

**“Towards a Strategy of Peace”: Protecting the Iran Nuclear Accord Despite \$46 Billion in State-Sponsored Terror Judgments\***

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## INTRODUCTION

On July 14, 2015, the United States of America, the European Union, the United Kingdom, Russia, and China reached a historic agreement with the Islamic Republic of Iran that will limit Iran's nuclear program to peaceful purposes only.<sup>1</sup> The deal, known formally as the Joint Comprehensive Plan of Action ("JCPOA") and colloquially as the Iran nuclear accord ("Accord"), was a triumph of international diplomacy.<sup>2</sup> The U.S. government expended significant political, economic, and diplomatic capital over several decades to compel Iran to negotiate.<sup>3</sup> President Barack Obama devoted a substantial portion of his presidency to reaching a nuclear agreement with Iran that protects the national security interests of the United States.<sup>4</sup> Members of Congress spent a fair portion of their time on the other side of the aisle, battling the very Accord that President Obama worked vigorously to establish.<sup>5</sup> Despite these efforts, Congress was unable to pass a resolution expressing disapproval of the Accord.<sup>6</sup>

1. Joint Comprehensive Plan of Action at 2, July 14, 2015 (2015) [hereinafter JCPOA], <http://www.state.gov/documents/organization/245317.pdf> [<https://perma.cc/K2AE-APQB>].

2. President Barack Obama, Address at American University: Remarks by the President on the Iran Nuclear Deal (Aug. 5, 2015), <https://www.whitehouse.gov/the-press-office/2015/08/05/remarks-president-iran-nuclear-deal> [<https://perma.cc/QMY7-NCAV>] ("[I]t was diplomacy—hard, painstaking diplomacy—not saber-rattling, not tough talk that ratcheted up the pressure on Iran.").

3. Parisa Hafezi et al., *Iran Deal Reached, Obama Hails Step Towards 'More Hopeful World,'* REUTERS (July 14, 2015, 7:25 PM), <http://www.reuters.com/article/us-iran-nuclear-idUSKCN0PM0CE20150714> [<https://perma.cc/H85M-XG3N>].

4. See Obama, *supra* note 2 (discussing, in detail, the lengthy and challenging process that President Obama embarked upon as he sought diplomacy with Iran).

5. See H.R. Res. 411, 114th Cong. (2015) (declaring that President Obama had not complied with the procedural requirements within the Iran Nuclear Agreement Review Act of 2015).

6. H.R. Res. 3460, 114th Cong. (2015) (passing in the House but not the Senate).

The Accord took effect on January 16, 2016, at which point sanctions against Iran began to ease.<sup>7</sup>

However, a towering obstacle to the Accord's implementation remains lurking in the shadows of U.S. federal courts.<sup>8</sup> As of November 2015, the Islamic Republic of Iran owed \$43.5 billion<sup>9</sup> to thousands of plaintiffs across the United States who were granted favorable civil judgments under the state-sponsored terror ("SST") exception to the Foreign Sovereign Immunities Act ("FSIA"), and this number continues to grow.<sup>10</sup> The SST exception grants federal courts the power to levy judgments against designated state sponsors of terror for terrorist activities that harm American citizens.<sup>11</sup> The Accord seemingly has no provision addressing the status of these judgments. Unfortunately, due to the confidential nature of the negotiations, it is unclear why these judgments were not resolved by the Accord. The judgments were likely considered off limits during the negotiations for fear that they would complicate the important goal of de-weaponizing nuclear facilities in Iran. Regardless, the Obama administration clearly chose to prioritize foreign policy objectives over the legal issues looming in the background.

At the time the SST exception to the FSIA was drafted in 1996, vigorous debate surrounded its utility, enforceability, and the risk of reciprocal litigation it created.<sup>12</sup> Central to this debate was the balance of power between plaintiffs, who sought compensation for injuries at the hands of terrorists, and the executive branch, which remained wary of losing control over foreign policy objectives and

7. *JCPOA Implementation*, U.S. DEP'T TREASURY (Jan. 16, 2016), [https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/jcpoa\\_implementation.aspx](https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/jcpoa_implementation.aspx) [https://perma.cc/HN26-ZF3G]. Implementation day occurred upon a finding that Iran had sufficiently curbed its nuclear program. *Id.*

8. There is no denying that other obstacles to the Accord emerge with each passing day, but this Comment focuses on an obstacle that is both clear and movable. *See, e.g.*, Rick Gladstone, *76 Experts Urge Donald Trump to Keep Iran Deal*, N.Y. TIMES (Nov. 14, 2016), [http://www.nytimes.com/2016/11/15/world/middleeast/trump-iran-deal.html?smprod=nytcore-iphone&smid=nytcore-iphone-share&\\_r=0](http://www.nytimes.com/2016/11/15/world/middleeast/trump-iran-deal.html?smprod=nytcore-iphone&smid=nytcore-iphone-share&_r=0) [https://perma.cc/S5X7-JUA8].

9. *Justice Forsaken: How the Federal Government Fails American Victims of Iranian and Palestinian Terrorism: Hearing Before the Subcomm. on Oversight, Agency Action, Fed. Rights, & Fed. Courts of the S. Comm. on the Judiciary*, 114th Cong. 2 (2015) (statement of Orde F. Kittrie, Professor of Law, Arizona State University); *see also* ORDE KITTRIE, CTR. ON SANCTIONS & ILLICIT FIN., AFTER SUPREME COURT DECISION, IRAN STILL OWES \$53 BILLION IN UNPAID U.S. COURT JUDGMENTS TO AMERICAN VICTIMS OF IRANIAN TERRORISM 1 (2016), [http://www.defenddemocracy.org/content/uploads/documents/Kittrie\\_After\\_SCOTUS\\_Iran\\_Owes.pdf](http://www.defenddemocracy.org/content/uploads/documents/Kittrie_After_SCOTUS_Iran_Owes.pdf) [https://perma.cc/U7U9-UFBZ].

