The Foreign Sovereign Immunities Act,\textsuperscript{2} as amended in 2008, provides an exploitable policy lever for the Obama administration as it seeks to deal with threats posed by state sponsors of terror such as Iran and Syria. Supporting private causes of action by victims of terror is both just and good policy.

The dramatic and successful evolution in civil litigation against foreign sovereign sponsors of terrorism since the late 1990s\textsuperscript{3} supports the argument that the U.S. government should cooperate with victims in their efforts to sue the parties that injured them and to collect any damages awarded. Recent successes have confirmed this thesis, but there is further room for cooperation. Today, U.S. victims of international terrorism have robust legal rights in U.S. federal courts against state sponsors of terrorism, after a protracted battle in the courts and Congress as to the scope of those rights. Now that the benefits of such litigation have become clearer, the Executive Branch should cooperate with victims of terrorism to ensure that they are able to collect on their damage awards, which would facilitate U.S. foreign policy goals.

\textsuperscript{1} Perles Law Firm, PC, Washington, DC. This paper was the foundation of the oral presentation and comments by Mr. Perles at the 2012 Sokol Colloquium on the topic of “Enforcement Provisions of the FSIA”. Additionally, this is an update and expansion of a paper written in 2008 by the coauthors and Major Gabriel Lajeunesse of the United States Airforce (whose input did not necessarily reflect the views of the Department of Defense or its components).

\textsuperscript{2} 28 U.S.C. § 1602, \textit{et seq.}

\textsuperscript{3} In the late 1990s, the first successful cases brought by U.S. citizens against state sponsors of terrorism, such as \textit{Flatow v. Islamic Republic of Iran}, 999 F. Supp. 1 (D.D.C. 1999), \textit{Eisenfeld v. Islamic Republic of Iran}, 172 F. Supp 2d 1 (D.D.C. 2000), and \textit{Jenco v. Islamic Republic of Iran}, 154 F. Supp 2d 27 (D.D.C. 2001).
The existence of the rights of victims of terrorism has not meant that they have been exercised as effectively as Congress intended. Congress created a legislative regime in 1996 to allow civil litigators to pursue state sponsors of terrorism by obtaining damages for U.S. victims of terrorism in order to both deter further acts of terrorism and compensate the victims of past acts. Two factors thereafter imperiled the efforts by private civil litigators: structural problems in the statutory regime and insufficient support from the Executive Branch and law enforcement and investigatory officials.

Prior to 1996, the only precedent in U.S. federal courts from cases brought by victims of terrorism seemed to suggest to victims of international terrorism that they should not bother to bring a lawsuit against either foreign states or the terrorist groups that had injured them. After the passage of a new “state-sponsored terrorism exception” to foreign sovereign immunity in 1996, there were now statutes creating subject matter jurisdiction against foreign states that sponsored acts of terrorism against U.S. citizens, as well as non-state actors, but a few harmful court decisions arising out of structural deficiencies in the key statutes created difficulties for the civil litigators seeking to represent U.S. citizens who had suffered death and personal injury as a result of international terrorism. A line of cases brought against the Islamic Republic of Iran, beginning with Flatow v. Islamic Republic of Iran, brought the concept of using civil

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4. “Although Libya's alleged participation, if true, in this tragedy is outrageous and reprehensible and the human suffering involved is heartbreaking, this Court may not rightly obtain jurisdiction over Libya for the purposes of these private rights of action. Libya's alleged terrorist actions do not fall within the enumerated exceptions to the Foreign Sovereign Immunity Act and therefore Libya must be accorded sovereign immunity from suit.” Smith v. Socialist People's Libyan Arab Jamahiriya, 886 F. Supp. 306, 315 (E.D.N.Y. 1995) (rejecting the first lawsuit against Libya for the bombing of Pan Am 103).

5. “I believe, as did the district court, that, in the circumstances presented here, appellants have failed to state a cause of action sufficient to support jurisdiction under either of the statutes on which they rely.” Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 799 (D.C. Cir. 1984).


litigation to win redress against sponsors of international terrorism to a wider audience of attorneys and victims. The hesitation to litigate diminished as several attorneys and firms successfully acquired sufficient information to withstand the rigors of trial in a U.S. federal court and win a judgment against a foreign state sponsor of terrorism. The subsequent difficulties the Flatows experienced in satisfying their judgment identified the obstacles that needed to be removed before anti-terrorism civil litigation could near its goals of deterrence and compensation.

Despite this, the field of anti-terrorism litigation has stabilized. An increasingly sophisticated knowledge of international terrorism adds fuel to the cycle of innovation by civil litigators and their successes have encouraged further support from Congress. The hesitation from the Executive Branch does lead one to ask whether these lawsuits complement U.S. foreign policy goals. But the fact that the litigation has continued to achieve notable successes, despite the hesitation of the Executive Branch, its utility to actors in the U.S. government’s foreign policy apparatus should be recognized.

Success in both obtaining a judgment and collecting against the foreign sovereign debtor is critical to the effort against state sponsors of terrorism. State sponsors of terrorism ignore these lawsuits unless their assets are vulnerable to the US judgment holders. While legislative reform has greatly aided the ability of civil litigators to secure large judgments in court and to attach the assets of liable state sponsors of terrorism, the cooperation of the Executive Branch is necessary before victims of terrorism may yet secure justice and anti-terrorism civil litigation may maximize its impact.

I. EARLY PROMISES – THE BEGINNING OF ANTI-TERRORISM CIVIL LITIGATION
There was a time when U.S. victims of terrorism had no explicit civil recourse for acts of international terrorism. In 1984, the United States Circuit Court for the District of Columbia Circuit decided *Tel-Oren v. Libyan Arab Republic*, and victims of horrendous attacks learned that they had no suitable remedy despite identifiable defendants. On March 11, 1978, thirteen heavily armed members of the Palestine Liberation Organization landed by boat in Israel and captured two buses, and a few carloads of hostages. They tortured them, shot them, wounded them and murdered them. Before the Israeli police could stop the massacre, 22 adults and 12 children were killed, and 73 adults and 14 children were seriously wounded.

In a per curiam opinion with three concurring written decisions, the appellate court found that the trial court correctly dismissed the case for lack of subject matter jurisdiction. The appellate court agreed that there was no jurisdictional basis for the trial court to adjudicate these acts of international terrorism and the case was dismissed. The claimants who brought the lawsuit originally included the sovereign state supporter of the attack, but the trial court ruled that it had no subject matter jurisdiction over the case and those claims were abandoned in the appeal. The result in this case laid bare the complete inability of U.S. citizens to file civil suits against the terrorists or their supporters injured them in acts of international terrorism. Congress would resolve this problem by enacting two statutes into law: one that allowed U.S. citizens injured in his or her person, property, or business by reason of an act of international terrorism" to sue to

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9 *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984).
10 *Id. at 776.*
11 *Id.*
12 *Id.*
13 *Id. at 795, 796, 798*
14 *Id. at 799 n.3.*
15 18 U.S.C. § 2333
recover damages and the second one to allow U.S. citizens to peel back the sovereign immunity that protected foreign state sponsors of terrorism from lawsuits by private individuals in the United States.\textsuperscript{16}

In 1992, Congress passed 18 U.S.C. § 2333, allowing a person "injured in his or her person, property, or business by reason of an act of international terrorism" to sue to recover damages. 18 U.S.C. § 2333 relies upon another statute for the controlling definition of "international terrorism"—18 U.S.C. § 2331 defines it as "activities that involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States." Civil litigation against state sponsors of terrorism also required action by Congress. Courts in the United States possess subject matter jurisdiction over foreign sovereigns only to the extent granted by the Foreign Sovereign Immunities Act ("FSIA").\textsuperscript{17} The FSIA therefore “provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country.”\textsuperscript{18} From early on, federal common law generally provided foreign states with absolute immunity from suit.\textsuperscript{19} With the rise of state trading companies in the twentieth century, exceptions began to be made under a theory of “restrictive immunity,” which was formally adopted as United States policy by the Department of State in the so-called Tate Letter of May 1952.\textsuperscript{20} Under this theory, immunity was confined to suits involving the foreign sovereign’s public acts, and

\textsuperscript{17} 28 U.S.C. § 1330 ("The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603").
\textsuperscript{19} See, e.g., The Schooner Exchange v. M’Faddon, 11 U.S. (7 Cranch) 116 (1812).
did not extend to cases arising out of a foreign state’s strictly commercial acts.\(^{21}\)

Administration of the restrictive-immunity theory proved problematic. Courts deferred to State Department recommendations on immunity questions, which forced this executive agency to assume a judicial function that often conflicted with its primary mission of conducting American foreign policy: foreign nations frequently pressured the State Department to recommend immunity, and political considerations sometimes led to recommendations of immunity in cases where immunity would not have been available under the restrictive theory.\(^{22}\) The State Department, moreover, did not participate in every case, which left the courts to make their own decisions in that class of cases. As a result, “the governing standards were neither clear nor uniformly applied.”\(^{23}\) In 1976, Congress responded to these problems by enacting the Foreign Sovereign Immunities Act, 28 U.S.C. §§1330, 1602-1611, which specified seven exceptions to the general rule of immunity for foreign states (including the “commercial activities exception”), and assigned the interpretation of those exceptions to the courts.\(^{24}\) Subsequent amendments added two additional exceptions to the general rule (including the 1996 addition of the “state sponsored terrorism exception”).\(^{25}\)

The FSIA provides for immunity, subject to its enumerated exceptions: “a foreign state shall be immune from the jurisdiction of the courts of the United States and of the

\(^{21}\) Id. at 487.

