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Hell-Bent on Awarding Recovery to Terrorism Victims: The Evolution and Application of the Antiterrorism Amendments to the Foreign Sovereign Immunities Act

I. Introduction

In direct response to the Lebanon hostage crisis and to attacks that claimed the lives of an American college student studying in Israel, three American civilian pilots on a humanitarian mission over the Florida Straits, and 189 American passengers on a commercial jet bound from London to New York, Congress strengthened the U.S. antiterrorism regime with sweeping new legislation. The most radical of several initiatives taken by Congress was the amendment of the Foreign Sovereign Immunities Act (FSIA)¹ in 1996 and 1998. The amendments allowed the federal courts of the United States unilaterally to exercise jurisdiction in civil suits over foreign sovereigns responsible for committing or supporting acts of international terrorism against Americans.² The amendments also gave the courts great power to abridge foreign sovereign immunity by authorizing the attachment and execution of property of the foreign state located in the United States to satisfy judgments obtained by terrorism victims.³

The passage of the legislation, although designed to compensate victims and their families, opened a Pandora's box and divided the branches of federal government when plaintiffs sought relief under its provisions. Although at the signing ceremony for the 1996 Antiterrorism and Effective Death Penalty Act (AEDPA)⁴, President Clinton publicly pledged his support for the

1. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1601-1611 (1994 & Supp. 1998).

2. See 28 U.S.C. § 1605(a)(7) (Supp. 1998).

3. See 28 U.S.C. § 1610(a)(7) (Supp. 1998).

4. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-

families of the victims of terrorism,⁵ his Administration subsequently worked to undermine the effectiveness of the new amendments. In two very prominent cases, *Flatow v. Islamic Republic of Iran*⁶ and *Alejandro v. Republic of Cuba*⁷, the Administration actively intervened and opposed enforcement of judgments obtained against foreign state sponsors of terrorism. As a result, many observers, including the plaintiffs in those cases, characterized the government's actions as one hand taking away what another hand gave.⁸

This comment examines the controversy surrounding enforcement of judgments under the antiterrorism amendments to the FSIA. Section two reviews the structure and development of the 1996 and 1998 amendments, as well as the political climate that facilitated the passage of the legislation. Section three briefly highlights the legal obstacles to recovery encountered by the plaintiffs in *Flatow* and *Alejandro* after money damages were awarded under the amendments. Section four draws examines the position of the Executive branch with respect to enforcement of judgments against terrorist states and considers the effect of the government's intervention in litigation filed under the antiterrorism amendments. Section five discusses the October 2000 amendments to Congress' antiterrorism regime and questions whether the new

132, 110 Stat. 1214 (1996).

5. See Remarks on Signing the Antiterrorism and Effective Death Penalty Act of 1996, PUB. PAPERS, Administration of William J. Clinton, 1996, Book 1 (Apr. 24, 1996):

[L]et us honor those who lost their lives by resolving to hold fast against the forces of violence and division, by never allowing them to shake our resolve or break our spirit, to frighten us into sacrificing our sacred freedoms or surrendering a drop of precious American liberty. Rather we must guard against them, speak against them, and fight against them.

I'd like to close with a word to all of the family members of Americans slain by terrorists and to the survivors of terrorism Your vigilance has sharpened our vigilance. And so I sign my name to this bill, in your names. We renew our fight against those who seek to terrorize us, in your names. We send a loud, clear message today all over the world, in your names: America will never surrender to terror. America will never tolerate terrorism. America will never abide terrorists. Wherever they come from, wherever they go, we will go after them. We will not rest until we have brought them all to justice and secured a future for our people, safe from the harm they would do – in your names.

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

7. *Alejandro v. Republic of Cuba*, 996 F. Supp. 1239 (S.D. Fla. 1997).

8. See Stephen M. Flatow, *In This Case, I Can't Be Diplomatic; I Lost a Child to Terrorism; Now I'm Losing U.S. Support*, WASH. POST, Nov. 7, 1999, at B02.

law, notwithstanding its provision of compensation, resolves the problems Congress sought to remedy.

II. Development of the 1996 and 1998 Antiterrorism Amendments to the FSIA

A. *Jurisdiction over Foreign State Sponsors of Terrorism*

The Antiterrorism and Effective Death Penalty Act (AEDPA)⁹ became law on April 24, 1996. Section 221 of that act amended two sections of the Foreign Sovereign Immunities Act of 1976 (FSIA)¹⁰ to create a private civil cause of action by U.S. nationals¹¹ or their survivors against foreign state sponsors of terrorism for injuries or death inflicted outside the United States. First, AEDPA added section 1605(a)(7) to the FSIA, which states that the district courts of the United States may exercise jurisdiction over all claims

in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources . . . for such act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency
12
....

In order to trigger the exception to foreign sovereign immunity, the claimant proceeding under section 1605(a)(7) must establish that the defendant foreign state was or is designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979¹³ or section 620A of the Foreign Assistance Act of 1961^{14, 15}. The claimant must also establish that he or the victim was a national of the United States when the act of terrorism occurred

9. 110 Stat. 1214 (1996).

10. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1601-1611 (1994 & Supp. 1998).

11. "National" is defined in section 101(a)(22) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(22) (1994), as a citizen or permanent resident alien.

12. § 221, 110 Stat. at 1241 (codified at 28 U.S.C. § 1605(a)(7) (Supp. 1998)).

13. Export Administration Act of 1979 § 6(j), 50 U.S.C. app. § 2405(j) (1979).

14. Foreign Assistance Act of 1961 § 620A, 22 U.S.C. § 2371 (1961).

15. 28 U.S.C. § 1605(a)(7)(A).

and that the claimant offered the foreign state a reasonable opportunity to arbitrate the claim.¹⁶

Congress expanded the exceptions to the jurisdictional immunity of foreign states in legislation made part of the Omnibus Consolidated Appropriations Act of 1997.¹⁷ The relevant portion of that Act provides a cause of action by a terrorism victim or his legal representative against agents of a foreign state for compensatory and punitive damages when the United States otherwise has jurisdiction over the foreign state under 28 U.S.C. § 1605(a)(7).¹⁸

B. Enforcement of Judgments

AEDPA specifically included an enforcement mechanism to ensure that judgments obtained against foreign states would be satisfied. Section 221 of AEDPA added section 1610(a)(7) to the FSIA to allow attachment and execution of property of a foreign state used for commercial purposes in the United States to satisfy judgments relating to claims brought under section 1605(a)(7).¹⁹

16. 28 U.S.C. § 1605(a)(7)(B).

17. Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, 110 Stat. 3009-172 (1996) (codified in part at 28 U.S.C. § 1605 note (Supp. 1998)).

18. See 28 U.S.C. § 1605 note (Supp. 1998), note: *Liability of Agents of State Sponsors of Terrorism to U.S. Nationals*, which provides:

(a) An official, employee, or agent of a foreign state designated as a state sponsor of terrorism designated under section 6(j) of the Export Administration Act of 1979 [50 U.S.C. App. § 2405(j)] while acting within the scope of his or her office, employment, or agency shall be liable to a United States national or the national's legal representative for personal injury or death caused by acts of that official, employee, or agent for which the courts of the United States may maintain jurisdiction under section 1605(a)(7) of title 28, United States Code, for money damages which may include economic damages, solatium, pain, and suffering, and punitive damages if the acts were among those described in section 1605(a)(7).

(b) Provisions related to statute of limitations and limitations on discovery that would apply to an action brought under 28 U.S.C. 1605(f) and (g) shall also apply to actions brought under this section. No action shall be maintained under this action if an official, employee, or agent of the United States, while acting within the scope of his or her office, employment, or agency would not be liable for such acts if carried out within the United States.

19. 28 U.S.C. § 1610(a) now provides that the property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if . . . (7) the judgment relates to a claim for which the foreign state is not immune under section 1605(a)(7), regardless of whether the property is or was involved with the

In 1998, Congress expanded the exceptions to immunity from attachment or execution by adding subsection (f) to section 1610 of the FSIA to expose to execution specific property of foreign states, including blocked assets and property used for diplomatic purposes.²⁰ The same legislation, contained in the Omnibus

act upon which the claim is based.

Note also that section 221 of AEDPA amended the wording of section 1610(b)(2) of the FSIA. Property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States is not immune from attachment or execution upon a judgment entered by a court of the United States if the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a) (2), (3), (5), or (7) or 1605(b), regardless of whether the property is or was involved in the act upon which the claim is based. See 28 U.S.C. § 1610(b)(2).