10. *See, e.g.*, *In re Terrorist Attacks on September 11, 2001*, No. 03-MDL-1570, 2016 WL 1029552, at \*2 (S.D.N.Y. Mar. 9, 2016) (over \$10 billion awarded against Iran).

11. 28 U.S.C. § 1605A (2012).

12. *See infra* Section I.D.

initiatives. Today, the SST exception to the FSIA once again poses a substantial obstacle to the executive's foreign policy objectives, this time in the form of an obstacle to the President's ability to implement the Accord, and more broadly, to normalize relations with Iran.<sup>13</sup> This Comment explores the historical development of the SST exception, examines obstacles posed by SST judgments in the context of recent diplomatic developments, and suggests methods by which those obstacles can be circumvented by both the President and Iran while also ensuring that plaintiffs are justly compensated.

This Comment is undergirded by three key goals: First, state sponsors of terror should receive their "just deserts."<sup>14</sup> Second, under the existing statutory scheme, victims of terrorism ought to receive some level of compensation for the harms they have suffered. Third, all the while, neither the pursuit of a "more practical, more attainable peace" with Iran should be sacrificed nor should the President compromise its foreign policy flexibility.<sup>15</sup> This Comment synthesizes these goals—revealing that the inherent tension between them does not render them mutually exclusive.<sup>16</sup>

Part I gives context. This Part provides a detailed overview of the Accord and the SST exception to the FSIA. Part II discusses the judgments that are currently pending against Iran and exposes the latent link between the judgments and the Accord. This Part considers the obstacles to diplomacy created by outstanding

13. For purposes of this Comment, normalization of relations refers to efforts to resume peaceful diplomatic relations between the United States and Iran. For a thoughtful analysis of how SST judgments pending against Cuba are likely to inhibit attempts at normalization between Cuba and the United States, see generally Andrew Lyubarsky, Note, *Clearing the Road to Havana: Settling Legally Questionable Terrorism Judgments to Ensure Normalization of Relations Between the United States and Cuba*, 91 N.Y.U. L. REV. 458 (2016).

14. ARISTOTLE, NICOMACHEAN ETHICS bk. IV, at 121 (Robert Williams trans., 1869) (c. 384 B.C.E.). "Just deserts" is "the punishment that a person deserves for having committed a crime." *Just Deserts*, BLACK'S LAW DICTIONARY (10th ed. 2014).

15. President John F. Kennedy, Commencement Address at American University: Towards a Strategy of Peace (June 10, 1963) [hereinafter *Towards a Strategy of Peace*], <http://sourcebooks.fordham.edu/mod/1963Kennedy-peacestrat.html> [<https://perma.cc/X8JA-W7ND>]. President Obama invoked these very words upon his acceptance of the Nobel Peace Prize and, once again, after finalizing the Accord. President Barack Obama, Remarks by the President at the Acceptance of the Nobel Peace Prize in Oslo, Nor. (Dec. 10, 2009), <https://www.whitehouse.gov/the-press-office/remarks-president-acceptance-nobel-peace-prize> [<https://perma.cc/5D4M-EYWM>]; Obama, *supra* note 2.

16. In the words of President John F. Kennedy, "Our problems are manmade; therefore they can be solved by man. And man can be as big as he wants. No problem of human destiny is beyond human beings. Man's reason and spirit have often solved the seemingly unsolvable, and we believe they can do it again." *Towards a Strategy of Peace*, *supra* note 15.

judgments against Iran. Part III argues that Iran should show up in court. This Part proposes methods by which Iran can mitigate the effects of SST litigation on the Accord. Part IV presents solutions. This Part identifies action that the United States can take to protect the Accord from SST judgments.

# I. THE IRAN NUCLEAR ACCORD, THE FOREIGN SOVEREIGN IMMUNITIES ACT, AND THE STATE-SPONSORED TERROR EXCEPTION

## A. *The Iran Nuclear Accord*

The path to the Accord was tumultuous and uncertain.<sup>17</sup> Some view the Accord as the culmination of years of international sanctions against Iran that successfully forced the Iranian regime to the negotiating table.<sup>18</sup> To others, however, the Accord is better than no deal, but remains imperfect.<sup>19</sup> Still, others believe that any deal with Iran is a deal with the “devil.”<sup>20</sup> Putting aside normative perspectives on the Accord, one aspect is indisputable—the United States expended sums of political, economic, and diplomatic capital to bring it to fruition. President Obama, in particular, expended substantial political energy, will, and capital as he sought to realize one of his top foreign policy objectives.<sup>21</sup>

17. Kate Lyons, *Iran Nuclear Talks: Timeline*, GUARDIAN (July 14, 2015, 3:45 PM), <http://www.theguardian.com/world/2015/apr/02/iran-nuclear-talks-timeline> [https://perma.cc/6WZA-J6K7] (detailing the lengthy negotiations); see also Jethro Mullen & Nic Robertson, *Landmark Deal Reached on Iran Nuclear Program*, CNN (July 14, 2015, 11:08 PM), <http://www.cnn.com/2015/07/14/politics/iran-nuclear-deal/> [https://perma.cc/LX9P-8N6Y] (describing the twenty month negotiations as “arduous”).