\(^{22}\) Id.

\(^{23}\) Id. at 488 (citations omitted).

\(^{24}\) The originally enacted exceptions to immunity of foreign states from the courts of the United States were waiver, commercial activity, expropriation, gifts in immovable property in the United States, torts occurring within the United States, 28 U.S.C. § 1605(a)(1)-(5), suits in admiralty to enforce maritime liens, 28 U.S.C. § 1605(b), and counterclaims against foreign state plaintiffs, 28 U.S.C. § 1607.

\(^{25}\) In 1988, Congress added an exception to immunity for actions to enforce arbitration agreements and awards. 28 U.S.C. § 1605(a)(6). In 1996, Congress added the “state-sponsored terrorism exception” to immunity for actions arising from a foreign state’s acts of torture, extrajudicial killing, hostage-taking, aircraft sabotage or material support for such an act which results in the injury or death of United States nationals. 28 U.S.C. § 1605(a)(7).
States except as provided in sections 1605-1607 of this chapter.”

A U.S. citizen cannot file a lawsuit against a foreign state in the United States unless the allegations contained in his or her complaint meet the requirements found within the several enumerated exceptions, listed at 28 U.S.C. § 1605-1607. Hence the result in *Tel-Oren*.

Results such as *Tel-Oren* and *Smith v. Socialist People's Libyan Arab Jamahiriya* in the Eastern District of New York in 1995, led to the formation of political coalitions that successfully advocated on the behalf of the rights of victims of terrorism. In 1996, as part of the Antiterrorism and Effective Death Penalty Act (“AEDPA”), Congress reacted by amending the Foreign Sovereign Immunities Act (“FSIA”) to create a judicial forum for adjudicating the claims of victims of terrorist acts committed by foreign states that the U.S. State Department has designated as state sponsors of terrorism. AEDPA created the “state-sponsored terrorism exception” to the sovereign immunity that is ordinarily enjoyed by foreign states under the FSIA. 28 U.S.C. § 1605(a)(7). Under AEDPA, countries officially designated by the Department of State as terrorist states can be held liable for personal injuries or deaths if the foreign state commits a terrorist act, or provides material support and resources to an individual or entity that commits such an act.

Congress next addressed the issue of remedies for plaintiffs in these cases. A provision called “Civil Liability for Acts of State-Sponsored Terrorism” was enacted on September 30, 1996 as part of the 1997 Omnibus Consolidated Appropriations Act. This provision is commonly referred to as the "Flatow Amendment." The Flatow

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28 *Id*.
30 The Flatow Amendment was named after the murdered daughter of lead Plaintiff Stephen Flatow whose case resulted in the decision *Flatow v. Islamic Republic of Iran*. 999 F. Supp. 1 (D.D.C. 1998). 20-year
Amendment established the measure of damages available in suits under the “state-sponsored terrorism” provision of the FSIA. After passage of the Flatow Amendment, victims of terrorism moved quickly to take advantage of the new tools provided by Congress to fight back against the sovereign states that injured them. Stephen Flatow filed a wrongful death complaint against the Islamic Republic of Iran (“Iran”) and its officials on February 26, 1997, in the United States District Court for the District of Columbia and on March 11, 1998, the district court entered a historic default judgment against Iran in favor of the Flatows in the amount of $247,513,220.

There have been numerous cases since Flatow that have documented the ties between Iran, Iraq, Syria, the Sudan, and Libya and individual acts of terrorism.

II. FLATOW’S PROMISE BROKEN?

Almost immediately, court decisions that were at odds with the congressional intent behind the Flatow Amendment threatened to radically undermine anti-terrorism civil litigation. The Flatow Amendment was critical to the early development of anti-terrorism civil litigation for two principle reasons: increasing the measure of damages available to victims in order to create deterrence through massive penalties for the proscribed behavior and providing a uniform measure of damages by creating a federal

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Alisa was riding in a bus that was attacked by a Palestine Islamic Jihad suicide bomber, who drove a van loaded with explosives and shrapnel. Id. at 7. Alisa died shortly after the bombing, from a fatal head wound. Id. at 8.

31 Id. at 12-13. This holding was overruled by the United States Circuit Court of Appeals for the District of Columbia Circuit in Cicippio-Puleo v. Islamic Republic of Iran, which found that the Flatow Amendment only provided a cause of action against officials of a foreign state under certain circumstances. 353 F.3d 1024, 1033 (D.C. Cir. 2004). This holding was overturned by Congress in 2008 by the codification of a new exception to foreign sovereign immunity at 28 U.S.C. § 1605A and an explicit federal right of action against the foreign state itself, with punitive damages, at 28 U.S.C. 1605A(c). P.L. 110-181, § 1083.

32 999 F. Supp. at 32.

33 Id. at 12-13 (“The brief explanation of the Flatow Amendment’s purpose in the House Conference Report explicitly states that it was intended to increase the measure of damages available in suits under 28 U.S.C. § 1605(a)(7).”) (citing to H.R. CONF. REP. 863, 104TH CONG, 2ND SESS. 1996, reprinted at 1996 U.S.C.C.A.N. 924).
cause of action. A foreign sovereign that is supporting acts of terrorism against U.S. citizens is unlikely to pay attention to damage awards against it unless the damages are significant:

The state-sponsored terrorism exception, however, was enacted explicitly with the intent to alter the conduct of foreign states, particularly towards United States nationals traveling abroad. Congressman Saxton, the Chairman of the House Task Force on Counterterrorism and Unconventional Warfare, was convinced that the only way to accomplish this goal was to impose massive civil liability on foreign state sponsors of terrorism whose conduct results in the death or personal injury of United States citizens. As compensatory damages for wrongful death cannot approach a measure of damages reasonably required for a foreign state to take notice, Congressman Saxton sponsored the Flatow Amendment in order to make the availability of punitive damages indisputable.\(^{34}\)

Are punitive damages appropriate for these types of cases? Punitive damages are traditionally used to both punish particularly heinous conduct and to deter future wrongdoing.\(^{35}\) The provision of material support to terrorists who detonate high explosives wrapped with nails and ball bearings on packed buses or in crowded civilian shopping malls would seem to be an act uniquely deserving of an award of punitive damages.\(^{36}\)

The evidence shows that Syria supported, protected, harbored, and subsidized a terrorist group whose modus operandi was the targeting, brutalization, and murder of American and Iraqi civilians. Premeditated violence against civilian targets is not a legitimate action by any government. Civilized society cannot tolerate states whose partnership

\(^{34}\) 999 F. Supp. at 25-26.

\(^{35}\) “Punitive damages are awarded to punish a defendant for particularly egregious conduct, and to serve as a deterrent to future conduct of the same type.” Eisenfeld v. Islamic Republic of Iran, 172 F. Supp. 2d 1, 9 (D.D.C. 2000); see also Pacific Mut. Life. Ins. Co. v. Haslip, 499 U.S. 1, 15 (1991).