20. Section 117 of the Omnibus Consolidated and Emergency Supplemental Appropriations Act for 1999 ("Appropriations Act"), Pub. L. No. 105-277, Div. A, § 101(h) [Title I, § 117], 112 Stat. 2681 (1998) (codified at 28 U.S.C. §§ 1610(f)(1)(A), (1)(B), (2)(A), (2)(B) (Supp. 1998)), provides as follows:

(a) EXCEPTION TO IMMUNITY FROM ATTACHMENT OR EXECUTION. Section 1610 of title 28, United States Code, is amended by adding at the end the following new subsection:

(f)(1)(A) Notwithstanding any other provision of law, including but not limited to section 208(f) of the Foreign Missions Act (22 U.S.C. 4308(f)), and except as provided in subparagraph (B), any property with respect to which financial transactions are prohibited or regulated pursuant to section 5(b) of the Trading with the Enemy Act (50 U.S.C. App. 5(b)), section 620(a) of the Foreign Assistance Act of 1961 (22 U.S.C. 2370(a)), sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701-1702), or any other proclamation, order, regulation, or license issued pursuant thereto, shall be subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state (including any agency or instrumentality of such state) claiming such property is not immune under section 1605(a)(7).

(B) Subparagraph (A) shall not apply if, at the time the property is expropriated or seized by the foreign state, the property has been held in title by a natural person or, if held in trust, has been held for the benefit of a natural person or persons.

(2)(A) At the request of any party in whose favor a judgment has been issued with respect to a claim for which the foreign state is not immune under section 1605(a)(7), the Secretary of the Treasury and the Secretary of State shall fully, promptly, and effectively assist any judgment creditor or any court that has issued any such judgment in identifying, locating, and executing against the property of that foreign state or any agency or instrumentality of such state.

(B) In providing such assistance, the Secretaries—

(i) may provide such information to the court under seal; and

(ii) shall provide the information in a manner sufficient to allow the court to direct the United States Marshall's office to promptly and effectively execute against that property.

(b) CONFORMING AMENDMENT.—Section 1606 of title 28, United States Code, is amended by inserting after "punitive damages" the following: "except any action under section 1605(a)(7) or 1610(f)".

(c) EFFECTIVE DATE.—The amendments made by subsections (a) and

Consolidated and Emergency Supplemental Appropriations Act for 1999, also expanded the liability of foreign states by allowing terrorism victims to recover punitive damages.²¹ Congress made both of these amendments applicable retroactively to all claims filed pursuant to section 1605(a)(7) of the FSIA.²²

C. *Congressional Concerns Justifying Amendment of the FSIA*

The amendments to the FSIA can best be characterized as a legislative response to the actual and perceived threat of terrorism against Americans. In 1988, the bombing of Pan Am Flight 103 over Lockerbie, Scotland claimed the lives of 270 victims including 189 Americans.²³ On February 26, 1993, foreign terrorists bombed the World Trade Center in New York City, killing seven Americans and injuring 1,004.²⁴ Between 1980 and 1992, more than 6,500 international terrorist incidents occurred worldwide, killing more than 5100 people and wounding 12,500.²⁵ Between 1993 and 1996 an additional 1,489 international terrorist attacks occurred, suggesting an escalation of violence worldwide.²⁶ A significant portion of the attacks was directed against American targets.²⁷ During the period 1980 to 1996, 635 Americans were killed and 2,206 were wounded.²⁸

(b) shall apply to any claim for which a foreign state is not immune under section 1605(a)(7) of title 28, United States Code, arising before, on, or after the date of enactment of this Act.

(d) WAIVER.—The President may waive the requirements of this section in the interest of national security.

21. *Id.* at § 117(b).

22. *Id.* at § 117(c).

23. *Foreign Sovereign Immunities Act Hearing Before the Subcomm. on Courts and Admin. Practice of the Comm. on the Judiciary on S. 825, 103rd Cong. 92* (1994) (letter dated June 16, 1994 from Allan Gerson, Esq., to Sen. Howell Heflin, Subcommittee Chairman) (hereinafter *FSIA Hearing*).

24. U.S. DEPT. OF STATE, PATTERNS OF GLOBAL TERRORISM 1993 at http://dosfan.lib.uic.edu/ERC/arms/PGT_report/1993PGT.html (last visited Jan. 5, 2000); U.S. DEPT. OF STATE, PATTERNS OF GLOBAL TERRORISM 1998, at App. C, "Total U.S. Citizen Casualties Caused by International Attacks, 1993-98" at <http://www.state.gov/www/global/terrorism/1998Report> (last visited Jan. 5, 2000).

25. *FSIA Hearing* at 23 (prepared statement and testimony of Sen. Arlen Specter).

26. U.S. DEPT. OF STATE, PATTERNS OF GLOBAL TERRORISM 1998, at App. C, "Total International Terrorist Attacks, 1979-98" at <http://www.state.gov/www/global/terrorism/1998Report> (last visited Jan. 5, 2000).

27. *FSIA Hearing* at 22-23 (prepared statement and testimony of Sen. Arlen Specter). Between 1980 and 1992, it is estimated that 2500 of the 6500 attacks were against American targets. *Id.*

28. *FSIA Hearing* at 22-23 (prepared statement and testimony of Sen. Arlen Specter); U.S. DEPT. OF STATE, PATTERNS OF GLOBAL TERRORISM 1998, at App.

Although these numbers might not alone justify sweeping antiterrorism legislation, Congress was cognizant of the United States' vulnerability to terrorism and the risk of greater American casualties. Almost exactly two months after AEDPA became law, on June 25, 1996, terrorists exploded a large fuel truck outside the Khubar Towers U.S. military housing facility near Dhahran, Saudi Arabia, killing nineteen Americans and wounding more than 500.²⁹ Moreover, at the time preceding passage of the amendments, the media actively portrayed terrorism as one of the greatest post-Cold War threats facing the United States. Finally, the 1995 bombing of the Oklahoma City federal building by two Americans served as a strong reminder to Congress of the United States' vulnerability at home and abroad.

Not only were the AEDPA amendments to the FSIA a political response to the prominent bombing attacks, but also they sought to remedy harms caused to American abductees overseas. Between 1984 and 1991, twenty American citizens were kidnapped and held hostage in Lebanon by terrorist groups funded by the Government of Iran.³⁰ In 1987, Iran reportedly spent in excess of \$64 million in the form of financial support to Hezbollah, the umbrella organization for many militant Shia Moslem terrorist groups in Lebanon, including the group that seized Joseph Cicippio, Alann Steen and Terry Anderson.³¹ Hostage survivors reported in hearings to Congress that they were "beaten, starved, chained or bound, exposed to the elements, blindfolded, taunted, subjected to threatened executions, and denied medical and hygiene facilities."³² By enacting the antiterrorism amendments, Congress sought to create an exception to sovereign immunity to afford American victims of such egregious human rights violations redress in the American courts.³³ Congress also hoped to deter the arbitrary detention, torture and confinement of U.S. citizens abroad.³⁴

C, "Total U.S. Citizen Casualties Caused by International Attacks, 1993-98" at <http://www.state.gov/www/global/terrorism/1998Report> (last visited Jan. 5, 2000).

29. U.S. DEPT. OF STATE, PATTERNS OF GLOBAL TERRORISM 1996 at <http://www.state.gov/www/global/terrorism/1996Report/year.html> (last visited Jan. 5, 2000).

30. *FSIA Hearing* at 23-24 (prepared statement and testimony of Sen. Arlen Specter); see also *FSIA Hearing* at 58 (prepared statement of David P. Jacobsen).

31. *FSIA Hearing* at 23-24 (prepared statement and testimony of Sen. Arlen Specter).

32. *Id.* at 23.

33. *FSIA Hearing* at 23 (prepared statement and testimony of Sen. Arlen Specter); see also *FSIA Hearing* at 75 (prepared statement of Joseph Cicippio).

34. *Id.*

The antiterrorism amendments were necessary because the antiterrorism regime in effect prior to AEDPA was insufficient to achieve the dual aims of redress and deterrence. For example, although Congress passed the Torture Victim Protection Act³⁵ in 1991 with the support of the Clinton Administration, it did not offer individual plaintiffs any incentive to seek relief under the Act. First, the TVPA excludes Americans who were abducted abroad because it allows recovery of money damages only from defendants who commit torture within the United States.³⁶ Second, the Act allows recovery only from individual defendants, who typically do not own significant personal assets, and therefore cannot provide a recovery amount suitable to compensate victims for the injuries suffered. Third, the TVPA does nothing to deter terrorism or to punish foreign states for providing financial or material support to terrorists.