18. See, e.g., 161 CONG. REC. H5909–10 (2015) (statement of Rep. Van Hollen) (“[F]or years, the Congress, the President, our European partners, and the international community have imposed a series of tough economic sanctions on Iran with the goal of preventing Iran from obtaining a nuclear weapon. Those sanctions brought Iran to the negotiating table and I commend President Obama, Secretary Kerry, and the entire team, along with our P5+1 partners, for their efforts to negotiate an agreement to prevent Iran from building a nuclear weapon.”).

19. *Id.* at H5898 (statement of Rep. Becerra) (“No deal is perfect. We can all think of ways of making a deal better. But thinking is not doing, and speculation won’t stop Iran from reaching a nuclear weapons capability.”).

20. See *id.* at H5908 (statement of Rep. Weber) (“This is a bad deal. You don’t argue, you don’t make deals with the devil, deals with the enemy. Do we not learn from history?”).

21. See President Barack Obama, Statement by the President on Iran (July 14, 2015), <https://www.whitehouse.gov/the-press-office/2015/07/14/statement-president-iran> [https://perma.cc/6RRP-JYVR] (“Today after two years of negotiations the United States, together with our international partners, has achieved something that decades of animosity has not—a comprehensive, long-term deal with Iran that will prevent it from

Though this Comment will not elaborate on the Accord's details, understanding the momentous nature of the agreement is key to understanding why the obstacles to its implementation must be removed.<sup>22</sup> In broad strokes, the Accord seeks to increase stability in the Middle East by de-weaponizing Iranian nuclear facilities for a period of at least fifteen years.<sup>23</sup> Beyond the concrete goals of regulating Iran's nuclear facilities, the Accord also seeks less tangible results, such as Iran's reintegration into the international economic community and the opportunity for American soft power to provide leverage for regime change from within Iran.<sup>24</sup> From the Iranian perspective, the benefits of the bargain include decreased sanctions, the release of seized Iranian assets, and an improved economic outlook.<sup>25</sup> Of course, the Iranian regime likely remains reluctant to resume unbounded trade with the West for fear of eroding control over Islamic cultural underpinnings—and, more practically, to maintain the Revolutionary Guards' control over the Iranian economy.<sup>26</sup> The consequences will likely be severe if either party fails

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obtaining a nuclear weapon.”). *See generally* Obama, *supra* note 2 (discussing, in detail, the lengthy and challenging process that President Obama embarked upon as he sought diplomacy with Iran).

22. For more detailed information about the Accord, see *The Historic Deal That Will Prevent Iran from Acquiring a Nuclear Weapon*, WHITE HOUSE, <https://www.whitehouse.gov/issues/foreign-policy/iran-deal> [<https://perma.cc/UU8H-2M63>].

23. The deal caps uranium enrichment at 3.67% and limits the stockpile to 300 kilograms, all for fifteen years. JCPOA, *supra* note 1, at 7. Iran will be required to ship spent fuel out of the country forever, as well as allow officials from the IAEA certain access for inspection. *Id.* at 8–9. Heightened inspections, including tracking uranium mining and monitoring the production and storage of centrifuges, will last for up to twenty-five years. *Id.* at 9. These measures are projected to severely inhibit Iran's ability to produce a nuclear weapon. *See id.* at 2 (The JCPOA will “ensure that Iran's nuclear programme will be exclusively peaceful, and mark a fundamental shift in their approach to this issue” and anticipating “that full implementation of this JCPOA will positively contribute to regional and international peace and security. Iran reaffirms that under no circumstances will Iran ever seek, develop or acquire any nuclear weapons . . . . Iran envisions that this JCPOA will allow it to move forward with an exclusively peaceful, indigenous nuclear programme . . . .”); Mullen & Robertson, *supra* note 17 (“The U.S. estimates that the new measures take Iran from being able to assemble its first bomb within 2–3 months, to at least one year from now.”).

24. *See infra* Section II.C.

25. Jackie Northam, *Lifting Sanctions Will Release \$100 Billion to Iran. Then What?*, NPR (July 16, 2015, 3:53 PM), <http://www.npr.org/sections/parallels/2015/07/16/423562391/lifting-sanctions-will-release-100-billion-to-iran-then-what> [<https://perma.cc/2NT4-RKH4>] (noting that approximately \$100 billion will be released to Iran once the Accord is implemented).

26. *See* Gerald F. Seib, *Will Iran Hard-Liners Buy Economic Opening?*, WALL ST. J. (Nov. 2, 2015, 9:25 PM), <http://www.wsj.com/articles/iran-hard-liners-say-no-thanks-to-economic-opening-1446481974>; *see also* Benoit Faucon, Stacy Meichtry & Asa Fitch, *Iran's Government and Revolutionary Guards Battle for Control of Economy*, WALL ST. J.

to comply with the standards set out in the Accord: sanctions will likely be reinstated,<sup>27</sup> Iran will likely resume unregulated production of enriched uranium,<sup>28</sup> and the risk of a military confrontation will increase.<sup>29</sup> As a result, many view the Accord as a cornerstone of the United States' national security and regional security in the Middle East, and as one of the most important foreign policy achievements of the Obama administration.<sup>30</sup> However, the SST exception to the FSIA may derail this delicate arrangement.

### B. *The Foreign Sovereign Immunities Act*

Before considering the exception to sovereign immunity embodied by the SST exception, it is important to understand the general rule that sovereigns are immune from suit by foreign citizens.<sup>31</sup> Chief Justice John Marshall first articulated the rule of absolute immunity for foreign nations against civil suits in the United States in *The Schooner Exchange v. McFaddon*.<sup>32</sup> This early view, known as the classical theory of sovereign immunity, held that all sovereigns were equal, and therefore no sovereign could exercise jurisdiction over another.<sup>33</sup> In 1952, the State Department advised the U.S. Attorney General Philip Perlman to adopt a more restrictive

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(May 18, 2016, 11:15 AM), <http://www.wsj.com/articles/irans-government-and-revolutionary-guards-battle-for-control-of-economy-1463584510>.