\(^{36}\) See e.g., Cronin v. Islamic Republic of Iran, 238 F. Supp. 2d 222, 235 (D.D.C. 2002) (“Here, the Court has no difficulty finding that the depraved and uncivilized conduct of the Iranian Ministry of Information and Security constitutes "outrageous" conduct. The defendant organized, trained, and funded Amal, Islamic Amal, and Hizbollah so that the organizations could torture and take individuals like the plaintiff hostage. Under even the most restrictive interpretation of the term, the defendant's actions in this matter are clearly "outrageous" and warrant the imposition of punitive damages.”).
with terrorist surrogates, like Zarqawi’s terrorist network, is formed for the purpose of achieving political victory through heinous acts of barbarism.\(^{37}\)

The second purpose behind the codification of a federal cause of action for use in actions against state sponsors of terrorism was equally important. This was to provide a uniform measure of damages for all victims of terrorism irrespective of where the act of terrorism took place or of the place of residence of the victim of terrorism. The alternative in place of a federal cause of action would be dependant upon the choice-of-law analysis conducted by each court, which might lead to widely varying recoveries or, worse, to an unfortunate circumstance where some families might recover but others might not in a single mass tort case due to the vagaries of the law applicable to each family.

The importance of the Flatow Amendment was underscored after the United States Circuit Court for the District of Columbia Circuit issued a ruling that effectively nullified it.\(^ {38}\) Cicippio-Puleo held that the “Flatow Amendment does not authorize a cause of action against foreign states”\(^ {39}\) despite the holding of Flatow, the overwhelming weight and uniformity of subsequent authority\(^ {40}\) and the logic behind these decisions.


\(^ {38}\) Cicippio-Puleo v. Islamic Republic of Iran, 353 F.3d 1024 (D.C. Cir. 2004).

\(^ {39}\) Id. at 1032.

The Flatow Amendment is a hollow right unless the state sponsor of terrorism itself can be held liable. Allowing the parents of a murdered US citizen to sue the driver of the truck that detonated a bomb that killed their child does not have any effect or impact upon the calculations of the foreign state that paid for the driver’s training, the bomb that incinerated the U.S. citizen, and the funds that sustain the organization that planned and executed the horrific act itself. The policy goals of anti-state sponsored terrorism litigation, as codified by Congress, are to compensate the victims of terrorism and to staunch the flow of money from foreign states to the terrorist organizations that fight proxy wars on behalf of the foreign states. This policy cannot be effectively achieved without a federal cause of action against the state itself, and the subsequent ability to collect money judgments against the terrorists, their organizations, their funders, and the U.S. State Department designated state sponsors of terrorism.

The ruling created a brake on litigation against state sponsors of terrorism as litigators were not only stripped of the right to seek punitive damages against foreign sovereigns, but the question of what, if any, law would supply any cause of action against a foreign sovereign became paramount. A prime example of the potential for mischief is illustrated by the decision issued in the case brought by the families of the deceased U.S. service personnel murdered in the 1983 bombing of the Marine barracks in Beirut, Lebanon. In 1982, a multi-national peacekeeping force including U.S. and French troops, with the concurrence of the United Nations, deployed to Beirut.\(^{41}\) The U.S. troops were

\(^{41}\) *Peterson v. Islamic Republic of Iran*, 264 F. Supp. 2d 46, 49 (D.D.C. 2003) (“The rules of engagement issued to the servicemen of the 24th MAU made clear that the servicemen possessed neither combatant nor police powers. In fact, under the rules, the servicemen were ordered not to carry weapons with live rounds in their chambers, and were not authorized to chamber the rounds in their weapons unless (1) they were directly ordered to do so by a commissioned officer or (2) they found themselves in a situation requiring the immediate use of deadly force in self-defense.”).
from the 24th Marine Amphibious Unit, which included men and women from all over the country, including non-U.S. nationals. In *Peterson v. Islamic Republic of Iran*, the court found that Iran organized and planned the attack that destroyed the Marine barracks. The enormously complex question remained of what law to apply to determine damages for nearly one thousand plaintiffs from numerous different states. “In order to ensure that the Court determines the appropriate amount of damages available to each plaintiff under the law, it must first ensure that each plaintiff has a valid claim under state law.”

Without the ability to utilize the Flatow Amendment, the plaintiffs were forced to resort to whatever other sources of law were available. It is important to remember that 28 U.S.C. § 1605(a)(7) merely prescribed the requirements that a plaintiff’s lawsuit must meet before a U.S. court may assert subject matter jurisdiction over the case. 28 U.S.C. § 1606 further provides that “the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances . . . .” Thus, once a plaintiff pierces the immunity of a foreign state under 28 U.S.C. § 1605(a)(7), and a court asserts its subject matter jurisdiction, 28 U.S.C. § 1606 defines the sources of law that apply to a foreign sovereign. This allows a plaintiff to assert any applicable cause of action against a non-immune foreign state. Under the FSIA, a foreign sovereign “shall be liable in the same manner and to the same extent as a private individual under like circumstances.”

Once a foreign state's immunity has been lifted under Section 1605 and jurisdiction is found to be proper, Section 1606 provides that "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 1606. Section 1606 acts

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42 *Id.*  
43 *Id.* at 61.  
as a "pass-through" to substantive causes of action against private individuals that may exist in federal, state or international law.\textsuperscript{46}

The \textit{Peterson} court therefore performed a choice-of-law analysis through an application of the choice-of-law rules of the forum.\textsuperscript{47} The court employed the District of Columbia’s “modified government interest analysis” to decide that the law of the plaintiffs’ domicile at the time of the attack has “the greatest interest in providing redress to its citizens.”\textsuperscript{48}

This meant that the law of the domicile of the service person at the time of the attack would provide the applicable law for the wrongful death claims and for the battery claims of the surviving service persons.\textsuperscript{49} For the family members with intentional infliction of emotional distress claims, 753 plaintiffs, the court would look to the domicile of the plaintiff at the time of the attack.\textsuperscript{50} This led the court to analyze the various laws of:

- Alabama
- California
- Connecticut
- District of Columbia
- Florida
- Georgia
- Illinois
- Indiana
- Kansas
- Kentucky
- Louisiana
- Maryland
- Massachusetts
- Michigan
- Minnesota
- Mississippi
- Missouri
- Nebraska
- New Jersey
- New Mexico
- New York
- North Carolina
- Ohio
- Oklahoma
- Pennsylvania
- Rhode Island
- South Carolina
- South Dakota
- Tennessee
- Texas
- Vermont
- Virginia
- Washington
- West Virginia
- Wisconsin

Aside from the enormous expenditure of judicial resources, this also resulted in a tragic outcome for those plaintiffs whom happened to have been situated in states that did not allow for recovery for intentional infliction of emotional distress under the factual circumstances of the case. Plaintiffs from Louisiana and Pennsylvania therefore were


\textsuperscript{47} 515 F. Supp. 2d at 38.

\textsuperscript{48} \textit{Id}.

\textsuperscript{49} \textit{Id}. at 39-40.

\textsuperscript{50} \textit{Id}. at 41.

\textsuperscript{51} \textit{Id}. 
unable to recover for their damages.\textsuperscript{52} Had there been a uniform measure of damages in a federal cause of action, those plaintiffs would have not been left out.

\textbf{III. FAILED ATTEMPTS TO CAPITALIZE ON 28 U.S.C. § 1605(a)(7)}

The tale of the Flatows’ attempts to enforce their judgment against Iran further illustrated the obstacles that remained to hinder litigators and provided a primer for the legislators who would set out to remove those obstacles. Among other Iranian assets inside the country,\textsuperscript{53} the Flatows targeted the former Iranian embassy and former Iranian embassy officials’ residences. The Department of Justice appeared in court to defend the Iranian assets from attachment by arguing that the attachments would impermissibly conflict with the obligations of the United States under the Vienna Convention on Diplomatic Relations, a treaty to which the United States is a signatory.\textsuperscript{54} The Department of Justice also defended against the attachment of any funds in the U.S. Treasury owed to Iran or under dispute in litigation between the U.S. government and Iran in other tribunals by arguing that any Iranian funds sitting in U.S. accounts are protected by U.S. sovereign immunity, and the courts agreed.\textsuperscript{55}

The asset hunt therefore expanded to include Iranian assets remaining in the United States yet outside U.S. government control. An insuperable obstacle quickly arose: courts began to apply the common law presumption of respect for the corporate form of juridically separate government instrumentalities, enunciated in First National

\textsuperscript{52} \textit{Id.} at 45.
City Bank v. Banco Para El Comercio Exterior de Cuba,\textsuperscript{56} and known as Bancec doctrine. This created an impossible obstacle to the statutory scheme through which Congress had sought to deter state-sponsored terrorism against American citizens.

