. FSIRA is an unusual remedy because it allocates foreign sovereign funds within the control of the United States to U.S. citizens. Yet a unique solution is exactly what is necessary to achieve Congress’s goal as expressed in the 1996 FSIA terrorism exception.

Litigation has led to an unwieldy and unsustainable state of affairs. For decades, judges have adjudicated a myriad of individual cases, handing down hundreds of millions of dollars in unattainable damages awards to plaintiffs across the country,<sup>232</sup> while failing to fully compensate even a single victim. FSIRA eliminates punitive damages, creating realistic individual awards and allowing victims to

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228. TERRORIST ASSETS REPORT, *supra* note 140, at 10 n.12.

229. *See id.* at 14.

230. Joanna Paraszczuk, *US Gov’t Opposes Forcing Iran to Reveal Its American Assets*, JERUSALEM POST, (June 12, 2012), <http://www.jpost.com/International/Article.aspx?id=273515>.

231. *See supra* note 182 and accompanying text.

232. *See* discussion *supra* Part I (regarding the difficulty of collecting damages).

actually receive compensation for their losses from the pockets of terrorist states. Finally, in an ideal (albeit highly unlikely) scenario, passing this proposed legislation may even spur a chain of diplomatic events similar to those following the Libyan Claims Resolution Act. Once SSTs realize that they will be liable to victims, it may be more cost effective for them to negotiate with the United States to reach a solution.<sup>233</sup>

### CONCLUSION

Since the September 11th terrorist attacks, the legislative branch has taken great strides in compensating victims of terrorism for their losses.<sup>234</sup> Congress successfully created the 9/11 Victim Compensation Fund for relatives of those who died in the World Trade Center.<sup>235</sup> Victims of the Lockerbie bombing have also obtained finality and feel that justice has been fulfilled.<sup>236</sup> Yet a third group of equally important American victims remains forgotten.

Despite popular, legislative, and judicial consensus that SSTs should compensate victims of terrorism for their losses, FSIA's terrorism exception has failed to achieve this goal. Numerous Congressional attempts to provide victims with the tools necessary to prevail in court against SSTs<sup>237</sup> have proven futile in the face of many insurmountable obstacles. In 2001, the Senate noted that:

Objections from all quarters have been repeatedly raised against the current ad hoc approach to compensation for victims of international terrorism. Objections and concerns, however, will no longer suffice. It is imperative that the Secretary of State, in coordination with the Departments of Justice and Treasury and other relevant agencies, develop a legislative proposal that will provide fair and prompt compensation to all U.S. victims of international terrorism. A compensation system already is in place for the victims of the September 11 terrorist attacks; a similar system should be available to victims of international terrorism.<sup>238</sup>

Over a decade later, this advice has yet to be implemented, to the detriment of victims of international terrorism. Sixteen years after

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233. For example, if Iran were to voluntarily contribute to the fund (as the model legislation allows for, see FSIRA, *infra* Appendix, at § 7), this contribution could be used as a bargaining chip in future efforts to lift sanctions.

234. See *supra* note 32 and accompanying text.

235. See Air Transportation Safety and System Stabilization Act of 2001, Pub. L. No. 107-42, §§ 401-409, 115 Stat. 230, 237-41 (2001).

236. See *supra* note 209 (quoting Kara Weipz).

237. See *supra* Part I (discussing the difficulty of implementing the FSIA exception).

238. See *SUITS AGAINST TERRORIST STATES*, *supra* note 80, at 18 (citing H.R. REP. NO. 107-278, 107th Cong. (Nov. 9, 2001)).

watching their beloved father and husband suffer an agonizing death, and despite endless promises from the legislature, the Weinstein family has yet to find closure. By repealing the FSIA terrorism exception and implementing the FSIRA, Congress can finally achieve justice for its citizens in a fair, comprehensive, and speedy manner.

## APPENDIX

THE FOREIGN SOVEREIGN IMMUNITIES REFORM ACT OF 2012<sup>239</sup>

To resolve pending claims against foreign sovereigns by U.S. nationals for acts of terror committed by a foreign sovereign or its instrumentalities, affecting U.S. nationals and their families.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

## SEC 1. SHORT TITLE

This title may be cited as the “Foreign Sovereign Immunities Reform Act of 2012.”

## SEC 2. PURPOSE

It is the purpose of this act to provide compensation to any national of the United States (or relatives of a deceased U.S. national) who was physically injured or killed as a result of any terrorist attacks committed by a state sponsor of terrorism or its instrumentalities.