27. In late 2016, the House and the Senate passed a bill that extends the President's authority to impose sanctions on Iran for another decade. H.R. 6297, 114th Cong. (2016). The bill became law on December 15, 2016. Iran Sanctions Extension Act, Pub. L. No. 114-277, 130 Stat. 1409.

28. Just before reaching the final stages of the Accord, Iran continued to threaten resumption of enriched uranium production if the Accord did not succeed. *Iran Would Resume Enrichment if Nuclear Talks Fail: Minister*, REUTERS (June 12, 2014, 4:42 PM), <http://www.reuters.com/article/us-iran-nuclear-idUSKBN0EN2EJ20140612> [<https://perma.cc/Z97M-W7Y9>].

29. See JCPOA, *supra* note 1, at 17–18.

30. See 161 CONG. REC. H5900–02 (2015) (statement of Rep. Pelosi).

31. *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 11 (D.D.C. 1998) (citing *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993)) (“This Court lacks jurisdiction over this matter unless it falls within one of the FSIA’s enumerated exceptions to foreign sovereign immunity.”).

32. 11 U.S. (7 Cranch) 116 (1812). Chief Justice Marshall noted that foreign sovereign immunity is rooted in “perfect equality and absolute independence of sovereigns, and [a] common interest impelling them to mutual intercourse, and an interchange of good offices with each other.” *Id.* at 137; see also *Flatow*, 999 F. Supp. at 11.

33. Jeewon Kim, Comment, *Making State Sponsors of Terrorism Pay: A Separation of Powers Discourse Under the Foreign Sovereign Immunities Act*, 22 BERKELEY J. INT’L L. 513, 513 (2004). See generally JAMES COOPER-HILL, *THE LAW OF SOVEREIGN IMMUNITY AND TERRORISM* (2006) (detailing the development of the terrorism exception and anti-terrorism litigation); HAZEL FOX, *THE LAW OF STATE IMMUNITY* (2002) (providing an overview of sovereign immunity).

theory of sovereign immunity.<sup>34</sup> Specifically, this restrictive theory would recognize immunity only for the public activities of states, rather than for their private and commercial activities.<sup>35</sup> Under this theory, foreign sovereigns were exposed to subject matter jurisdiction in American courts for activities such as international contracts and loan repayment.<sup>36</sup> This more restrictive theory was developed to level the playing field when private American citizens contracted with companies operated by socialist governments.<sup>37</sup> Ultimately, the restrictive theory of sovereign immunity became preeminent in the United States.<sup>38</sup>

Prior to the passage of the FSIA, immunity decisions were often made unilaterally by the Department of State. In passing the FSIA in 1976, Congress sought to transfer state immunity decisions from the executive branch to the judiciary, in part because Congress considered the judiciary less susceptible to political pressure.<sup>39</sup> Originally, exceptions to foreign sovereign immunity were restricted to matters such as commercial disputes or matters where the foreign sovereign waived immunity.<sup>40</sup> Therefore, when the FSIA was originally passed, there was no right of action against foreign sovereigns for state-sponsored crimes such as torture or terrorism.<sup>41</sup> This changed with the passage of the SST exception.

34. Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep't of State, to Philip B. Perlman, U.S. Att'y Gen. (May 19, 1952), reprinted in *Changing Policy Concerning the Granting of Sovereign Immunity to Foreign Governments*, 26 DEP'T ST. BULL. 984, 984-85 (1952) [hereinafter Tate Letter].

35. *Id.*; see also Daveed Gartenstein-Ross, Note, *A Critique of the Terrorism Exception to the Foreign Sovereign Immunities Act*, 34 N.Y.U. J. INT'L L. & POL. 887, 892 (2002).

36. See *Flatow*, 999 F. Supp. at 11 (stating that courts "steadfastly refused to extend the FSIA as originally enacted beyond commercial activities"). State public activities were thought to be "those acts arising from internal administrative acts of a government, legislative acts, acts involving armed forces, acts involving diplomatic activity, and public loans." Margot C. Wuebbels, Note, *Commercial Terrorism: A Commercial Activity Exception Under § 1605(a)(2) of the Foreign Sovereign Immunities Act*, 35 ARIZ. L. REV. 1123, 1125 (1993). Conversely, private activities "were defined as acts of industrial, commercial, financial, or any other business enterprises in which private persons may engage, or an act connected with such an enterprise." *Id.*

37. Gartenstein-Ross, *supra* note 35, at 893 ("Continued U.S. commitment to absolute sovereign immunity would have produced an inequitable situation where private U.S. companies were amenable to suit in foreign courts, while socialist countries' state trading companies were immune to suit in the United States, even if they had, for example, breached their contracts with U.S. firms." (citing Tate Letter, *supra* note 34, at 985)).

38. *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 487-88 (1983).