Congress was also aware that espousal, by which citizens could petition the State Department to seek redress on their behalf through diplomatic channels, offered inadequate relief for human rights violations.³⁷ Often, the State Department would not take up individual claims because of diplomatic concerns. “[T]he Department’s decision with respect to espousal is likely to be influenced, not only by the merits of the case, but by the Department’s concern for offending a foreign state and creating a potential irritant in its dealings with that state.”³⁸ In one well-publicized case, the State Department deferred for more than nine years before rendering a decision on espousal.³⁹ In contrast to the State Department, the federal courts were free from the pressures of engaging in “cautious diplomacy” with foreign states. Indeed, this was one justification for passage of the Foreign Sovereign Immunities Act in 1976. The House Judiciary Committee’s Report to the original Act states:

A principal purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of

35. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1991) (codified at 28 U.S.C.S. § 1350 note (1994)).

36. *FSIA Hearing* at 81 (statement of Abraham D. Sofaer).

37. *See FSIA Hearing* at 83 (prepared statement of Abraham D. Sofaer).

38. *FSIA Hearing* at 84 (prepared statement of Abraham D. Sofaer).

39. *Saudi Arabia v. Nelson*, 113 S. Ct. 1471 (1993) (petitioner waited more than nine years for a decision from the Department as to the espousal of his claim of unlawful detention and torture against Saudi Arabia). *See FSIA Hearing* at 84 (prepared statement of Abraham D. Sofaer).

immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process. The Department of State would be freed from pressures from foreign governments to recognize their immunity from suit and from any adverse consequences resulting from an unwillingness of the Department to support that immunity.⁴⁰

Finally, the antiterrorism amendments may have been motivated by Congress' fear that effective criminal justice could not be achieved against terrorists and their government sponsors. Proponents of the legislation studied the prosecution of the parties responsible for the bombing of Pan Am Flight 103. Although the allegations in the criminal complaint identified several high-ranking officials and the government of Libya as the masterminds of the bombing, only two Libyans were indicted.⁴¹ Furthermore, because of severe resistance by the Libyan government, extradition of the bombing suspects to the Netherlands for trial had not been accomplished by 1996, despite severe economic sanctions by the United States and United Nations against Libya.⁴² In light of these facts, it might have been foreseeable to Congress that the families of the victims would not be made whole by the application of international criminal law.

Taken together, these events, concerns and fears motivated Congress to support the AEDPA amendments to the FSIA. Although the legislation seemed like a political winner and garnered the public support of President Clinton⁴³, the Administration subsequently intervened in cases filed in federal court and opposed the enforcement provisions. Absent the support of the executive branch, enforcement of judgments obtained under the antiterrorism amendments became nearly impossible.

40. H.R. REP. NO. 94-1487 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604; also *reprinted in part in FSIA Hearing* at 6 (prepared statement of Rep. Romano L. Mazzoli).

41. *FSIA Hearing* at 93 (letter dated June 16, 1994 from Allan Gerson, Esq., to Sen. Howell Heflin).

42. In fact, extradition was accomplished much later in 1999 after the United States and the United Kingdom had spent years applying diplomatic and economic pressure to the Libyan government allegedly responsible for the terrorism. *See CBS Morning News: Long Awaited Verdict Announced in the Trial of Two Libyans Accused of Blowing Up Pan Am Flight 103* (CBS television broadcast, Jan. 31, 2001). The verdict in the criminal trial was not delivered until January 31, 2001. *Id.* Only one of the two defendants was found guilty. *Id.*

43. *See supra* note 5; *see also* *Flatow v. Islamic Republic of Iran*, 76 F. Supp. 2d 16, 20 n.4 (D.D.C. 1999) (citing President Clinton's public proclamations of support for the antiterrorism legislation).

III. Obstacles to Recovery Experienced by Plaintiffs in Cases Filed under the Antiterrorism Amendments

During the hearings on the bills that later became section 221 of AEDPA, both the State Department and the Justice Department instructed Congress that the proposed antiterrorism amendments would not provide an effective remedy for American plaintiffs, for several reasons. First, foreign states would be reluctant to enter the courts of the U.S. to defend themselves against charges of violations of law stemming from conduct within their own borders.⁴⁴ Judgments would have to be obtained in a majority of cases by default, and foreign states could choose simply to ignore them.⁴⁵ Second, state sponsors of terrorism would likely not have significant commercial assets in the United States from which judgments could be paid.⁴⁶ Moreover, because the AEDPA amendments departed from international law norms, it became highly unlikely that judgments under the amendments would be recognized and enforced in foreign jurisdictions, or that terrorist states would maintain significant assets in any jurisdiction which would honor the U.S. judgments.⁴⁷ Finally, the State Department and Justice Department expressed concern about the vulnerability of U.S. assets and property located abroad in the event another country would enact reciprocal legislation.⁴⁸

Congress did not anticipate the resistance to execution that the executive branch would offer as a result of these concerns and its interest in determining U.S. foreign policy. Similarly, Congress did not anticipate that the federal judiciary would construe the exceptions to immunity from execution or attachment narrowly in the face of the antiterrorism amendments. Although passage of the AEDPA amendments to the FSIA in 1996 inspired several plaintiffs to file civil suits in the district courts,⁴⁹ the conflict

44. See *FSIA Hearing* at 91 (letter from Sheila F. Anthony, Assistant Attorney General, to Sen. Howell Heflin, providing Justice Department's response to questions from Sen. Strom Thurmond).

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. See, e.g., *Alejandro v. Republic of Cuba*, 996 F. Supp. 1239 (S.D. Fla. 1997); *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1 (D.D.C. 1998); *Cicippio v. Islamic Republic of Iran*, 18 F. Supp. 2d 62 (D.D.C. 1998); *Rein v. Socialist People's Libyan Arab Jamahiriya*, 995 F. Supp. 325 (E.D.N.Y. 1998); *Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239 (2d Cir. 1996); *Frey v. Socialist People's Libyan Arab Jamahiriya*, 110 F. Supp. 2d 10 (D.D.C. 2000); *Eisenfeld v. Islamic Republic of Iran*, 2000 U.S. Dist. LEXIS 9545 (D.D.C. July 11,

between branches effectively precluded them from recovery. Two early cases brought to judgment, *Alejandro v. Republic of Cuba* and *Flatow v. Islamic Republic of Iran*, illustrate some of the more serious legal obstacles to enforcement of tort judgments against foreign states.

A. *Alejandro v. Republic of Cuba*

1. *Background*—*Alejandro v. Republic of Cuba*⁵⁰ was the first lawsuit brought under the 1996 AEDPA amendments to the FSIA, based on the retroactive application of the amendments to an act of terrorism that occurred on February 24, 1996.⁵¹ The Cuban Air Force shot down two unarmed civilian planes belonging to a Miami-based humanitarian organization over international waters, killing all four pilots aboard.⁵² The planes were engaged in a routine mission to search the Florida Straits for Cuban rafters and to notify the U.S. Coast Guard of their location and condition.⁵³ The attack was particularly barbarous because the Cuban MiG-29s neither warned the civilian pilots, nor in any way attempted to intercept or divert the planes without resort to violence.⁵⁴

The personal representatives of three of the pilots sued Cuba and the Cuban Air Force for damages under section 1605(a)(7) of the FSIA in the United States District Court for the Southern District of Florida.⁵⁵ Neither defendant appeared to defend the suit.⁵⁶ Pursuant to the procedure set forth in 28 U.S.C. § 1608(e), the court held an evidentiary hearing to allow the plaintiffs to establish their claim.⁵⁷ The undisputed evidence established that the acts occurred over international waters more than eighteen miles from the Cuban coast and that the plaintiffs and three of the four deceased were American nationals at the time of the killings.⁵⁸ The court found that the unprovoked rocket attacks against the civilian planes constituted an “extrajudicial killing” within the

2000); *Anderson v. Islamic Republic of Iran*, 90 F. Supp. 2d 107 (D.D.C. 2000); *Daliberti v. Republic of Iraq*, 97 F. Supp. 2d 38 (D.D.C. 2000).

50. *Alejandro v. Republic of Cuba*, 996 F. Supp. 1239 (S.D. Fla. 1997) (hereinafter *Alejandro I*).

51. *Alejandro I* at 1242, 1243, 1247.

52. *Id.* at 1242.

53. *Id.* at 1243.

54. *Id.* at 1246.

55. *Id.* at 1242.