## SEC 3. STATEMENT OF CONGRESS

Congress supports the President in his efforts to provide fair compensation to all nationals of the United States who have terrorism-related claims against a foreign sovereign and its instrumentalities through a comprehensive claims settlement by such nationals against the sovereign administered by the Office of Foreign Assets Control (OFAC) of the U.S. Department of the Treasury.

## SEC 4. DEFINITIONS

For the purposes of this Title, the following definitions shall apply:

- (1) CLAIMANT—The term “claimant” means an individual filing a claim for compensation under section 6.
- (2) ECONOMIC LOSS—The term “economic loss” means any pecuniary loss resulting from harm (including the loss of earnings or other benefits related to employment, medical expense loss, replacement services loss, loss due to death, burial costs, and loss of business or employment opportunities) to the extent recovery for such loss is allowed under applicable state law.

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239. This legislation is modeled after the Libyan Claims Resolution Act, Pub. L. No. 110-301, 122 Stat. 2999 (2008), and the September 11th Victims Compensation Fund of 2001, Pub. L. No. 107-42, §§ 401–409, 115 Stat. 230, 237–41 (codified at 49 U.S.C. § 40101 (2006)).

(3) **ELIGIBLE INDIVIDUAL**—The term “eligible individual” means an individual determined to be eligible for compensation under section 6.

(4) **NONECONOMIC LOSSES**—The term “noneconomic losses” means losses for physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium (other than loss of domestic service), hedonic damages, injury to reputation, and all other nonpecuniary losses of any kind or nature.

(5) **ADMINISTRATOR**—The term “Administrator” means the Administrator appointed under section 5.

(6) **NATIONAL OF THE UNITED STATES**—The term “national of the United States” has the meaning given that term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(22)).

(7) **STATE SPONSOR OF TERRORISM**—The term “state sponsor of terrorism” means a country and its instrumentalities, the government of which the Secretary of State has determined is a government that has repeatedly provided support for acts of international terrorism.

(8) **ACT OF TERRORISM**—The terms “act of terrorism” or “terrorist attack” have the meaning given the term “international terrorism” in 18 U.S.C. § 2331(1).<sup>240</sup>

## SEC 5. ADMINISTRATION

### (A) IN GENERAL

(1) The Director of the Office of Foreign Assets Control, acting through an Administrator appointed by the Director, shall—

a. Administer the compensation program established under this title;

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240. “International terrorism” has the following meaning:

[A]ctivities that—involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State[;] . . . appear to be intended—to intimidate or coerce a civilian population; to influence the policy of a government by intimidation or coercion; or to affect the conduct of a government by mass destruction, assassination, or kidnapping; and occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum[.]

18 U.S.C. § 2331(1) (2006).

- b. Promulgate all procedural and substantive rules for the administration of this title; and
  - c. Employ and supervise hearing officers and other administrative personnel to perform the duties of the Administrator under this title.
- (B) **AUTHORITY OF THE ADMINISTRATOR**—The administration of the program by the Director referred to in subsection (A)(1) may not be delegated, and shall not be subject to judicial review.
- (C) **AUTHORIZATION OF APPROPRIATIONS**—There are authorized to be appropriated such sums as may be necessary to pay the administrative and support costs for the Administrator in carrying out this title.

**SEC 6. DETERMINATION OF ELIGIBILITY FOR COMPENSATION AND PAYMENT STRUCTURE**

(A) **FILING OF CLAIM**—

- (1) **IN GENERAL**—A claimant may file a claim for compensation under this title with the Administrator. The claim shall be on the form developed under paragraph (2) and shall state the factual basis for eligibility for compensation and the amount of compensation sought.
- (2) **CLAIM FORM**—The Administrator shall develop a claim form that claimants shall use when submitting claims under paragraph (1). The Administrator shall ensure that such form can be filed electronically, if determined to be practicable.
- (3) **CONTENTS OF FORM**—The form developed under subparagraph (2) shall request:
  - (i) Information from the claimant concerning the physical harm that the claimant suffered, or in the case of a claim filed on behalf of a decedent information confirming the decedent's death, as a result of a terrorist attack by a state sponsor of terrorism; and
  - (ii) Information from the claimant concerning any possible economic and noneconomic losses that the claimant suffered as a result of the attack.