39. See *id.* at 493; see also Kim, *supra* note 33, at 514.

40. Gartenstein-Ross, *supra* note 35, at 895.

41. This rule was applied strictly. Pan Am Flight 103 crashed into the hamlet of Lockerbie, Scotland, during a flight between London and New York City when a plastic



### C. *The State-Sponsored Terror Exception*

In 1996, Congress added another exception to the general rule guaranteeing immunity for foreign states. Congress passed the SST exception as part of the Anti-Terrorism and Effective Death Penalty Act of 1996 (“AEDPA”).<sup>42</sup> The exception grants U.S. federal courts jurisdiction over foreign sovereigns when a claim satisfies five elements: (1) the claim must involve torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such acts; (2) the act or provision of material support must be engaged in by an official, employee, or agent of the foreign state acting within the scope of his or her duty; (3) the Secretary of State must have designated the defendant state as a state sponsor of terrorism, either at the time the act occurred or as a result of the act; (4) either the claimant or victim must have been a U.S. citizen when the act occurred; and (5) if the act occurred in the defendant state, the claimant must have in good faith explored the legal remedies available in the state and given the state a reasonable opportunity to arbitrate the claim.<sup>43</sup>

In addition to the jurisdictional extension pursuant to AEDPA, Congress passed the Civil Liability Act as part of AEDPA. The Civil Liability Act, sometimes referred to as the Flatow Amendment, created a private right of action for U.S. citizens to recover civil judgments against sovereigns sued under the SST exception.<sup>44</sup> The

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explosive detonated on board, killing 270 people. *Terrorist Bombing of Pan Am Flight 103*, CENT. INTELLIGENCE AGENCY (Nov. 21, 2012, 8:28 AM), <https://www.cia.gov/about-cia/cia-museum/experience-the-collection/text-version/stories/terrorist-bombing-of-pan-am-flight-103.html> [https://perma.cc/T3TR-H7MN]. The CIA later determined that Libya was responsible for the bombing. *Id.* The rule was applied so strictly that the families of victims of this bombing were unable to sue Libya for its involvement because terrorist activities carried out by a foreign sovereign did not fit within one of the exceptions to the FSIA. See *Smith v. Socialist People’s Libyan Arab Jamahiriya*, 886 F. Supp. 306, 315 (E.D.N.Y. 1995), *aff’d*, 101 F.3d 239 (2d Cir. 1996). These plaintiffs were ultimately successful after the SST exception was passed. See *Rein v. Socialist People’s Libyan Arab Jamahiriya*, 162 F.3d 748, 753–55 (2d Cir. 1998).

42. Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 28 U.S.C.).

43. 28 U.S.C. § 1605A(a) (2012).

44. Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 589, 110 Stat. 3009, 3009–172 (1996) (codified as amended at 28 U.S.C. § 1605 note (2012)) (passing the “Civil Liability for Acts of State Sponsored Terrorism”) (stating that “an official, employee, or agent of a foreign state designated as a state sponsor of terrorism . . . while acting within the scope of his or her office, employment, or agency shall be liable to a United States national . . . for personal injury or death caused by acts of that official, employee, or agent for which the courts of the United States may maintain jurisdiction under [former] section 1605(a)(7) of title 28 of the United States Code, for money

Flatow Amendment was inspired by the efforts of Stephen Flatow, whose daughter, Alisa Flatow, was killed in a suicide bombing committed by Hamas while she was studying abroad in Israel.<sup>45</sup> Stephen Flatow lobbied Congress to pass what became known as the Flatow Amendment.<sup>46</sup>

Together, the SST exception and the Flatow Amendment allow U.S. federal courts and even state courts<sup>47</sup> to hear lawsuits against foreign sovereigns that have been designated state sponsors of terror.<sup>48</sup> This expansive jurisdictional reach would have shocked Chief Justice Marshall and other adherents to the classical theory of sovereign immunity because it erodes the notion of sovereign equality.<sup>49</sup> The Flatow Amendment even changes the types of damages that can be awarded against sovereign nations. Prior to the amendment, the FSIA expressly prohibited punitive damages against sovereign nations under any of its exceptions.<sup>50</sup> However, the Flatow Amendment permitted courts, for the first time ever, to award punitive damages to plaintiffs who sue foreign sovereigns under the FSIA.<sup>51</sup>

The punitive damages authorized by the Flatow Amendment quickly resulted in inflated judgments. Following the Flatow Amendment's passage, Alisa Flatow's father filed a lawsuit against Iran pursuant to the newly granted jurisdictional reach. In *Flatow v. Islamic Republic of Iran*,<sup>52</sup> \$225 million in punitive damages were levied against Iran for the death of Alisa Flatow.<sup>53</sup> Notably, these punitive damages were supplemental to the \$20 million in

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damages which may include economic damages, solatium, pain, and suffering, and punitive damages . . .").

45. See Joseph Keller, *The Flatow Amendment and State-Sponsored Terrorism*, 28 SEATTLE U. L. REV. 1029, 1031 (2005); see also *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 12–13 (D.D.C. 1998) (explaining the history and development of the Flatow Amendment).

46. See Richard T. Micco, Note, *Putting the Terrorist-Sponsoring State in the Dock: Recent Changes in the Foreign Sovereign Immunities Act and the Individual's Recourse Against Foreign Powers*, 14 TEMP. INT'L & COMP. L.J. 109, 110 n.7 (2000).

47. See Lyubarsky, *supra* note 13, at 473–79 (discussing the jurisdictional issues associated with state court rulings against Cuba pursuant to the SST exception).

48. But see Keller, *supra* note 45, at 1031–32 (arguing that the Flatow Amendment does not provide a cause of action against a given foreign state itself, but only against a foreign state's "officials, employees, or agents").

49. See *supra* notes 32–33 and accompanying text.

50. Keller, *supra* note 45, at 1031.

51. Civil Liability for Acts of State Sponsored Terrorism, Pub. L. No. 104-208, § 589, 110 Stat. 3009, 3009–172 (1996) (codified as amended at 28 U.S.C. § 1605 note (2012)).