\textit{First National City Bank} had enunciated an equitable, common law principle under which duly created instrumentalities of a foreign state are ordinarily entitled to a presumption of independent status. \textit{First National City Bank} also made it clear, however, that this presumption must not be used to undermine countervailing congressional policies. “In particular, the Court has consistently refused to where it is interposed to defeat legislative policies.”\textsuperscript{57} Congress enacted both the “state-sponsored terrorism exception” to the FSIA and the Flatow Amendment in order to deter state-sponsored terrorism.\textsuperscript{58} The “state-sponsored terrorism” exception, however, “was enacted explicitly with the intent to alter the conduct of foreign states, particularly towards United States nationals traveling abroad.”\textsuperscript{59} The Flatow Amendment, in turn, sought to achieve deterrence by increasing the damages available for plaintiffs suing foreign state sponsors of terrorism.\textsuperscript{60} Congress intended to create massive civil liability for proven state sponsors of terrorism under 28 U.S.C. § 1605(a)(7) as a way of altering their behavior.\textsuperscript{61}

Furthermore, in 1996, when Congress amended 28 U.S.C. § 1605 to include the “state-sponsored terrorism exception” to foreign sovereign immunity, it also amended 28 U.S.C. § 1610 to permit attachment of assets irrespective of the assets’ involvement in

\textsuperscript{57} Id. at 630 (citing Anderson v. Abbot, 321 U.S. 349, 362-63(1944)).
\textsuperscript{58} Flatow, 999 F. Supp. at 12, 25.
\textsuperscript{59} Id.
\textsuperscript{60} Id. at 12-13.
the underlying incident that provided the right for attachment.62 These amendments were intended to ease the process of attachment and execution for 28 U.S.C. § 1605(a)(7) judgment creditors. Prior to the amendments, victims of state-sponsored terrorism who obtained judgments under the then-existing provisions of the FSIA could not attach or execute upon the assets owned by the foreign state, unless they could prove the asset sought for execution or attachment was involved in the underlying incident.63

The harsh limitations this requirement placed upon successful plaintiffs’ ability to satisfy their outstanding judgments were illustrated in Letelier v. Republic of Chile.64 In Letelier, the victims of a bombing and assassination, sponsored by Chile and carried out in the United States, sought to execute upon the Chilean national airline, Linea Aerea Nacional-Chile (“LAN”), to satisfy their default judgment against Chile.65 The court found that the property was not used for the commercial activity upon which the claim was based and denied execution against LAN.66 In doing do, the court made clear the reason for its ruling: “Congress did not provide for execution against a foreign state's property under the circumstances of this case. Congress provided for execution against property used in commercial activity upon which the claim is based.”67 The 1996 amendment to 28 U.S.C. § 1610 was to ensure that victims of terrorism with outstanding 28 U.S.C. § 1605(a)(7) judgments did not fall into the Letelier trap.

64 748 F.2d 790, 791 (2d Cir. 1984).
65 Id. at 792.
66 Id. at 795-98.
67 Id. at 799.
The Letelier trap may have been avoided, but was quickly replaced by emergence of the Bancere trap in the Ninth Circuit decision Flatow v. Islamic Republic of Iran.\textsuperscript{68} The Flatows had “obtained a writ of execution for $ 247,513,220.00 on property in Carlsbad, California, owned by California Land Holding Company” a wholly-owned subsidiary of Bank Saderat Iran,\textsuperscript{69} which an Iranian national bank wholly owned by the state of Iran, as are all banks in Iran, due to the nationalization of banks in 1979 after the revolution. The Ninth Circuit affirmed the decision by the federal court in the Southern District of California by finding that the Bancere doctrine prevented execution against an entity established separate from the state by the state, unless the plaintiff can show that Iran exercises extensive or “day-to-day control” over Bank Saderat Iran.\textsuperscript{70} “The court found that Flatow had not shown that BSI operates as an arm of the Iranian government or that BSI's mission is to further the policies of the Iranian government.”\textsuperscript{71} The U.S. government entered a statement of interest and “took the position that the amendments to the FSIA did not alter the Bancere presumption because Bancere and the FSIA govern two separate questions of law: liability and jurisdiction.”\textsuperscript{72}

The mistake of the Ninth Circuit was to formulate a federal common law rule regarding the attribution of liability under the FSIA that defeated the congressional intent behind the anti-terrorism legislation. Congress decided that financial penalties should be exacted upon those foreign states that sponsor acts of terrorism against United States citizens, and Congress deliberately constructed a legislative scheme to fulfill its goal of deterrence. The Ninth Circuit mechanically construed Bancere to block the attachment of

\textsuperscript{68} 308 F.3d 1065 (9th Cir. 2002).
\textsuperscript{69} Id. at 1067.
\textsuperscript{70} Id. at 1072-74.
\textsuperscript{71} Id. at 1072.
assets otherwise available to satisfy outstanding judgments resulting from litigation that Congress has specifically sought to encourage, and thus upset Congress’s carefully crafted scheme.

In applying the *Bancec* doctrine, the Ninth Circuit adopted a “day-to-day control” test developed by other courts under the rubric of a different statutory provision: the FSIA’s “commercial activities exception” to sovereign immunity, 28 U.S.C. § 1605(a)(2). This was a serious mistake because the history and purposes of the two exceptions are quite different. The “day-to-day control” test is completely incongruous when applied to cases arising under the “state-sponsored terrorism exception,” found in 28 U.S.C. §1605(a)(7). The *Bancec* test, which is broadly consistent with analogous rules in American corporate law, has an obvious appeal in light of the purpose and history of the “commercial activities exception.” In establishing a separate corporation to pursue specific commercial activities, a foreign government is making trade-offs similar to those that an American corporation makes when it establishes an independent subsidiary. There being no obvious reason for applying different rules of attribution in these two highly analogous situations, courts have been inclined to treat them alike.

The legislative intent behind 28 U.S.C. § 1605(a)(7), the “state-sponsored terrorism exception,” however, is quite different from that underlying 28 U.S.C. § 1605(a)(2), the “commercial activities exception.” The difference is illustrated, for example, by the explicit and profound difference between the corresponding provisions for attachment in aid of execution. When the claim is brought under the “state-sponsored terrorism exception,” judgment creditors do not have to prove that property sought for

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72 *Id.* at 1071 n.10.
73 *See, e.g.*, *Hester Int’l Corp. v. Federal Republic of Nigeria*, 879 F.2d 170, 177-78 (5th Cir. 1989).
attachment in aid of execution was involved in the underlying claim. 28 U.S.C. § 1610(a)(7). This stands in contrast to judgment creditors holding a judgment from a claim under the “commercial activities exception,” who are required by statute to prove that the asset sought for attachment in aid of execution was involved in the commercial activity that their underlying claim was based on. 28 U.S.C. § 1610(a)(2).

Whatever justification there is for the “day-to-day control” test under the FSIA’s “commercial activities exception,” it has no justification whatsoever under the “state-sponsored terrorism exception” that is at issue in this case. Unlike the “commercial activities exception,” the statutory provision at issue in this case cannot be regarded as a device for facilitating legitimate commercial intercourse among the community of nations. While the “commercial activities” exception represents the codification of the restrictive doctrine of immunity, the “state-sponsored terrorism exception” is not based on the restrictive theory, and instead denies immunity for the indisputably ‘sovereign’ act of waging war or conducting a violent foreign policy. The purpose of the “state-sponsored terrorism exception,” quite unlike that of the “commercial activities exception,” is to penalize foreign states for grossly unacceptable conduct against American citizens.

The U.S. government has now come to view Bank Saderat Iran as a key cog for Iranian support for terrorism. “Stuart Levey, the Treasury's under-secretary for terrorism and financial intelligence, announced . . . [Bank Saderat Iran] had been blacklisted because ‘this bank, which has approximately 3,400 branch offices, is used by the

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74 We do not necessarily endorse the “day-to-day control” test for all cases arising under the “commercial activities exception.” Our point here is only that the “day-to-day control” test is clearly not appropriate under the “state-sponsored terrorism exception,” whatever its merits may be elsewhere.
government of Iran to transfer money to terrorist organisations.\textsuperscript{75} In any event, time would be required before the advocates for the victims of international terrorism could successfully press for the legislative reforms necessary to address the \textit{Bancec} doctrine.

The Flatows’ attachment efforts can now be seen as correct in retrospect in another case: \textit{Flatow v. Alavi Foundation}.\textsuperscript{76} In that decision, the Fourth Circuit affirmed a trial court’s quashing of writs of execution against property of the Alavi Foundation in Maryland that Flatow alleged were controlled by Iran. On November 13, 2009, the U.S. government moved to seize an entire sky scraper in New York City as well as properties around the country belonging to two non-profit foundations under civil forfeiture statutes.