(B) **REVIEW AND DETERMINATION**—

- (1) **REVIEW**—The Administrator shall review a claim submitted under subsection (A) and determine—
  - (i) whether the claimant is an eligible individual under subsection (c);

- (ii) with respect to a claimant determined to be an eligible individual—
  1. the extent of the harm to the claimant, including any economic and noneconomic losses; and
  2. the amount of compensation to which the claimant is entitled based on the harm to the claimant, the facts of the claim, and the individual circumstances of the claimant.
  3. The Administrator shall not consider negligence or any other theory of liability.
- (2) DETERMINATION—Not later than 120 days after that date on which a claim is filed under subsection (a), the Administrator shall complete a review, make a determination, and provide written notice to the claimant, with respect to the matters that were the subject of the claim under review. Such a determination shall be final and not subject to judicial review.
  - (i) RIGHTS OF CLAIMANT—A claimant in a review under paragraph (1) shall have—
    1. the right to be represented by an attorney;
    2. the right to present evidence, including the presentation of witnesses and documents; and
    3. any other due process rights determined appropriate by the Administrator.
  - (ii) NO PUNITIVE DAMAGES—The Administrator may not include amounts for punitive damages in any compensation paid under a claim under this title.
  - (ii) COLLATERAL COMPENSATION—The Administrator shall reduce the amount of compensation determined under paragraph (i)(2)(b) by the amount of the collateral source compensation the claimant has received or is entitled to receive as a result of the terrorist attack.
- (c) ELIGIBILITY—
  - (1) IN GENERAL—A claimant shall be determined to be an eligible individual for purposes of this subsection if the Administrator determines that such claimant—
    - (i) is an individual described in paragraph (2); and
    - (ii) meets the requirements of paragraph (3).
  - (2) INDIVIDUALS —A claimant is an individual described in this paragraph if the claimant is—
    - (i) an individual who—

1. was present at a terrorist attack committed by a state sponsor of terrorism; and
2. suffered physical harm or death as a result of such an attack;
3. in the case of a decedent who is an individual described in subparagraph (a) or (b), the personal representative of the decedent who files a claim on behalf of the decedent.

(3) REQUIREMENTS—

(i) SINGLE CLAIM—Not more than one claim may be submitted under this title by an individual or on behalf of a deceased individual.

(ii) LIMITATION ON CIVIL ACTION—

1. IN GENERAL—Upon the submission of a claim under this title, the claimant waives the right to file a civil action (or to be a party to an action) in any Federal or State court for damages sustained as a result of the terrorist attack. The preceding sentence does not apply to a civil action to recover collateral source obligations.

2. PENDING ACTIONS—In the case of an individual who is a party to a civil action described in clause (i), such individual may not submit a claim under this title unless such individual withdraws from such action by the date that is 90 days after the date on which regulations are promulgated under section 407.

SEC. 7: RECEIPT OF ADEQUATE FUNDS AND DISTRIBUTION OF APPROPRIATED FUNDS

(A) IN GENERAL—

(1) A state sponsor of terrorism and its agencies or instrumentalities, and the property of said sponsor, shall no longer be subject to the exceptions to immunity from jurisdiction, liens, attachment, and execution, nor any of the provisions contained in the previously-existing section 1605A, 1605(a)(7), or 1610 of title 28, United States Code.

(2) The provisions listed in Section 7(A)(1) will be replaced by the claim system developed by the Administrator in Section 6 of the Act.

(B) ALLOCATION OF FUNDS—

- (1) The funds for the claim system will come from “blocked assets” of the state sponsor of terrorism responsible for the act of terrorism in question;
  - (i) The Administrator will determine, in accordance with OFAC regulations, which assets are considered “blocked” for the purposes of paragraph (a).
  - (ii) Monies may also come from contributions the state sponsor may wish to deposit into the victims’ fund.
- (C) IMMUNITY—
  - (1) IN GENERAL —Notwithstanding any other provision of law, the Administrator has the authority to designate any assets described in subparagraph (B) immune from attachment or any other judicial process. Such immunity shall be in addition to any other applicable immunity.
  - (2) ASSETS DESCRIBED —The assets described in this subparagraph include any assets that—
    - (i) relate to the claims agreement; and
    - (ii) for the purpose of implementing the claims agreement, are—
      1. held by an entity designated as a state sponsor of terrorism by the Administrator under Section 4;
      2. transferred to the entity; or
      3. transferred from the entity.
- (D) DISTRIBUTION OF FUNDS TO ELIGIBLE INDIVIDUALS
  - (1) IN GENERAL—Not later than 120 days after the date on which a determination is made by the Administrator regarding the amount of compensation due a claimant under this title, the Administrator shall authorize payment to such claimant of the amount determined with respect to the claimant.
  - (2) BUDGET AUTHORITY—This title constitutes budget authority and represents the obligation of state sponsors of terrorism to provide for the payment of amounts for compensation under this title.

END OF MODEL LEGISLATION