56. *Alejandro I* at 1242. Cuba, however, asserted in a diplomatic note that the district court had no jurisdiction over it or its political subdivisions. *Id.*

57. *Id.*

58. *Id.* at 1248.

meaning of section 1605(a)(7) of the FSIA.⁵⁹ Finally, the court found that the Cuban Air Force acted on behalf of the Cuban state because Cuban government officials directed the attacks and congratulated the pilots after the shootdown.⁶⁰ Consequently, the court held the Cuban Air Force liable under section 1605(a)(7) of the FSIA for compensatory damages in the total amount of \$49.9 million and punitive damages in the amount of \$137.7 million.⁶¹ The court also held the Republic of Cuba vicariously liable for compensatory damages under the statutory note to FSIA section 1605.⁶² On November 5, 1998, the court amended the judgment to hold Cuba jointly liable for the punitive damages.⁶³

Predictably, Cuba impugned the judgment of the district court. In a letter dated May 11, 1998, the Cuban Ministry of Foreign Relations wrote that "[t]he Republic of Cuba is a Sovereign State and no North American court has jurisdiction to judge it or its institutions, much less for the events that occurred on February 24, 1996 in Cuban territorial waters"⁶⁴

2. *Enforcement*—In 1996, prior to the end of litigation, the victims' families each received \$300,000 paid by the Clinton Administration out of Cuban bank accounts frozen in 1962.⁶⁵ Notwithstanding these amounts, following judgment in their favor, the plaintiffs sought to garnish the debts of nine U.S. telecommunications carriers and two major U.S. banks owed allegedly to the Cuban government.⁶⁶ The assets had been blocked from transfer pursuant to the Cuban Assets Control Regulations

59. *Id.*

60. *Id.*

61. *Alejandro I* at 1253. The punitive damages amount, reflecting the court's calculation of one percent of the value of the Cuban Air Force's fleet of 102 MiGs, was awarded to express condemnation of the Cuban government for the acts and to deter the defendants from committing future terrorist acts. *Id.*

62. *Id.* at 1249.

63. See *Alejandro v. Republic of Cuba*, 183 F. 3d 1277, 1278-79, n. 1 (11th Cir. 1999). The court based its action on the amendment to section 1606 of the FSIA contained in section 117(b) of the Omnibus Consolidated and Emergency Supplemental Appropriations Act for 1999, Pub. L. No. 105-277, 112 Stat. 2681, 2681-491 (1998).

64. Letter from Ministry to the Honorable Swiss Embassy, U.S.A. Interests Section, May 11, 1998, reprinted in *Alejandro v. Republic of Cuba*, 42 F. Supp. 2d 1317, 1323 (S.D. Fla. 1999) (hereinafter *Alejandro II*).

65. Bill Miller & John Mintz, *Once-Supportive U.S. Fights Family Over Iranian Assets*, WASH. POST, Sept. 27, 1998, at A08.

66. *Alejandro v. Telefonica Larga Distancia de Puerto Rico*, 183 F. 3d 1277, 1279-1280 (11th Cir. 1999) (hereinafter *Alejandro IV*).

(CACR) and the comprehensive trade embargo established by President Kennedy in 1962.⁶⁷

As the result of motions to dissolve the writs of garnishment filed by seven carrier-garnishees and the Cuban recipient of the assets, the District Court for the Southern District of Florida was asked to rule on two threshold issues: whether the frozen assets were subject to attachment under the antiterrorism amendments, and whether the assets were subject to garnishment when the agent involved in the telecommunications service agreements, Empresa de Telecomunicaciones de Cuba, S.A. ("ETECSA"), was a private corporation separate from the Cuban government.⁶⁸ The United States filed three Statements of Interest in support of the garnishees' positions on these issues.⁶⁹

With respect to the first question, the court recognized that unless licensed by the Treasury Department, the CACR prohibit any U.S. national from attaching or executing the blocked property of the Cuban government.⁷⁰ However, the 1998 amendments to the FSIA that added section 1610(f) specifically authorized the attachment of such blocked assets.⁷¹ Those amendments also contained a provision that allowed the President to waive the requirements of subsection 1610(f) in the interest of national security.⁷² President Clinton exercised the waiver on the same day he signed the Act, October 21, 1998, to block the attachment and execution of three consular properties owned by Iran in Washington, D.C. by the plaintiff in *Flatow v. Islamic Republic of Iran*.^{73 74} The effect of the President's exercise of authority was disputed by the parties in *Alejandro II*.

Prior precedent pertaining to the scope of the President's authority to waive application of the 1998 attachment provisions in the interest of national security was not favorable to the *Alejandro* plaintiffs. The District Court for the District of Columbia in *Flatow v. Islamic Republic of Iran* construed the waiver provision as authorizing the President to waive the *entirety* of the new section 1610(f), including the subsection that exposes diplomatic property

67. *Alejandro II* at 1324-25.

68. *Alejandro II* at 1326; *see also Alejandro IV* at 1279-80.

69. *Alejandro II* at 1327.

70. *Id.* at 1324.

71. Omnibus Consolidated and Emergency Supplemental Appropriations Act for 1999 ("Appropriations Act") § 117, Pub. L. No. 105-277, 112 Stat. 2681 (1998) (codified at 28 U.S.C. §§ 1610(f)(1)(A), (1)(B), (2)(A), (2)(B) (Supp. 1998))

72. *Id.* at § 117(d).

73. 999 F. Supp. 1 (D.D.C. 1998).

74. Presidential Determination No. 99-1, 63 Fed. Reg. 59,201 (1998).

to attachment and execution proceedings.⁷⁵ By contrast, the District Court for the Southern District of Florida in *Alejandro II* interpreted the waiver provision as allowing the President only to relieve the State and Treasury Departments from their statutory duty to assist judgment creditors in locating foreign assets.⁷⁶ Specifically, it concluded that the President did not have the authority to waive 28 U.S.C. §1610(f)(1).⁷⁷ The court found the plain meaning of the waiver provision (section 117(d)) of the Appropriations Act, as well as the Act's legislative history, ambiguous.⁷⁸ However, it justified its ruling by classifying the 1998 Appropriations Act as an extension of the 1996 AEDPA amendments to the FSIA:

By enacting section 117, Congress expanded the property subject to attachment/execution, giving the victims a larger pool of assets from which to satisfy any judgment in their favor. All of these legislative enactments are guided by a single purpose: to provide an executable judicial remedy to the nationals of the United States attacked by a terrorist foreign state.⁷⁹

The Florida district court also found that its interpretation of the waiver clause would not harm the President's ability to initiate or maintain diplomatic relations with terrorist states or affect the United States' treaty obligations because only commercial, not diplomatic, property was at risk.⁸⁰ Finally, the court considered the amount of deference to be accorded the President in matters of foreign affairs.⁸¹ It concluded that the President had broad discretion to exercise the waiver but was not entitled to deference in the interpretation of the statute.⁸² Therefore, the court concluded that section 1610(f)(1) remained in force.⁸³ The plaintiffs could garnish the indebtedness owed to ETECSA and in the possession of the garnishees without having to obtain a license from the Office of Foreign Assets Control.

With respect to the second issue relevant to the plaintiffs' ability to garnish the assets, the court held that ETECSA was an instrumentality of the Government of Cuba under section 1603(b)

75. *Flatow v. Islamic Republic of Iran*, 76 F. Supp. 2d 16, 26-27 (D.D.C. 1999).

76. *Alejandro II* at 1328-1334.

77. *Id.* at 1331.

78. *Id.* at 1329-1330.

79. *Id.* at 1331.

80. *Id.* at 1332-33.

81. *Alejandro II* at 1333.

82. *Id.* at 1334.

83. *Id.* at 1331.

of the FSIA.⁸⁴ The court applied the test prescribed by the Supreme Court in *First National City Bank v. Banco Para El Comercio Exterior de Cuba*⁸⁵ (hereinafter *Bancec*), under which government instrumentalities enjoy a presumption of separate juridical status unless (1) the foreign government so extensively controls the instrumentality as to give rise to a principal and agent relationship; or (2) a contrary finding is necessary to prevent fraud or manifest injustice.⁸⁶ The district court found incidents of practical control because the Cuban government leased the telecommunications equipment and facilities to ETECSA and supplied and paid the majority of ETECSA's labor force.⁸⁷ However, this did not rise to the level of an agency relationship.⁸⁸ Rather, the court found that ETECSA had no separate juridical status because a contrary conclusion would defeat Congress' "expressed . . . commitment to subject the property of a government instrumentality to attachment or execution to satisfy a judgment against the terrorist foreign state."⁸⁹ Because the assets were payable to an instrumentality of the Cuban government and were specifically subject to execution under section 1610(f)(1), the district court denied the carriers' and ETECSA's motions to dissolve the writs of garnishment.⁹⁰

The carriers appealed, however, and the plaintiffs' victory was largely stripped away by the Eleventh Circuit Court of Appeals on August 11, 1999.⁹¹ That court reviewed the district court's application of the *Bancec* test de novo and ruled that ETECSA was a separate juridical entity from the Cuban government.⁹² First, it considered an argument that the plaintiffs would be deprived of relief if the debts to the carriers could not be attached.⁹³ The court rejected this argument, stating that such a concern was universal, and that to allow such an easy overcoming of the *Bancec* presumption would render it a judicial nullity.⁹⁴ Next, the court

84. *Id.* at 1336.