The forfeiture action is part of an investigation into the Alavi Foundation, which the government says has sent millions of dollars to Iran's Bank Melli. In March, the US Treasury Department called the bank a key fundraising arm for Iran's nuclear program.\textsuperscript{77}

Utilization of the public-private partnership in 1998 would have prevented years of Iranian money laundering in Maryland subsequent to the quashing of the writs in 1998.

In 2001, Congress passed the Terrorism Risk Insurance Act ("TRIA") in an attempt to clarify the ability of the victims of terrorism to seize frozen assets in the United States.\textsuperscript{78} The law however did not sufficiently address the \textit{Bancec} doctrine. The imposition of the \textit{Bancec} doctrine has no place where foreign governments seek to use the corporate form to protect their assets from victims of acts of terrorism. A legislative solution to the \textit{Bancec} problem and the problem created by the decision in \textit{Cicippio-}

\textsuperscript{77} \textit{Alavi Foundation: Complaint comes at delicate time for US, Iran}, Michael B. Farrell http://www.csmonitor.com/2009/1113/p02s17-usfp.html
Puleo were desperately needed if anti-terrorism litigation was not going to die a premature death.

IV. FLATOW’S PROMISE UPHELD – NEEDED LEGISLATIVE REFORM

For advocates representing American victims of international terrorism, 2008 was a year of significant developments. In January 2008, Congress passed the 2008 National Defense Authorization Act (“NDAA”), P.L. 110-181, § 1083, amending the FSIA to provide an explicit, private right of action against state sponsors of terrorism. The legislation was designed to address a 2004 opinion issued by the United States Circuit Court of Appeals for the District of Columbia Circuit that held the FSIA provided a cause of action against individual agents in their personal capacity only, rather than against the foreign state itself—forcing claimants to seek remedies under domestic state law, if available. The 2008 amendment to the FSIA created a federal cause of action that allowed for the recovery of monetary damages to include economic damages, solatium, pain and suffering, and punitive damages; “in any such action, a foreign state shall be vicariously liable for the acts of its officials, employees, or agents.”

An early application of the amended law was seen on September 26, 2008, when Judge Rosemary M. Collyer, of the U.S. District Court for the District of Columbia, handed down a judgment for over $400 million to the survivors of Jack Armstrong and

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79 Congress passed the law after providing for Presidential waiver authority to the application of the law to the Government of Iraq following a veto over concerns of how the legislation would affect the fledgling democracy in Iraq.
81 Cicippio-Puleo v. Islamic Republic of Iran, 353 F.3d 1024 (D.C. Cir. 2004).
Jack Hensley, two American contractors who were brutally murdered by Al Qaeda in Iraq ("AQI") in Gates v. Syrian Arab Republic. The judgment was rendered against the Arab Republic of Syria—held liable for the murders via the federal cause of action under the amended FSIA for Syria’s material support to Zarqawi and AQI. The use of the federal cause of action avoided any problem that may have been presented by using different state laws to prescribe the rules for the causes of action or damages in the case. Additionally, the new federal cause of action allowed the court to award punitive damages for the unusually heinous nature of the murders at issue.

The amended FSIA also contains a critical new provision that a judgment may be enforced against any property “titled in the name of any defendant, or titled in the name of any entity controlled by any defendant” expanding the scope of liability to state-owned enterprises. This remedy of the Bancec trap, in cases involving judgments against state sponsors of terrorism, will make FSIA judgments significantly more threatening to state sponsors than in prior experience, particularly if the judgments can be registered and enforced in foreign jurisdictions.

84 Id. at 75.
85 Id. at 73 (“The medical evidence corroborates the video: each man was alive when his captors began to saw upon his neck with a sharp-bladed, but relatively short tool. Williams T-2-58; Welch T-2-25. Both were physically restrained during the ordeal, with handcuffs holding their hands behind their backs, and ropes binding their ankles. Williams T-2-49-50 & 58; Welch T-2-24 & 32. As the expert testimony made clear, the ability to sense pain depends upon the brain receiving input from the spinal cord. It was not easy to sever fully the spinal cords of Mr. Armstrong or Mr. Hensley because of the methods and tools used by their murderers, as evidenced by the markings on their spinal vertebrae. Williams T-2-60 ("it required considerable effort and movement and length of time to cut through both the soft tissue and bone"); Welch T-2-29 ("the blade hit the spinal column in . . . 11 different places"). The cutting began on the right side of each man's neck and continued, around the back of the neck without severing the spinal cord, until it reached the left carotid artery; only then did Mr. Armstrong and Mr. Hensley bleed to death and lose sensation of pain. See Williams T-2-54 ("So consciousness with just one carotid artery [] compromised would remain for a while."). It was, quite obviously and scientifically, "a very cruel and inhumane method of causing death." Id. at 63.").
86 28 U.S.C. § 1605(g)(1).
State sponsors of terrorism had been able to use the *Bancec* doctrine to shield their investments in the United States from U.S. citizens who hold judgments against them. Congress enacted both the “state-sponsored terrorism exception” to the FSIA and the Flatow Amendment in order to deter state-sponsored terrorism by financially penalizing the state sponsors of terrorism. Although dozens of U.S. citizens hold judgments resulting from litigation brought under these enactments against the government of Iran for hundreds of millions of dollars, it can avoid collection claims from victims of terror if it actively invests money in the United States through shell corporations, foreign subsidiaries and other properly layered entities. The *Bancec* doctrine allowed these foreign states to invest and litigate in the United States, before the eyes of their victims, even those victims with valid final outstanding judgments against those foreign states. US citizens who have lost loved ones to senseless acts of violence cannot comprehend why the United States would allow Iranian business investment in the United States to be shielded from attachment when Iran has killed and injured hundreds of United States citizens since 1980.

While premised upon international trade concerns, the *Bancec* doctrine frustrated Congress’s effort to deter state sponsors of terrorism. Instead, the victims of terrorism are deterred from bringing suits of the type that Congress deliberately sought to encourage. While the *Bancec* doctrine is perfectly sensible in the realm of commercial activity and should be invoked to protect legitimate commercial undertakings by foreign governments, trade between the United States and state sponsors of terrorism should not take priority over compensating the victims of terrorism and penalizing the sponsors of terrorism.
V. EXECUTIVE BRANCH COOPERATION FURTHERS U.S. FOREIGN POLICY GOALS

In addition to the expanded relief afforded by the amended FSIA, 2008 saw unprecedented support from the political branches of government in holding Libya accountable for its past support of terrorism. In January 2008, the U.S. District Court for the District of Columbia ruled on behalf of a group of American families under the FSIA, awarding a $6 billion judgment against Libya in connection with the 1989 bombing of UTA Flight 772.\textsuperscript{87} Libya, anxious to reestablish relations with the United States, was unable to make much progress as State Department officials and members of Congress blocked rapprochement until the claims were satisfied.\textsuperscript{88} In August, the governments of Libya and the U.S. reached an agreement where Libya agreed to pay the U.S. $1.5 billion in settlement of all outstanding claims.\textsuperscript{89} Though many victims were dissatisfied with this result and felt that the U.S. government made a politically expedient settlement at the expense of fair compensation of all victims and survivors of Libyan terrorism, the level of U.S. government participation in the vindication of private causes of action was unique. While it may have been preferable to see more done on behalf of victims, U.S. government support for the Libyan cases was vital to their eventual settlement.

In the past, the Executive Branch has typically taken a dim view of private actions against state sponsors of terrorism under the FSIA; viewing them as interfering with the President’s foreign affairs powers: “undermin[ing] the President’s ability to combat international terrorism and other threats to national security by permitting the wholesale

\textsuperscript{88} For background see Families Who Sued Libya See Their Victory Voided U.S. Pact Nullifies $6 Billion Award in ‘89 Bombing Over Africa By Kimberly Kindy Washington Post Staff, Tuesday, December 23, 2008.
attachment of blocked property, thereby depleting the pool of blocked assets and
depriving the U.S. of a source of leverage...”\(^90\) President Clinton’s infamous reversal of
policy—on the one hand supporting the creation of the Flatow Amendment,\(^91\) which was
initially construed as a cause of action against state supporters of terrorism until the 2004
opinion issued by the United States Circuit Court of Appeals for the District of Columbia
Circuit, while later sending the Department of Justice to file briefs on behalf of Iran to
protect Iranian assets located in the United States against the efforts of the Flatow family
to satisfy their judgment against Iran in U.S. court—provides another example of the kind
of political football that can often occur.\(^92\)

Last year’s resolution of the Libya cases for its past acts of state sponsorship of
terrorism provides an illustration of how advocates for victims of state sponsorship of
terrorism can provide ammunition to the State Department in its advancement of U.S.
policy and how the two can work together to achieve their goals. The primary cases that
drove the agreement with Libya forward were the Lockerbie Pan Am 103 bombing, the
LaBelle discotheque bombing case and the UTA Flight 177 bombing. It had been U.S.
government policy to bring Libya into the community of law abiding nations on the
condition that its government take the requisite steps towards responsible governance—
by giving up their WMD program, ending support to groups of terrorists and accepting

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2008, 13 (quoting *Terrorism: Victims’ Access to Terrorist Assets — Hearing Before the Senate Committee
for Victims of Terrorism Act: Hearing Before the Subcommittee on Immigration and Claims of the House
Committee on the Judiciary*, 106th Cong., 2d Sess. (April 13, 2000) (statement submitted by Treasury
Deputy Secretary Eizenstat, Defense Under Secretary for Policy Slocombe, and State Under Secretary
Pickering).