52. 999 F. Supp. 1 (D.D.C. 1998).

53. *Id.* at 5. Such a figure represented over three times the total amount of Iranian expenditures that purportedly went to terrorist groups in that year. *Id.* at 32–34.

compensation awarded to the Flatow family for the value of Alisa's life.<sup>54</sup> Awarding such extravagant damages is one thing, but collecting on them is quite another. The next Section discusses the legal machinery involved in collecting these damage awards.

### 1. The Machinery of Recovery

The machinery used for recovering judgments against state sponsors of terror is in a constant state of flux. As plaintiffs began to attain monumental judgments against states like Iran and Cuba, many found that recovery was nearly impossible because of the difficulty of seizing foreign assets.<sup>55</sup> In response, Congress passed a number of measures designed to assist successful plaintiffs as they grasp for assets belonging to judgment debtors.<sup>56</sup> These measures and executive responses to these measures evince the constant tension between compensating SST plaintiffs and protecting key diplomatic bargaining tools embodied by frozen foreign assets that belong to SST defendants.

The Victims of Trafficking and Violence Protection Act of 2000 directs the U.S. Treasury—through the Office of Foreign Assets Control (“OFAC”)—to assist judgment creditors in recovering their judgments.<sup>57</sup> As of 2014, OFAC had frozen \$2.35 billion in assets belonging to both designated state sponsors of terror and non-state terrorist groups, \$1.97 billion of which belonged to Iran.<sup>58</sup> Notably, the amendment directing the U.S. Treasury to assist judgment

54. *Id.* at 1, 32; *see also infra* Section III.B.

55. JENNIFER K. ELSEA, CONG. RESEARCH SERV., RL 31258, SUITS AGAINST TERRORIST STATES BY VICTIMS OF TERRORISM 69–74 (2008) (comparing judgments rendered against terrorist states to amounts actually recovered by plaintiffs). The report notes that “[t]he limited availability of defendant States’ assets for satisfaction of judgments has made collection difficult.” *Id.* at i.

56. *See, e.g.*, 28 U.S.C. § 1610(f)(2)(A) (2012) (urging the Treasury and State Departments to assist judgment creditors collect judgments). Note that “judgment debtors” refers to SST defendant states, and “judgment creditors” refers to SST plaintiffs.

57. *Id.* (“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 should make every effort to fully, promptly, and effectively assist any judgment creditor or any court that has issued any such judgment in identifying, locating, and executing against the property of that foreign state or any agency or instrumentality of such state.”).

58. OFFICE OF FOREIGN ASSETS CONTROL, U.S. DEP’T OF THE TREASURY, TERRORIST ASSETS REPORT: CALENDAR YEAR 2014 TWENTY-THIRD ANNUAL REPORT TO THE CONGRESS ON ASSETS IN THE UNITED STATES RELATING TO TERRORIST COUNTRIES AND INTERNATIONAL TERRORISM PROGRAM DESIGNEES 3, 14 tbl.1 (2014), <https://www.treasury.gov/resource-center/sanctions/Programs/Documents/tar2014.pdf> [<https://perma.cc/5JTK-FLAE>]. These assets were “blocked pursuant to economic sanctions imposed by the United States.” *Id.* at 3.

creditors is subject to waiver by the President “in the interest of national security.”<sup>59</sup> This waiver has been exercised on at least two occasions, most notably when President Clinton exercised the waiver immediately after the passage of the amendment.<sup>60</sup> President Clinton justified the waivers by noting that allowing the attachment of frozen assets “would impede the ability of the President to conduct foreign policy in the interest of national security and would, in particular, impede the effectiveness of such prohibitions and regulations upon financial transactions.”<sup>61</sup> President Clinton also exercised a similar waiver provision under an earlier version of the same amendment.<sup>62</sup> Shortly after he exercised the earlier waiver, President Clinton offered prescient context:

Absent my authority to waive section 117’s attachment provision, it would also effectively eliminate use of blocked assets of terrorist states in the national security interests of the United States, including denying an important source of leverage. In addition, section 117 could seriously affect our ability to enter into global claims settlements that are fair to all U.S. claimants, and could result in U.S. taxpayer liability in the event of a contrary claims tribunal judgment.<sup>63</sup>

President Clinton’s foresight exposes the tension between creating a means of recovering SST judgments and the competing interest of protecting a substantial bargaining tool for future diplomatic negotiations.

In 2002, following the September 11th attacks, Congress passed yet another act known as the Terrorism Risk Insurance Act of 2002 (“TRIA”), which sought to make it easier to attach the assets of judgment debtors.<sup>64</sup> The purpose of TRIA was to minimize the executive branch’s ability to stop attachment of frozen assets by

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59. § 1610(f)(3).

60. Presidential Determination No. 2001-03, 65 Fed. Reg. 66,483, 66,483 (Oct. 28, 2000).

61. *Id.*

62. Presidential Determination No. 99-1, 63 Fed. Reg. 59,201, 59,201 (Oct. 21, 1998).

63. Presidential Statement on Signing the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, 34 WEEKLY COMP. PRES. DOC. 2108, 2113 (Oct. 23, 1998).

64. Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, § 201, 116 Stat. 2322, 2337 (codified as amended at 28 U.S.C. § 1610 note (2012)); *see also* Ilana Arnowitz Drescher, Note, *Seeking Justice for America’s Forgotten Victims: Reforming the Foreign Sovereign Immunities Act Terrorism Exception*, 15 N.Y.U. J. LEGIS. & PUB. POL’Y 791, 804 (2012).

severely reducing the President's waiver authority.<sup>65</sup> However, TRIA maintained a waiver option whereby the President could block assets so long as an asset-by-asset analysis found that the national security interest required waiver of plaintiffs' right to attachment.<sup>66</sup> Accordingly, though TRIA represents a good-faith attempt to provide remedies for victims of terrorism, Congress yet again failed to alleviate the burden faced by victims of terrorism seeking to actually recover for their tragic losses.