85. *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983).

86. *Bancec*, 462 U.S. at 629-630.

87. *Alejandro II* at 1339.

88. *Id.*

89. *Id.*

90. *Id.* at 1343.

91. *Alejandro v. Telefonica Larga Distancia de Puerto Rico*, 183 F. 3d 1277 (11th Cir. 1999) (hereinafter *Alejandro IV*).

92. *Alejandro IV* at 1286, 1288.

93. *Id.* at 1286.

94. *Id.* at 1286-87.

downplayed the importance of the exception to immunity as part of the government's antiterrorism policy on the grounds that there was no evidence of ETECSA's involvement in the terrorist act.⁹⁵ Finally, the court held that section 1610(f)(1)(A) did not subject property of *instrumentalities* to execution and attachment, but rather exposed only *property belonging to the foreign government*.⁹⁶ The court noted that Congress had toyed with a bill amending section 1610(a) explicitly to allow attachment of property of agencies and instrumentalities of foreign states and therefore could enact such legislation if it so intended.⁹⁷

The court then considered whether the plaintiffs proved that ETECSA was an alter ego of the Cuban government to satisfy the first *Bancec* exception.⁹⁸ The plaintiffs argued that ETECSA received payments under the OFAC licenses.⁹⁹ Language in the statute authorizing the licenses, reproduced in the licenses themselves, authorized the carriers to make payments "to Cuba" in exchange for the provision of telecommunications services.¹⁰⁰ The plaintiffs argued that the language in the statute and licenses estopped ETECSA and the carriers from denying that ETECSA was an alter ego of the Cuban government.¹⁰¹ The court rejected this argument.¹⁰² It found that some of the licenses authorized transactions specifically with EMTELCUBA (ETECSA's predecessor) and its successors.¹⁰³ Also, although the authorizing statute did not define "Cuba," the term "Cuba" under the Cuban Assets Control Regulations was defined to include "any political subdivision, agency, or instrumentality" of Cuba, so the statutory language was not dispositive.¹⁰⁴

Finally, the court concluded that the plaintiffs had waived their right to engage in further discovery regarding the actual relationship between ETECSA and the Cuban government.¹⁰⁵ Based on these reasons, the court vacated the judgment of the district court

95. *Id.* at 1287.

96. *Id.*

97. *Alejandro IV* at 1287-88.

98. *Id.* at 1288.

99. *Id.* at 1288-89.

100. *Id.*

101. *Id.* at 1289.

102. *Alejandro IV* at 1289.

103. *Id.*

104. *Id.*

105. *Id.* at 1289-1290.

and remanded the case for dissolution of the writs of garnishment that sought to garnish amounts owed to ETECSA.¹⁰⁶

In light of the Eleventh Circuit decision, the plaintiffs had reached a dead end. Although the court authorized further discovery into the existence of other funds held by the telecommunications carriers but owing directly to the Cuban government¹⁰⁷, the plaintiffs did not locate such assets. Moreover, the plaintiffs knew that they likely would not receive relief if the funds discovered owed to an agency or instrumentality of the Cuban government.

B. Flatow v. Islamic Republic of Iran

1. *Background*—Like his counterparts in *Alejandro*, the plaintiff in *Flatow* met with considerable resistance in his efforts to enforce a judgment under section 1610 of the FSIA. In the underlying case, Alisa Michelle Flatow, a twenty-year-old American citizen studying during her junior year of college in Israel, was killed on the Gaza Strip when a suicide bomber drove a van full of explosives into the passenger bus in which Flatow was traveling.¹⁰⁸ The Shaqaqi faction of Palestine Islamic Jihad claimed responsibility for the bombing and was confirmed as the perpetrator of the act.¹⁰⁹

Stephen Flatow, the decedent's father and administrator of her estate, filed suit for wrongful death in federal District Court in Washington, D.C., pursuant to the retroactive application of 28 U.S.C. §1605(a)(7).¹¹⁰ The complaint named five defendants: the Islamic Republic of Iran, the Iranian Ministry of Information and Security, the Supreme Leader of Iran, the former President of Iran, and the former head of the Iranian Ministry of Information and Security.¹¹¹ Iran failed to appear and defend the suit.¹¹²

The District Court, after the evidentiary hearing required by 28 U.S.C. § 1608(e), during which the plaintiff met his burdens of proof and persuasion, entered a default judgment against the

106. *Id.* at 1290.

107. *See Alejandro v. Republic of Cuba*, 64 F. Supp. 2d 1245, 1253 (S.D. Fla. 1999).

108. *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 7 (D.D.C. 1998) (hereinafter *Flatow I*).

109. *Flatow I* at 8-9.

110. *Id.* at 6, 13.

111. *Id.* at 9-10.

112. *Id.* at 6.

named defendants.¹¹³ Iran's liability was predicated on the fact that it had been designated as a state sponsor of terrorism pursuant to section 6(j) of the Export Administration Act of 1979 continuously since January 19, 1984.¹¹⁴ It sponsored the Shaqaqi faction's terrorist activities in the Gaza Strip region by supplying the group with all of its funding¹¹⁵ and with training.¹¹⁶ The court found Iran and the co-defendants jointly and severally liable for loss of accretions, compensatory damages, solatium and \$225,000,000 in punitive damages.¹¹⁷ The latter amount, reflecting three times Iran's annual expenditure for terrorist activities, was calculated to create a deterrent to future terrorist activities directed towards Americans.¹¹⁸

2. *Enforcement*—On July 6, 1998, Flatow filed a motion seeking a court order to attach three parcels of real estate owned by the Iranian government in Washington, D.C.¹¹⁹, and two Nations-Bank accounts containing funds generated by the State Department's lease of the properties¹²⁰ to satisfy the judgment.¹²¹ The District Court granted the motion and ordered the writs of attachment.¹²² However, the U.S. Marshal's Office notified the U.S. Departments of State and Treasury, which requested that the District Court delay attachment until the federal government could

113. *Id.* at 5, 6.

114. *Flatow I* at 9.

115. Funding totaled approximately two million dollars annually to Palestine Islamic Jihad in support of terrorist activities. *Flatow I* at 9. Iran's sponsorship of terrorist activities is reflected as a line item in its national budget and totals approximately seventy-five million dollars annually. *Id.* at 34.

116. *Flatow I* at 9.

117. *Id.* at 5.

118. *Id.* at 34.

119. Specifically, the properties included the Iranian Embassy and Chancery and the Iranian Ambassador's residence until April 8, 1980, the residence of the Iranian military attaché, and the residence of the Iranian Minister of Cultural Affairs. *Flatow v. Islamic Republic of Iran*, 76 F. Supp. 2d 16, 19 n.3 (D.D.C. 1999) (hereinafter *Flatow IV*).

120. The first account, entitled "Blocked Iranian Diplomatic and Consular Property Renovation Account c/o Blocked Assets Administration, U.S. Department of Treasury," comprised excess funds and interest generated from the lease of the real estate to third parties. The second account, entitled "U.S. Department of State, Office of Foreign Missions, Iranian Renovation Account," contained funds generated by the leases but used for maintenance and related expenses. *Flatow IV* at 19.

121. *Flatow IV* at 18.

122. See Ethan J. Early, *Flatow v. Islamic Republic of Iran and the Foreign Sovereign Immunities Act: Is Peace of Mind Enough?*, 14 CONN. J. INT'L L. 203, 228 (1999).

voice its opposition to attachment.¹²³ On July 9, 1998, the District Court temporarily stayed the writs.¹²⁴

The government filed a statement with the court on July 23, 1998, setting forth several reasons why the attachment should not proceed.¹²⁵ First, the government argued that the Foreign Missions Act and the International Emergency Economic Powers Act explicitly prohibited the attachment of the identified properties.¹²⁶ Second, the government argued that the properties were not subject to attachment under the FSIA.¹²⁷ Third, the government argued that attachment would interfere with the United States' ability to discharge its international obligations under the Vienna Convention on Diplomatic Relations.¹²⁸ Finally, the government argued that the attachment and execution of the properties would adversely affect the President's ability to promote the foreign policy interests of the United States.¹²⁹ The government requested the District Court to vacate the July 7, 1998 order issuing the writs of attachment.¹³⁰

The district court granted the government's motion and quashed the writs.¹³¹ The court found it unnecessary to resolve whether attachment of the properties under section 1610(a)(7) of the FSIA would impede the President's authority to receive foreign ministers and consuls or clash with the Foreign Missions Act, the International Emergency Economic Powers Act, or the Vienna Convention.¹³² Rather, the court decided the case based solely on its interpretation of the attachment provision of section 1610(a)(7), under which property in the United States of a foreign state is subject to execution only if the property is or was "used for commercial activity in the United States."¹³³ The court noted that the "commercial activity" test in the FSIA focuses primarily on the conduct of the foreign state vis-à-vis the property.¹³⁴ With respect

123. *Id.*

124. *Id.*

125. See Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 93 AM. J. INT'L L. 161, 182 (1999) (reproducing in part the government's statement filed with the court).