\(^91\) Civil Liability for Acts of State-Sponsored Terrorism,” P.L. 104-208, Title I, §101(c) [Title V, § 589]

\(^92\) For background see *Clinton Shields Iran from U.S. Justice Blocks Restitution to Families of Victims
Murdered By State-Sponsored Terrorists*, Western Journalism Center, 28 Sep 2000 available online at
liability for past terrorist actions, and increasing diplomatic and commercial ties between our countries. As isolated as Libya was, however, the U.S. Executive Branch had few levers with which to influence their behavior and to finalize the resolution of the cases against Libya.

Despite this lack of leverage, a unique United States private-public partnership succeeded in negotiating the transfer of $1.5 billion in Libyan funds to compensate past victims of Libyan acts of state-sponsored terrorism. The partnership was comprised of Jim Kreindler and Perles Law Firm, PC as the legal counsel for two of the largest groups of victims, and Jonathan Schwartz of the State Department, Deputy Legal Advisor for Near Eastern Affairs. This partnership should serve as a model for future reconciliation with other countries currently outside the community of law abiding nations. Such a partnership does not happen often because of the absence of an institutional voice for victims of terrorism at the State Department. One way to fix this is to statutorily create an office for terror victims’ assistance, (“LTVA”), based upon LCID—which would deal with providing assistance for U.S. victims of terrorism as LCID provides assistance to U.S. companies with foreign investment disputes.

What is referred to as the “Libya model” worked well because Mr. Schwartz, Mr. Kreindler and Perles Law worked toward the ultimate goal of victim compensation, even in difficult times when the partnership was strained by inherently divergent interests. The creation of the LTVA office would lay the groundwork for the future replication of the successful results of the Libya model. The Libya model worked in this case because Mr. Schwartz took the unusual step of effectively serving as a quasi-institutional voice for victims of Libyan terrorism at the State Department. Irrespective of the establishment of
an office such as LTVA, the public-private partnership should be repeated for the benefits of the victims of terrorism and to further U.S. foreign policy interests.

One of the byproducts of the Libya-United States settlement over all past acts of terrorism is the Executive Branch espousing the claims of all plaintiffs in U.S. courts who had filed suit against Libya, thereby putting an end to their litigation efforts in return for varying levels of compensation, which included a possible result of zero compensation for some plaintiffs. It cannot be doubted that the President has the authority to settle claims or take the lead in foreign affairs. Precedents for the President’s power to enter into agreements with foreign nations to settle monetary claims by U.S. citizens are seen in cases such as *Dames & Moore v. Regan*\(^{93}\) or *United States v. Pink*.\(^{94}\) Nonetheless the Executive Branch’s constitutional prerogative over these private causes of action does not automatically mean that it is good policy to exercise the power and trump the private claim. In addition to the moral rationale—doing our very best to make victims of horrific acts of terrorism whole—there is a significant public policy reason for supporting these actions. If state sponsors of terrorism come to realize that there is a cost for their malicious activities, they may reevaluate their policies. Even if private causes of action do not cause an immediate shift in state policy, these lawsuits provide another avenue for attacking the malign influence of state sponsors of terrorism such as Syria and Iran. As recently described by journalist Robin Wright, the U.S. Treasury Department has found

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\(^{93}\) *Dames & Moore v. Regan*, 453 U.S. 654, 687 (1980) (stating in upholding the Iran-U.S. Settlement that the “fact that the President has provided such [an alternative] forum here means that the claimants are receiving something in return for the suspension of their claims, namely, access to an international tribunal before which they may well recover something on their claims.”).

\(^{94}\) *United States v. Pink*, 315 U.S. 203 (1942) (where the United States was acting pursuant to an Executive Agreement with the former Soviet Union that required it to collect the remaining assets from the New York branch of a Russian insurance company that were allegedly owed to foreign creditors).
that private industry itself provides a significant financial tool against terror.\footnote{Robin Wright, \textit{Stuart Levey’s War}, N.Y. TIMES, 31 October 2008.} If industry is convinced that doing business with a state sponsor poses greater risk than benefit, they will simply stop doing business.

The amended FSIA provides leverage in this arena by providing an expansion of means to recover from foreign state-owned assets and enterprises. The threat of a judgment creditor attaching such properties would make industry wary of doing business with state sponsors of terror, particularly in countries which provide for full faith and credit to foreign civil judgments. While the Libyan desire for rapprochement provided a unique point of leverage, U.S. officials can still do much to aid in cases with unrepentant state sponsors of terror by simply taking a non-obstructive posture towards civil actions, and allowing private judgment creditors to pressure the state sponsors of terrorism. Further, the U.S. government could help by identifying state-owned assets in the United States and, in conjunction with U.S. allies abroad. These properties are often hidden in a web of front companies that victims would have difficulty identifying.\footnote{For example, a high rise in New York City was recently seized by US authorities—owned on paper by the Assa Corporation but which acted on behalf of the Treasury designated terror facilitator, Iran’s Bank}

Should the Executive Branch follow the Libya model, thereby reversing its trend of resisting the successful resolution of private actions against state sponsors of terrorism, and choose to use these private suits as levers against state sponsors, the FSIA could have an impact in not only compensating victims, but causing state sponsors of terror to recalculate the costs of their behaviors. The Obama administration should seriously consider the value of this potential tool in the continued struggle against violent extremists and the states that support them.
The Obama Administration should consider another example of the benefits that flow from cooperation with advocates for victims of state-sponsored terrorism. As a result of efforts by private claimants, the state sponsor of the Khobar Towers bombing was publicly exposed by trial lawyers after the FBI was prevented from investigating the attack by the Saudi government. As Louis Freeh detailed in a *Wall Street Journal* op-ed in July 2006, the United States government decided not to pursue the investigation into the Iranian angle due to prevailing geopolitical considerations. President Clinton was supporting the rise of then Iranian President Khatami, the Iranian reformist in hopes (in retrospect, unfounded) that Khatami could usher in a new era of US-Iranian relations.

The Executive Branch is constitutionally privileged to sacrifice private interests in the pursuit of foreign policy and national security objectives of the U.S. Luckily for the Khobar Towers victims and the U.S. government, the FSIA allows for lawsuits against those designated as state sponsors of terrorism. Here, a law firm took the case and pursued it—resulting in a judgment against Iran. This allowed for the public exposure of that regime’s guilt, something the Clinton administration could not investigate or pursue at the time. Nonetheless, because of the FSIA incentives, victims of that horrendous attack and their counsel were able to investigate the attack and expose its perpetrators before the world. The exposure by private litigants allowed the U.S. government to disclaim responsibility in its dialogue with the Iranian government as President Clinton pursued rapprochement.

Many cases have publicized the state sponsors of infamous attacks where the U.S. government was unwilling or unable to devote resources to the investigation, or where

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geopolitical considerations constrained their overt involvement. One example is seen in a case successfully brought in the District Court for the District of Columbia against Iran for its complicity in the 1983 Marine barracks bombing in Beirut, Lebanon that caused the death of over 240 servicemen, captioned *Peterson v. Islamic Republic of Iran*. Judge Royce Lamberth authored a May 30, 2003 opinion that adjudged Iran liable based upon the clear and convincing evidence linking Iran to the 1983 attack.\(^97\) Subsequently, Judge Lamberth entered a judgment against Iran in excess of $2.6 billion.\(^98\)

This important case exposed Iran’s involvement in the 1983 Beirut attack. While those in intelligence circles were aware of Iran’s complicity, that fact did not reach wider public circulation until the court awarded this judgment. The news was carried on CNN.com and went around the world. The attack happened so long ago that it was almost forgotten, but this is an important terrorist attack to remember for another reason. Bin Laden was inspired to bomb the two U.S. embassies in Africa in 1998 by the Marine barracks bombing. American soldiers are “paper tigers,” Osama bin Laden told ABC News in 1998.\(^99\) “[T]he Marines fled after two explosions.”\(^100\) Our withdrawal from Lebanon led Bin Laden to believe that he could blast the United States out of Africa to protect his then home base in the Sudan. And while Bin Laden himself withdrew from the Sudan in the late 1990s, Al Qaeda activity in the horn of Africa remains a top U.S. foreign policy concern.