A 2008 amendment to the FSIA further reduced obstacles to attachment by altering the "*Bancec* doctrine."<sup>67</sup> The *Bancec* doctrine required a judgment creditor to show that the debtor exercised day-to-day control over an asset in order to attach the asset.<sup>68</sup> The 2008 amendment alters this standard by requiring only simple ownership by the judgment debtor in order for a judgment creditor to attach an

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65. TRIA appears to have been a response to the President's choice to exercise the waiver option in a "blanket manner." H.R. REP. NO. 106-939, at 117-18 (2000) (Conf. Rep.), *as reprinted in* 2000 U.S.C.C.A.N. 1380, 1408-10. Although the precedent to TRIA, the Victims of Trafficking and Violence Protection Act of 2000, did not provide express guidance on how or when the waiver was to be used, the House-Senate conference committee report shows some level of consternation over previous uses of the waiver. *Id.*; *see also* Lyubarsky, *supra* note 13, at 465.

66. The term "blocked asset" is defined in TRIA to mean

- (A) any asset seized or frozen by the United States under [TWEA or IEEPA]; and
- (B) does not include property that—
  - (i) is subject to a license issued by the United States Government for final payment, transfer, or disposition by or to a person subject to the jurisdiction of the United States in connection with a transaction for which the issuance of such license has been specifically required by statute other than [IEEPA] or the United Nations Participation Act of 1945 (22 U.S.C. 287 *et seq.*); or
  - (ii) in the case of property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations, or that enjoys equivalent privileges and immunities under the law of the United States, is being used exclusively for diplomatic or consular purposes.

§ 201(d)(2). Notably, § 201(b) of TRIA somewhat narrowed the previous waiver authority of the President. § 201(b) (noting that the President can only exercise the waiver with respect to "property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations").

67. National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1083, 122 Stat. 3, 341-42 (codified at 28 U.S.C. § 1610(g)(1)(A)-(E) (2012)).

68. *See* First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba, 462 U.S. 611, 626-27 (1983) (recognizing a presumption that a foreign government's determination that its instrumentality should be accorded separate legal status should be respected); *see also* Flatow v. Islamic Republic of Iran, 308 F.3d 1065, 1073-74 (9th Cir. 2002) (interpreting the *Bancec* doctrine to require proof that the judgment debtor exercised "day-to-day" control over to the entity in order for a judgment creditor to overcome the separate juridical entity presumption).

asset.<sup>69</sup> Furthermore, no connection between the terrorist activity and the assets to be seized need be shown.<sup>70</sup> Therefore, the commercial assets of judgment debtors in American banks can be attached even if the assets are being used for legitimate trade purposes.<sup>71</sup> These assets can be attached regardless of whether the judgment debtor profits from or manages the assets, and regardless of whether the debtor is the sole beneficiary in interest of the assets.<sup>72</sup>

In 2012, when Congress went further in its attempts to compensate victims of state-sponsored terror, Chief Justice John Roberts argued vehemently that they went too far.<sup>73</sup> A provision of the Iran Threat Reduction and Syria Human Rights Act of 2012<sup>74</sup> directs Article III courts to make available for attachment a set of assets held in New York City on behalf of Bank Markazi, the Central Bank of Iran.<sup>75</sup> The Act effectively alters the law applicable to attachment proceedings for a discrete subset of SST plaintiffs so that these plaintiffs can gain access to over \$1.75 billion in bonds held in a New York City bank account on behalf of Iran's Central Bank.<sup>76</sup> Despite serious separation-of-powers concerns,<sup>77</sup> the law was upheld by the Supreme Court of the United States in *Bank Markazi v. Peterson*.<sup>78</sup> Even so, the attached assets represent a mere drop in the bucket for the 1,000 plaintiffs who joined together to collect on their judgments.

Most recently, Congress resorted to transferring U.S. taxpayer funds directly to judgment creditors to satisfy portions of their judgments.<sup>79</sup> The Justice for United States Victims of State Sponsored Terrorism Act, signed into law by President Obama in late 2015, appropriates over \$1 billion from the U.S. Treasury<sup>80</sup> and calls for the

69. 28 U.S.C. § 1610(g)(1)(A)–(E) (2012).

70. *Id.* § 1610(a)–(b).

71. *Id.*

72. *Id.* § 1610(g)(1)(A)–(E).

73. *See Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1329 (2016) (Roberts, C.J., dissenting).

74. Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112-158, § 502, 126 Stat. 1214, 1258 (codified at 22 U.S.C. § 8772 (2012)).

75. *Bank Markazi*, 136 S. Ct. at 1316 (majority opinion).

76. *Id.* at 1329 (Roberts, C.J., dissenting).

77. *See generally id.* at 1329–38 (noting that Congress “arrogated” the “power to decide cases” to itself by passing the law).

78. 136 S. Ct. 1310, 1317 (2016) (majority opinion).

79. Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 404, 129 Stat. 2242, 3007–08 (2015) (codified as amended at 42 U.S.C. § 10609) (passing the “Justice for United States Victims of State Sponsored Terrorism Act”).