126. *Id.* at 182.

127. *Id.* at 183.

128. *Id.* at 184.

129. *Id.*

130. See Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 93 AM. J. INT'L L. at 182, 185.

131. *Flatow IV* at 18.

132. *Id.*

133. *Id.* at 21-22.

134. *Id.* at 22.

to the real estate, the court found that Iran's prior use of the facilities for diplomatic purposes was sovereign in nature and not commercial.¹³⁵ Also, Iran opposed the lease of its properties; it did not offer them voluntarily for a commercial purpose.¹³⁶ The court held that

[a]mong its purposes, the FSIA was designed to subject foreign states to the laws of the United States when they choose to engage in private commercial activity. To effectuate this purpose, the statute creates various narrow windows of federal jurisdiction over foreign states. But if the FSIA could be applied to foreign state property that is being used by a non-agent third party, it would expand the class of cases arising under the Act beyond those limited, enumerated exceptions to immunity prescribed by Congress, and thus would expose foreign states to far greater liability than was originally contemplated under the Act.¹³⁷

Finally, the court held that the action of the United States in taking custody of and maintaining the properties was a sovereign responsibility authorized by section 4305(c) of the Foreign Missions Act.^{138 139} Therefore, the properties were not used for commercial activity and were immune from attachment under section 1610(a)(7).¹⁴⁰

With respect to the bank accounts, the court found that they too were immune from attachment.¹⁴¹ One account contained funds that were specifically licensed to the Office of Foreign Missions to maintain the properties in good repair, pursuant to the United States' statutory duty.¹⁴² That account, which originally contained Iranian assets, was regulated by the International Emergency Economic Powers Act and the Iranian Assets Control Regulations and was subject to section 1610(f)(1)(A) of the FSIA.¹⁴³ However, the district court found that the President had waived section

135. *Id.* at 22-23.

136. *Flatow IV* at 21.

137. *Id.* at 23 (citations omitted).

138. The Foreign Missions Act provides that "if a foreign mission has ceased conducting diplomatic, consular and other governmental activities in the United States, and has not designated a protecting power or other agent . . . the Secretary, until the designation of a protecting power or other agent . . . may preserve and protect any property of that foreign mission." 22 U.S.C. § 4305(c) (1994).

139. *Flatow IV* at 23.

140. *Id.*

141. *Id.* at 24.

142. *Id.*

143. *Id.*

1610(f)(1)(A) in the interest of national security, and therefore the funds were not subject to attachment.¹⁴⁴

The assets in the other account, reflecting the profits and interest generated by the leases of the property by the United States, did not constitute Iranian property, and the court therefore concluded that the FSIA did not apply to the funds.¹⁴⁵ Because Stephen Flatow did not argue any express waiver of sovereign immunity by the United States, the court held that he was not entitled to attach that account.¹⁴⁶

The court expressed its regret at Stephen Flatow's "Pyrrhic victory," but shifted the burden to Congress to pass legislation authorizing attachments of the type sought.¹⁴⁷ It noted that Congress rejected a bill in 1999 that would have amended section 1610(f) of the FSIA to permit the attachment of foreign mission property used for nondiplomatic purposes and proceeds from the rental of such property.¹⁴⁸

Stephen Flatow next sought to attach an arbitration award entered by the Iran-United States Claims Tribunal against FMC Corporation.¹⁴⁹ The February 12, 1987 award arose out of a contract dispute involving the sale of military equipment to Iran.¹⁵⁰ Flatow argued that the award was property of Iran "used for commercial activity in the United States" and qualified for attachment under section 1610(a)(7) of the FSIA.¹⁵¹ However, the court found that because the three-year statute of limitations for confirming and enforcing the award had expired, the award was null and void.¹⁵² Therefore, the court concluded that Iran had no enforceable property rights in the award, and it could not be property used for commercial activity in the United States.¹⁵³ The court also noted that Flatow's claim to the property under section 1610(f)(1)(A) of the FSIA also failed because the President had waived the requirements of the section in the interest of national security.¹⁵⁴

144. *Flatow IV* at 24, 27.

145. *Id.* at 24.

146. *Id.* at 24-25.

147. *Id.* at 27-28.

148. *Id.* at 28.

149. *Flatow v. Islamic Republic of Iran*, 76 F. Supp. 2d 28, 29 (D.D.C. 1999) (hereinafter *Flatow V*).

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Flatow V* at 29-30.

These defeats occurred in the context of a series of losses for Stephen Flatow. On September 7, 1999, the United States District Court for the District of Maryland quashed Flatow's November 9, 1998 writs of execution against two parcels of real estate owned by the Alavi Foundation.¹⁵⁵ Flatow argued, based on independent investigation and information supplied by representatives of the Departments of State, Treasury and Justice, that the Foundation was an agency or instrumentality of the government of Iran.¹⁵⁶ Under Maryland law, for Flatow to levy on the Foundation's property, he had to prove that the Foundation was an agent, alter ego, instrumentality, or garnishee of Iran, or that Iran conveyed property to the Foundation to defraud creditors.¹⁵⁷ The court concluded that Flatow did not show the necessary agency relationship and did not seek a writ of garnishment or argue the fraud theory.¹⁵⁸ First, section 1603(b)(3) narrowly defined an agency or instrumentality of a foreign state as an entity not a citizen of any state of the United States.¹⁵⁹ The Alavi Foundation was a nonprofit corporation organized under New York law. Therefore, it was a citizen of New York and was entitled to a strong presumption of independence from the government of Iran.¹⁶⁰ To overcome the presumption and to establish an agency relationship, Flatow had to prove that the Iranian government exercised day-to-day control over the Foundation's activities.¹⁶¹ Despite his attempts, Flatow did not convince the court that day-to-day control existed.¹⁶² Therefore, the court ordered the release of the properties from levy and enjoined Flatow from issuing additional writs against the Alavi Foundation's property.¹⁶³

Finally, on November 15, 1999, the United States District Court for the District of Columbia issued an order granting the United States' motion to quash Flatow's November 18, 1998 writ of attachment against "all credits held by the United States to the benefit of the Islamic Republic of Iran."¹⁶⁴ Flatow attempted to

155. Flatow v. Islamic Republic of Iran, 67 F. Supp. 2d 535, 537 (D. Md. 1999) (hereinafter *Flatow II*).

156. *Id.* at 540-42.

157. *Id.* at 538.

158. *Id.* at 543.

159. *Id.* at 538.

160. *Flatow II* at 538.

161. *Id.* at 538-539.

162. *Id.* at 540.

163. *Id.* at 543.

164. Flatow v. Islamic Republic of Iran, 74 F. Supp. 2d 18, 19 (D.D.C. 1999) (hereinafter *Flatow III*).

attach \$5,042,481.65 and interest held in the U.S. Treasury Judgment Fund.¹⁶⁵ The Iran-U.S. Claims Tribunal had awarded judgment in this amount to Iran on June 5, 1998, but the U.S. had not paid the judgment.¹⁶⁶ Flatow argued that the funds were the property of Iran, as defined by the Iranian Assets Control Regulations, and therefore were subject to attachment under sections 1610(f)(1)(A) and (a)(7) of the FSIA.¹⁶⁷ The United States argued that the Treasury funds were U.S. property and that the U.S. was immune from suit for attachment under the doctrine of sovereign immunity.¹⁶⁸ The court held that under controlling federal law, funds remaining in the U.S. Treasury, though designated to satisfy a judgment against the United States, remain the property of the United States until actually disbursed by the government.¹⁶⁹ Therefore, Flatow's writ of attachment was barred unless he could show that the U.S. expressly and unequivocally waived its sovereign immunity.¹⁷⁰ The court also noted that judgment creditors could not obtain money from the Treasury without a statute specifically authorizing payment.¹⁷¹ It found the language in the Iranian Assets Control Regulations insufficient to waive the United States' sovereign immunity.¹⁷² Similarly, the court engaged in an analysis of the semantics of section 1610(f)(1)(A) of the FSIA and found that its opening phrase, "notwithstanding any other provision of law," was insufficiently explicit to authorize waiver of the sovereign immunity of the U.S. and attachment and execution of the Treasury funds.¹⁷³ The court noted that Congress was familiar with the requirements of an unequivocal expression of waivers of sovereign immunity and could have included such a waiver if that was its intent.¹⁷⁴

Flatow also attempted an argument based on the section 1610(a)(7) "commercial activity" exception because the Tribunal judgment sprung from a contract dispute involving sales of aircraft equipment between Iran and Avco Corporation, a U.S.