VI. MISSED OPPORTUNITIES?

\(^{100}\) *Id.* (“We have seen in the last decade the decline of the American Government and the weakness of the American soldier who is ready to wage cold wars and unprepared to fight long wars. This was proven in Beirut when the Marines fled after two explosions.”).
In view of these promising developments in anti-terrorism civil litigation, the Executive Branch should increase its cooperation with victims’ enforcement efforts. On September 7, 2007 the plaintiffs in Peterson v. Iran, recovered a $2.7 billion judgment against Iran arising out of the Marine Barracks bombing of October 23, 1983. Post-judgment remedies permit the Peterson plaintiffs, the judgment creditor, to seize assets of Iran, the judgment debtor, that are in the hands of any third parties. This process is traditionally called a garnishment, in which a third party is obligated to turn over to a US Marshal money or "property" due to the judgment debtor. Various subsets of the legal process compel the surrender of the debtor’s property in the third party’s hands, including the service of a writ of execution, a full blown creditor’s suit to enforce the judgment, subpoena of records belonging to third parties to trace the assets of the judgment debtor, and an order compelling a physical appearance before a judge to testify and produce documents. While the Peterson plaintiffs’ judgment originated in the United States District Court for the District of Columbia, this judgment can be registered in any judicial district in the United States.

The Peterson plaintiffs promptly registered their judgments in various other judicial districts in an effort to seize Iranian assets throughout the country. These districts included the Northern District of California and the Northern District of Illinois. In both proceedings, the issue of the extent to which the foreign sovereign

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102 The Peterson plaintiffs sought to enforce their judgment against Iran against various third parties holding Iranian assets in the Northern District of California by registering their judgment in that District on March 11, 2008. Peterson v. Islamic Republic of Iran, 08-mc-80030 (JSW), Registration of Foreign Judgment in the amount of $2,656,944,877.00 in favor of plaintiff and against defendant (N.D. Cal. Filed March 11, 2008).
103 The Peterson plaintiffs sought to enforce their judgment against Iran in the Northern District of Illinois by a motion for intervention. Rubin v. Islamic Republic. 03-cv-09370 (BMM), Motion to Intervene by
itself must be made to submit to discovery by the Peterson plaintiffs for the purpose of enforcing the underlying judgment has been raised. Discovery into the holdings of various third parties holding or transferring Iranian assets would necessarily provide information on one of the most important topics in U.S. national security circles today. Appeals have been entered in both proceedings and in both circuit courts, the U.S. government has filed a statement of interest siding with Iran as a party to the proceeding in the Northern District of Illinois and a statement of interest siding with the third party in possession of Iranian assets in the Northern District of California.\footnote{Existent case law supports broad based discovery against an agency or instrumentality of a foreign state. \textit{Richmark Corp. v. Timber Falling Consultants}, 959 F.2d 1468 (9th Cir. 1992).} Despite the gravity of permitting a private party to proceed with broad-based non-jurisdictional discovery, neither FSIA on its face or TRIA prohibits such an endeavor nor has any court banned such practices.

What is well known is that Iran has been using national banks to fund its WMD program through an overseas network of shell companies. In 2006 and 2007 the U.S. Treasury began blacklisting various Iranian state-owned banks and international companies in an attempt to announce these entities’ ties to international terrorism and more importantly to nuclear proliferation and WMD acquisition:

\begin{quote}
The Department of the Treasury today designated Bank Sepah, a state-owned Iranian financial institution for providing support and services to designated Iranian proliferation firms . . . “Bank Sepah is the financial linchpin of Iran's missile procurement network and has actively assisted Iran's pursuit of missiles capable of carrying weapons of mass destruction,” said Stuart Levey, Treasury's Under Secretary for Terrorism and Financial Intelligence (TFI).\footnote{http://www.ustreas.gov/press/releases/hp219.htm (January 9, 2007).}
\end{quote}

\footnotetext[104]{Deborah Peterson, \textit{et al.} (N.D. Il. filed July 7, 2008). The motion to intervene was granted on October 16, 2008.}

\footnotetext[105]{http://www.ustreas.gov/press/releases/hp219.htm (January 9, 2007).}
The discovery of information, at issue now in the Peterson plaintiffs’ litigation in Northern District of California and the Northern District of Illinois, could facilitate U.S. government efforts to break up proliferation networks and support for international terrorism. The potential for the serious interruption of financial support for the Iranian weapons and terrorism pipeline is illustrated by the groundbreaking restraint of over $2 billion in Iranian funds at a financial institution in New York City, which is now the subject of an ongoing garnishment action.\(^\text{106}\)

Under the Obama administration, the U.S. Treasury has expanded sanctions against Iran to further cripple Iran’s financial and industrial sectors. The first major step taken by the Obama administration against the Iranian regime went into effect on June 24, 2010 with the creation of the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (“CISADA”). CISADA limited Iran’s ability to import refined petroleum and other industrial goods that enable the Islamic Republic’s civil and military industrial capacities.\(^\text{107}\) Further sanctions banning U.S. entities from dealing with the National Iranian Tanker Company took effect in July, 2012 along with other restrictions on Iranian crude oil distribution, all contributing to a substantial one-third drop in the exchange value of Iran’s currency against the U.S. dollar in October 2012. The U.S. government estimates that crude oil sales account for roughly half of Iran’s national annual revenue.\(^\text{108}\)

In a concerted effort to destabilize Iran’s central banking structure and promote non-proliferation, the National Defense Authorization Act for 2012 gave the first

\(^{106}\) The matter remains under seal and subject to a protective order. Peterson v. Islamic Republic of Iran, CA 01-2094 docket Entry #439 (RCL) (September 30, 2009).


provisions sanctioning the Central Bank of Iran, Bank Markazi, by restricting U.S. entities from doing business with it. In an unprecedented move against the Iranian financial structure, President Obama issued Executive Order 13599 on February 5, 2012, blocking and freezing all assets of the Central Bank of Iran held in the U.S. or by any U.S. citizen. Freezing assets tied to Iran’s Central Bank opens doors for victims of terrorism who have secured judgments against Iran in U.S. courts currently searching for assets to compensate their civil judgments.

Those plaintiffs seeking compensation in judgments against Iran were given momentum on August 10, 2012 when President Obama signed into law Section 502 of the Iran Threat Reduction and Syria Human Rights Act of 2012, part of the newest Iran sanctions, the “Iran Threat Reduction and Syria Human Rights Act of 2012.” Section 502, entitled “Interests in Certain Financial Assets of Iran,” stripped the immunity previously provided under the FSIA from assets of the Central Bank of Iran discovered in U.S. banks. The new provision established that Iranian Central Bank assets discovered in the Peterson case in New York banks “shall be subject to execution or attachment … to satisfy any judgment to the extent of any compensatory damages awarded against Iran.” Securing the funds is still an ongoing legal battle, but Section 502 gives the Peterson plaintiffs a clearer route to securing compensation. The supportive political provisions are certainly useful, but without more comprehensive support from the Obama administration in cases against state sponsors of terrorism, plaintiffs will continue to struggle to compensate their judicial victories.