165. *Id.* at 20.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Flatow III* at 20, 21.

170. *Id.* at 20.

171. *Id.* at 22, *citing* Automatic Sprinkler Corp. v. Darla Env'tl. Specialists, 53 F. 3d 181, 182 (7th Cir. 1995).

172. *Id.* at 23.

173. *Id.* at 24.

174. *Flatow III* at 24.

enterprise.¹⁷⁵ The court rejected the argument because it found that the funds were not Iranian property.¹⁷⁶ Flatow also argued the Algiers Accords contained an express waiver of U.S. and Iranian sovereign immunity with respect to the enforcement of Tribunal awards.¹⁷⁷ Flatow asserted that by virtue of his judgment, he stood in the shoes of Iran and could enforce the Tribunal award against the U.S.¹⁷⁸ The district court disagreed and found that the Accords did not authorize third party creditors to enforce judgments on behalf of Iran.¹⁷⁹ Flatow again was precluded from relief.

IV. Analysis: Why Has the Executive Branch Opposed Enforcement of the Antiterrorism Amendments?

A. *United States' Opposition to Enforcement is Based on Competing Foreign Policy Goals*

Opposition to enforcement by the Executive branch has been based largely on concerns that enforcement of multimillion-dollar judgments against foreign sovereigns and their agents would undermine the Executive's authority in the area of foreign policy. These concerns seem rational. For example, the antiterrorism amendments to the FSIA unilaterally extend federal jurisdiction over foreign sovereigns for purposes of tort without deference to the doctrine of sovereign immunity recognized under international law. The amendments function essentially as a federal long-arm statute that specifies that certain foreign states submit to the jurisdiction of the U.S. district courts when the sole relevant contact with the forum involves the killing of a U.S. national, even if the act of killing occurs abroad, the U.S. victim is not the intended target of the attack, and there is no other relationship between the foreign state and the forum. The foreign state has not knowingly and voluntarily waived its sovereign immunity, nor has it consented to jurisdiction under these circumstances. As such, it is to be expected that the foreign state will not honor or recognize the judgment. Comity between nations does not require recognition of a judgment that is considered void as against the terrorist state's public policy, sovereign immunity. Moreover, there are many unresolved questions regarding due process and whether the U.S. court can

175. *Id.* at 24-25.

176. *Id.* at 25.

177. *Id.*

178. *Id.*

179. *Flatow III* at 25.

exercise personal jurisdiction under such circumstances absent the foreign state's consent.

In light of these issues, the seizure of foreign assets located in the United States pursuant to the FSIA might add to tensions that the Executive branch would like to resolve. For example, the United States would like to improve diplomatic relations with Iran as part of its efforts to stabilize the Middle East.¹⁸⁰ Some U.S. allies in Europe have called for the resumption of trade and diplomatic relations with Libya and the elimination of the longstanding sanctions regime against that country.¹⁸¹ The U.S. may one day choose to recognize and promote the democratization of Cuba and expand trade with that nation. Frozen assets provide a powerful bargaining chip in meeting each of these goals.¹⁸² For example, the U.S. can release such assets gradually to reward countries for behavior the U.S. favors.¹⁸³ The assets also can be used to resolve outstanding judgments via "global settlements," in exchange for the U.S. conferring diplomatic recognition and resuming economic trade.¹⁸⁴ Inasmuch as section 1605(a)(7) of the FSIA has allowed the creation of large judgments against state sponsors of terrorism, the United States has not opposed litigation brought by private plaintiffs.

However, allowing private plaintiffs to enforce the judgments by tapping into the frozen assets located in the United States threatens the government's interests and may weaken the government's negotiating position. For example, U.S. opposition to Stephen Flatow's attempts to execute on his judgment is based

in part on concern that they will complicate efforts by the two countries to resolve conflicting multibillion-dollar claims in two separate proceedings in international courts at the Hague. Iran has alleged that there are \$12 billion in the United States looted from the country by the shah, a claim U.S. officials have

180. See, e.g., *Upfront Tonight: U.S. Government Reaching Out for Better Relationship with Iran After it Voted in a New Reform Government During its Past Elections* (CNBC broadcast, Mar. 19, 2000) (following election of reform majority to Iranian government, Clinton Administration announced that some Iranian assets frozen since the 1979 hostage crisis would be returned and that ban on some Iranian products, such as carpets, dried fruits, nuts and caviar, would be lifted).

181. See James Blitz, *Italy Pursues Goal of Increased Libya Trade*, FINANCIAL TIMES (London), Dec. 3, 1999, at 13.

182. See *U.S. Quashes Attachment by Terrorism Victim Against Iranian Property*, INT'L ENFORCEMENT L. REP., Jan. 2000.

183. See Bill Miller and John Mintz, *Once-Supportive U.S. Fights Family Over Iranian Assets*, WASH. POST, Sept. 27, 1998, at A08.

184. *Id.*

dismissed. Any eventual rapprochement between the two nations would involve a settlement of these massive financial disputes Iran's regime has been preoccupied by these claims for years. Former U.S. officials point out that a lengthy stalemate in a previous controversy – Tehran's detention of U.S. diplomats – was broken in 1981 when Washington agreed to release to Iran \$10 billion in previously frozen bank accounts. The Flatows could stand a better chance of collecting by waiting for such a "global" settlement between the two governments

¹⁸⁵

The government also has expressed concerns about the collateral effects of enforcement. If judgment creditors suddenly were to receive a favorable decision allowing execution on frozen assets, other potential plaintiffs might file suits to claim their piece of the pie.¹⁸⁶ As the assets decreased, so would the United States' leverage to achieve other foreign policy goals with respect to the foreign state.

B. FSIA Plaintiffs Must Overcome Other Significant Legal and Practical Hurdles

To some extent, the Clinton Administration's predictions about the effectiveness of the FSIA have been correct. First, foreign states have ignored the proceedings filed under section 1605(a)(7) of the Act. Second, none of the seven nations designated as state sponsors of terrorism by the State Department maintains constructive diplomatic and economic relations with the United States. Logically, it follows that these nations do not have much property in the U.S. which might be "used for a commercial purpose" within the meaning of section 1610(a)(7) of the FSIA. The court decisions bolstered the Administration's credibility. For instance, *Flatow II* made it clear that seized diplomatic and consular property currently being used for commercial purposes is off-limits to judgment creditors. So are temporary funds in the U.S. Treasury slated to pay the debts and judgments of the United States owing to terrorist nations.¹⁸⁷ Finally, the courts have been reluctant to scrutinize the form and function of third party corporations that

185. *Id.*

186. See testimony of Deputy Treasury Secretary of State Stuart E. Eizenstat, noted in Laurence Arnold, *Families Blast U.S. Roadblocks to Compensation for Terrorism*, RECORD (Bergen County, NJ), Oct. 28, 1999, at A8.

187. See *Flatow III*, *supra* note 164.

front for foreign governments to make assets available for execution.¹⁸⁸

The remaining battles recently litigated in the federal courts have dealt with creditors' ability to garnish funds flowing from businesses in the United States to foreign entities. Even if the target funds satisfy the "commercial purpose" exception to immunity from attachment, plaintiffs still must show that the recipients are not juridically separate from the terrorist government. This boils down to plaintiffs proving factually that the entity to which the funds flowed was the alter ego of the state. The burden is compounded by the difficulty of engaging in international discovery with noncooperative garnishees.

Until very recently, it seemed certain that FSIA plaintiffs would not recover any money on their judgments unless the United States assisted them or Congress amended the antiterrorism regime again. In 1999, Congress took up the challenge and attempted to pass additional legislation to further amend the FSIA. Senate Bill 1796, entitled "Bill to Modify the Enforcement of Certain Anti-Terrorism Judgments, and For Other Purposes," would have permitted victims of terrorism to attach foreign assets located in the United States, including foreign mission property no longer used for diplomatic purposes. The measure did not garner enough support to pass.¹⁸⁹ In 2000, however, Congress was successful in obtaining support for new legislation that forces the Executive branch to subordinate its foreign policy authority to Congress.

V. Epilogue: The 2000 Justice for Victims of Terrorism Act and Its Repercussions

On October 28, 2000, following intensive lobbying by victims of terrorism, Congress passed and President Clinton signed the Victims of Trafficking and Violence Protection Act of 2000.¹⁹⁰ Contained within that Act is the Justice for Victims of Terrorism Act (JVTA)¹⁹¹, which modifies and incorporates several provisions of House Bill 3485 and Senate Bill 1796, both introduced in late 1999. Among its relevant provisions, the antiterrorism legislation directs the Secretary of the United States Treasury to pay upon request to a qualifying claimant 100 or 110 percent of compensatory

188. See *Flatow II*, *supra* note 155.

189. See *Flatow IV*, *supra* note 119, at 28.

190. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000).