In perhaps the greatest nod to the success of these lawsuits in advancing the cause of victims of terrorism, a senate and house bill has been advanced by Canadian legislators to largely replicate the U.S. system for lawsuits against state sponsors of terrorism.\textsuperscript{112} If the Canadian government agrees with the efficacy of the program advanced by U.S. private advocates for victims of terrorism, then the U.S. government should support these efforts and cooperate with its victims of terrorism in their search for assets to satisfy any outstanding judgments. Only by overcoming the obstacles that have prevented victims from collecting upon their judgments can the anti-terrorism litigation scheme prove its utility. And only the utilization of the public-private partnership has succeeded thus far in procuring that level of success. The Chief Judge of the District Court for the District of Columbia recently issued an opinion that noted the endemic obstacles that have continuously hobbled victims of terrorism:

Despite the best intentions of Congress and moral statements of support from the Executive Branch, the stark reality is that the plaintiffs in these actions face continuous road blocks and setbacks in what has been an increasingly futile exercise to hold Iran accountable for unspeakable acts of terrorist violence.\textsuperscript{113}

\textbf{VII. THE USE OF TRIA AS AN ENFORCEMENT TOOL}

The Terrorism Risk Insurance Act of 2002 (TRIA) was adopted as Pub. L. No. 107-297, 116 Stat. 2322 (2002) and is codified at 28 U.S.C. § 1610, Note. Congress enacted TRIA in 2002 as a footnote to 28 U.S.C. § 1610 in order to facilitate the ability of the victims of terrorist attacks to collect upon their judgments. In relevant part, TRIA Section 201(a) provides:

\textit{Notwithstanding any other provision of law . . . in every case in which a person has obtained a judgment against a terrorist party on a claim based}

\textsuperscript{112} Victor Comras, \textit{A Bulwark Against Terror}, National Post, editorial (September 11, 2009).

\textsuperscript{113} \textit{In re Islamic Republic of Iran Terrorism Litig.}, 659 F. Supp. 2d 31, 35-36 (D.D.C. 2009).
upon an act of terrorism, or for which a terrorist party is not immune under section 1605(a)(7) of title 28 United States Code, the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) 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.

TRIA § 201(a) (emphasis added). Thus, to execute upon the blocked assets of a “terrorist party”, a plaintiff must establish the following facts: (1) they have obtained judgments for compensatory damages; (2) against a “terrorist party”; (3) on a claim based upon an “act of terrorism, or for which a terrorist party is not immune under”; and (4) the blocked assets are “the blocked assets of” a “terrorist party” or “the blocked assets of any agency or instrumentality of” a “terrorist party”. 114 Conflicting approaches in the statutory interpretation of the provisions of TRIA in the Second Circuit has illustrated how courts evaluate the different policy considerations implicated by the utilization of TRIA.

In the beginning of 2013, the Second Circuit is set to hear the appeals in Hausler v. JPMorgan Chase Bank, 845 F. Supp. 2d 553 (S.D.N.Y. 2012) and Calderon-Cardona v. JPMorgan Chase Bank, 2011 WL 6155987 (S.D.N.Y. Dec. 7, 2011) jointly. The analysis of the TRIA in each line of cases differs in three key areas: (1) the statutory construction of the phrase “blocked assets of the terrorist party,” (2) the underlying policy rationales that inform the interpretation, (3) whether TRIA preempts state law regarding ownership of property/assets.

The key distinctions between the opinions focus on the statutory interpretation of the phrase “blocked assets of that terrorist party.” The Hausler line reads TRIA in
conjunction with the appropriate regulatory scheme to comprehensively define which blocked assets can be attached and therefore preempt state property law. This approach is more victim-focused and emphasizes that the purpose of the statute is to provide comprehensive compensation for victims of terrorism. Furthermore, it asserts that using state law could lead to inconsistent judgments where some states allow the attachment of certain types of property while other states do not. The Calderon-Cardona approach breaks the phrase into two components and finds that TRIA does not define ownership sufficiently. Consequently, state law must supplement the federal scheme, and the petitioner cannot establish the second component because EFTs are not properly owned by the state or its instrumentalities under state law. This approach also defers to the executive and does not want to read TRIA broadly because it may negatively impact the executive’s ability to negotiate on the international stage.

In Hausler I, the court found that TRIA in conjunction with the CACRs preempted state property law in establishing ownership. The court relied on reading the two together because the CACRs provide an explicit and broad definition of what constitutes a property interest or asset. The plain language of the statute indicates that blocked assets are determined in reference to the CACRs. The court additionally looks to the legislative history of TRIA which indicates Congress had a broad purpose intended to “deal comprehensively with the problem of judgments rendered on behalf of victims of terrorism in any court of competent jurisdiction.”

114 See TRIA § 201(a); see also Weinstein v. Islamic Republic of Iran, 624 F.Supp.2d 272, 274 (E.D.N.Y. 2009), aff’d, 609 F.3d 43 (2d Cir. 2010); Weininger v. Castro, 462 F. Supp. 2d 457, 479 (S.D.N.Y. 2006) (listing elements of a TRIA claim).
115 Id. at 530-31.
116 Id. at 532-33 (noting that according to the C.F.R. “the term ‘interest’ when used with respect to property shall mean an interest of any nature whatsoever, direct or indirect.”).
117 Id. at 531 (citing H.R. Conf. Rep. No. 107-779 at 27).
blocked assets very broadly to refer to any asset seized or frozen under the CACRs.\textsuperscript{118}

The focus here is on the broad remedial purpose of providing a remedy for victims of terrorism.

\textit{Hausler II} was decided in February 2012, after Calderon-Cardona and Levin. The court reaffirmed its original finding that state law was preempted by the definition of blocked assets in TRIA.\textsuperscript{119} The court distinguished Calderon-Cardona saying that the court incorrectly splits the analysis of the phrase “blocked assets of that terrorist party” into two pieces: “blocked assets” and “of that terrorist party.” \textit{Id}. The \textit{Hausler II} court asserts that in reading the phrase as a whole it demonstrates that assets blocked pursuant to the particular regulation or administrative action directed at the particular terrorist party are available for attachment.\textsuperscript{120} This limits a party seeking a judgment against Iran from executing against funds blocked pursuant to the CACRs because those are targeted at Cuba, not Iran.

The Levin court, following Hausler, asserts that TRIA must be read in context with the overarching statutory scheme of the FSIA.\textsuperscript{121} Furthermore, the court noted that in Asia Pulp, the Second Circuit held that Jaldhi instructs that whether or not midstream EFTs may be attached or seized depends upon the nature and the wording of the statute to which attachment or seizure is sought, and in this case, TRIA defines which assets are subject to attachment by reference to regulations pursuant to which the assets are blocked.\textsuperscript{122} Essentially, Levin and Hausler I and II look at TRIA in the greater context of regulations against the country. In each case, the states in question were Cuba and Iran,

\textsuperscript{118} \textit{Id}. at 533.
\textsuperscript{119} \textit{Id}. at 566.
\textsuperscript{120} \textit{Id}. at 568.
\textsuperscript{121} \textit{Id}. at 10.
both state sponsors of terrorism with aggressive statutory regulations in place restricting trade and imposing sanctions.

_Calderon-Cardona_, took a different approach, splits the phrase “blocked assets of that terrorist party” into two components and asserts that the petitioners cannot establish that North Korea or one of its agencies or instrumentalities actually owns the EFTs in question.\(^{123}\) The court asserts that TRIA does not specifically define property or property ownership leaving a gap in the law that should be filled by reference to state law.\(^{124}\) The court does acknowledge that the CACRs are functionally equivalent to the NKSRs.\(^{125}\) The NKSRs, in the court’s view, do not properly define ownership leaving “ample room for state law to supplement this federal regime.”\(^{126}\) The analysis here hangs on the meaning of the word “of” regarding ownership. The court finds that EFTs do not qualify as an asset “of” or belonging to North Korea so they are not attachable.

_Calderon-Cardona_ actually decided the case based on the fact that North Korea is no longer declared a state sponsor of terrorism. The court shows deference to the Executive Branch in being able to use TRIA judgments as part of bargaining with a state sponsor of terrorism.\(^{127}\) Essentially, executive foreign policy trumps the victims’ interest in judgment recovery.

We will follow the resolution of these cases very closely considering that the final decision from the Second Circuit might have an impact on terrorism victims’ enforcement efforts in the United States, depending of course on how the opinion is written. Undoubtedly, the loser will seek review at the Supreme Court.

\(^{122}\) Id. at 16-17.
\(^{123}\) Id. at 8.
\(^{124}\) Id. at 9.
\(^{125}\) Id. at 10.
VIII. CONCLUSION

These types of cases significantly increase the cost of state sponsorship of terror through punitive and compensatory damages and expose what would otherwise be secret networks for the facilitation of terror. These cases also make doing business more difficult, as financial institutions increasingly scrutinize transactions. These cases may act as a type of private sanction—forcing corporations doing business with state sponsors of terror to think twice if their actions could make them liable in U.S. courts. Based upon past experience, the Obama administration should expand its cooperation, even if in an unofficial capacity, because these lawsuits further U.S. government foreign policy goals, by creating serious disincentives for the continuity of state sponsorship of terror.

126 Id. at 12.
127 Id. at 6.