191. Sections 2002-2004 of the Victims of Trafficking and Violence Protection Act of 2000.

damages awarded by a court judgment on claims filed under 28 U.S.C. § 1605(a)(7), plus post-judgment interest and any amounts awarded by judicial order as sanctions against Cuba.¹⁹² To be entitled to 100 percent, the claimant must “relinquish all rights to execute against or attach property that is at issue in claims against the United States before an international tribunal, that is the subject of awards rendered by such tribunal, or that is subject to [28 U.S.C. §1610(f)(1)(A)].”¹⁹³ To receive the ten percent premium, the claimant also must relinquish all rights and claims to punitive damages awarded in the judgment.¹⁹⁴

The Act’s funding provisions are highly controversial. In the case of judgments against Cuba, the Act gives the President the authority to vest and liquidate property of Cuba and judicially sanctioned entities in the United States that has been blocked pursuant to the section 5(b) of the Trading with the Enemy Act, sections 202 and 203 of the International Emergency Economic Powers Act, or derivative proclamations, orders, or regulations.¹⁹⁵ The Act also specifies that sanctions payments shall be made from funds or accounts subject to sanctions, or from blocked assets of the Cuban government.¹⁹⁶ In the case of judgments against Iran, the amounts are to be paid from rental proceeds from Iranian diplomatic and consular property located in the U.S. and other frozen assets, subject to a maximum limit for all claims against Iran of approximately \$400 million.¹⁹⁷ If the United States pays money to a victim in connection with a Foreign Military Sales Program account, it becomes subrogated to the extent of the payments to the rights of the judgment creditor against the debtor state. The Act directs the President to pursue the United States’ rights “as claims or offsets of the United States in appropriate ways, including any negotiation process which precedes the normalization of relations between the foreign state designated as a state sponsor of terrorism and the United States”¹⁹⁸ In the case of Iran, the Act is specific: neither may the United States pay or release blocked assets to Iran, nor may the President normalize relations with Iran, until the subrogated claims have been satisfied.¹⁹⁹

192. Justice for Victims of Terrorism Act § 2002(a).

193. *Id.* § 2002(a)(2)(D).

194. *Id.* § 2002(a)(2)(C).

195. *Id.* § 2002(b)(1).

196. *Id.*

197. Justice for Victims of Terrorism Act § 2002(b)(2).

198. *Id.* § 2002(c).

199. *Id.* § 2002(d).

Although the new law seems to bring closure to the victims' struggle to achieve compensation by guaranteeing a speedy recovery²⁰⁰, it also seems certain to exacerbate the problems created by the early amendments to the FSIA. Moreover, the law may increase the political and economic tensions between the United States and its foreign adversaries that fuel terrorism in the first place. For example, the Iranian government has taken admittedly retaliatory steps to encourage litigation by Iranian citizens against the U.S. government by exempting plaintiffs' attorneys' fees from income taxes.²⁰¹ Iran has reaffirmed its belief that the \$1.2 billion of judgments obtained against it by U.S. plaintiffs violate due process and are illegal according to international laws and conventions.²⁰² It has warned that the new law is counterproductive to the Clinton Administration's efforts to improve U.S. – Iranian relations, will "raise the wall of distrust between the two countries to a newer level," and will in the long run "end up hurting U.S. national interests and its people."²⁰³ The United States should be concerned. It maintains significant assets abroad, which might be subject to attachment and seizure in execution of retaliatory judgments obtained under foreign laws. In addition, the JVTa severely constrains the President's foreign policy discretion by precluding normalization of relations with terrorist states until the money judgments are recovered. This in turn may "make rogue governments defensive [and] discourag[e] dialogue, engagement, political reform, and integration by these states into international legal and financial regimes."²⁰⁴ Whereas frozen assets previously might have been available for the U.S. to use to encourage or to reward political reform abroad, release of the assets will now be conditioned upon reimbursement of the Treasury for the judgments paid. And inasmuch as the new law complicates and prolongs the

200. Indeed, by the time this Comment is published, more than 16 families will have received financial compensation from the U.S. government totaling in excess of \$424.5 million, plus significant interest payments. See Bill Miller, *Terrorism Victims Set Precedent; U.S. to Pay Damages, Collect from Iran*, WASH. POST, Oct. 22, 2000, at A01.

201. See *Iran: Majlis Deputy Condemns USA for Anti-Iranian Bill*, "Iran News" web site, Tehran, in English, Nov. 2, 2000; reported by BBC Worldwide Monitoring, available in LEXIS, News Group File.

202. *Id.*

203. *Id.*

204. Anne-Marie Slaughter and David Bosco, *Plaintiff's Diplomacy*, FOREIGN AFFAIRS, Sept./Oct. 2000, at 102, available in LEXIS, Magazine Stories, Combined file.

existing sanctions regime, it will likely encourage additional anti-U.S. sentiment abroad and fuel terrorism.

Even more troublesome, however, is the extent to which the Congress has made the federal courts its agents in abrogating foreign sovereign immunity.

The very basis of jurisdiction over foreign states in these cases – designation by the State Department of a government as a supporter of terrorism – is itself a political decision that the court then endorses. Often foreign states do not even appear to defend themselves. In such an environment, the fairness of the proceedings becomes questionable. Judges may be tempted to set policy from the bench, and the perception of impartiality will suffer.²⁰⁵

In addition, under the 2000 JVTA, the judiciary must determine the amounts to be awarded as sanctions against Cuba, which involves the concept of “punishment” of another sovereign better reserved to the Executive branch. Diplomatic property located in the United States is no longer sacred and worthy of protection, and it may be that a district court in a future suit will be required to attach rental proceeds from foreign government property located on U.S. soil. And the judicial system may soon be burdened with new suits by plaintiffs eager to persuade the courts *ex parte* that they too were victims of international terrorism.

VI. Conclusion

The reader should query whether, in light of the recent JVTA, the antiterrorism amendments to the FSIA have served their designated purposes. Congress enacted the antiterrorism amendments with two major goals in mind: to compel foreign state sponsors of terrorism to provide compensation to American victims of international terrorist attacks, and to deter such states from engaging in terrorism and sponsorship by making the financial costs prohibitively high. Arguably, the 1996 and 1998 amendments did neither, and the most recent amendments do little more than respond to Congress’ political need to placate the plaintiffs by paying them off.

The early amendments sought to hold foreign governments directly accountable to American plaintiffs by extending the jurisdiction of the U.S. district courts over agents of terrorism. The system didn’t work because the courts were reluctant to authorize

205. *Id.*

the seizure of foreign assets and to allow private citizens to deal the final blow to sovereign immunity absent the concurrence of the Executive and Legislative branches. In an effort to correct the problem, Congress interposed the JVTa and inadvertently made matters much worse. The JVTa relieves the foreign government from direct accountability to the plaintiffs. Under the JVTa, the U.S. government offers cash to the victims to separate them and the legal mechanism Congress designed from the diplomatic process of resolving international disputes. It also undermines the effectiveness of the judgments by eliminating the punitive damages awards. In contrast to the legal mechanism, the diplomatic process compels respect for the sovereignty of the adversary state and attempts to leverage frozen assets of that state to compel reimbursement. In other instances, particularly with respect to the Cuban judgments, the Executive branch may be required to act as the agent of the plaintiffs and to liquidate frozen assets to reimburse the government.²⁰⁶ Notwithstanding the directives in the JVTa, many critics of the law are skeptical that the government will actually recover.²⁰⁷

In either case, the terrorists will not be deterred. It is difficult to envision the antiterrorism regime working any hardship on terrorists if assets belonging to their home states but frozen and unavailable for the past 20 or 30 years are reduced to offset civil judgments. Perhaps the real solution to the problem lies in strengthening domestic and international criminal laws. After all, how can the survivors of terrorist attacks who lost years of their own freedom as hostages or close family members during bombings sense any real justice when the perpetrators of the crimes maintain their freedom? In other words, is the government's proffered financial compensation merely a placebo to resolve temporarily the ache of manifest injustice?

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206. Query whether it would have been better for Congress simply to have established a domestic victims' fund.

207. See, e.g., Associated Press, *Terrorism Suits Settled with Government Money*; "Scheme": *Legislation Will Pay Victims from the U.S. Treasury Before Asking Terrorist Nations*, TELEGRAPH HERALD (Dubuque, IA), Oct. 30, 2000, at a2.