80. Justice for United States Victims of State Sponsored Terrorism Act, 42 U.S.C. § 10609(e)(5) (2015).

appointment of a special master to allocate these funds to victims of state-sponsored terror.<sup>81</sup> Victims' maximum recovery amounts are capped according to the statute, but they retain the right to collect any unpaid amounts in alternative forums.<sup>82</sup> Unfortunately, even this solution leaves many judgment creditors without a means of recovery, and those who do recover are recovering against the United States, not the nation that harmed them and their families. Thus, despite dogged efforts embodied by subsequent acts and amendments, Congress may have created a right without a practicable remedy when it passed the SST exception.<sup>83</sup> Worse yet, the Justice for United States Victims of State Sponsored Terrorism Act shows that Congress has inadvertently created a right of action against the United States itself by allowing judgment creditors to satisfy their SST judgments using taxpayer dollars.

This survey of efforts to streamline recovery of judgments entered pursuant to the SST exception reveals years of hardship for SST plaintiffs—and years of legislative revisions for the elected officials tasked with drafting laws that allow these plaintiffs to recover. Congress faces a dilemma: it must create a meaningful path to recovery for SST plaintiffs while avoiding the constitutional and policy perils that the SST exception presents, which are discussed in detail in the following Section.

#### D. Disadvantages of the SST Exception

Vigorous scholarly debate about the utility and wisdom of the SST exception accompanied its passage.<sup>84</sup> The disadvantages of the

81. *Id.* § 10609(b); see also John Bellinger, *Omnibus Bill Creates One Billion Dollar Fund for Victims of Terrorism (and Allows up to \$250 Million to Go to Their Attorneys)*, LAWFARE (Dec. 28, 2015, 12:04 PM), <https://www.lawfareblog.com/omnibus-bill-creates-one-billion-dollar-fund-victims-terrorism-and-allows-250-million-go-their> [<https://perma.cc/VQ78-2EVG>].

82. § 10609(d)(5)(B).

83. Providing a right without a remedy is a cardinal constitutional sin: “The Government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

84. See, e.g., S. Jason Baletsa, Comment, *The Cost of Closure: A Reexamination of the Theory and Practice of the 1996 Amendments to the Foreign Sovereign Immunities Act*, 148 U. PA. L. REV. 1247, 1251 (2000) (arguing that the SST exception ultimately results in “unenforceable judgments that deny the victims’ families the closure and accountability they desperately need”). See generally, e.g., Gartenstein-Ross, *supra* note 35 (critiquing the SST exception and arguing the terrorist problem is best left to the political branches of government); Kim, *supra* note 33, at 514–15 (evaluating the SST exception and potential separation-of-powers challenges to its constitutionality).

SST exception have become particularly acute in light of the mounting judgments against Iran. Furthermore, the disadvantages of the SST exception interrelate with legal, constitutional, and policy challenges to judgments arising from the SST exception. These legal and constitutional infirmities provide fertile soil for settling and disposing of these judgments in a manner that is favorable to plaintiffs and diplomatically prudent. To understand the disadvantages of the SST exception, it is critical to first interrogate the primary purposes and public policy considerations that instigated its passage.

### 1. Underlying Policy Rationale

The primary purpose of the SST exception and its accompanying private right of action through the Civil Liability Act is to deter state sponsors of terror from committing or complicity allowing violence against American citizens.<sup>85</sup> The exception does so by placing foreign sovereigns “on notice of costs associated with terrorist conduct and confront[ing] them with the fact that those costs must be considered in deciding on future acts of terrorism.”<sup>86</sup>

Another purpose of the SST exception is to provide compensation for American citizens who suffer violence at the hands of state sponsors of terror.<sup>87</sup> Prior to the passage of the SST exception, courts regularly dismissed lawsuits against countries including Iran, Cuba, and Libya for terrorist acts against American citizens under the theory of sovereign immunity.<sup>88</sup> The SST exception changed this reality, subjecting previously protected sovereigns to the jurisdiction of U.S. federal courts. Members of Congress relished the opportunity to hold state sponsors of terror accountable.<sup>89</sup> The exception and subsequent Flatow Amendment are designed to allow for the imposition of substantial judgments through punitive damages,

85. See *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 25 (D.D.C. 1998) (stating that the terrorism exception “was enacted explicitly with the intent to alter the conduct of foreign states, particularly towards United States nationals traveling abroad”).

86. Brendan F. Ward, *Recent Amendments to the Foreign Sovereign Immunities Act: Strategic Tool, Cruel Hoax, or Untenable Impediment to Foreign Policy* 7–8 (Feb. 8, 2000) (unpublished paper submitted to the Faculty of the Naval War College in partial satisfaction of the requirements of the Department of Joint Maritime Operations), <https://www.hsdl.org/?view&did=438697> [<https://perma.cc/66X2-T6GZ>].

87. William P. Hoye, *Fighting Fire with . . . Mire? Civil Remedies and the New War on State-Sponsored Terrorism*, 12 DUKE J. COMP. & INT’L L. 105, 116–19 (2002).

88. *Id.*; see also, e.g., *Flatow*, 999 F. Supp. at 13–14.

89. See *Flatow*, 999 F. Supp. at 12 (citation omitted); see also David M. Herszenhorn, *Out of a Father’s Grief, a Fight Against Terrorism*, N.Y. TIMES (Jan. 4, 1999), <http://www.nytimes.com/1999/01/04/nyregion/out-of-a-father-s-grief-a-fight-against-terrorism.html> [<https://perma.cc/A3N2-3GN5>].



as discussed above, in order to ensure the deterrence purpose of the exception is met.<sup>90</sup>

Outside of Congress, supporters hailed the amendment as a civil means of fighting terror, and as a means of providing redress and closure for victims of terrorism and their families.<sup>91</sup> Others noted the potential for strategic and efficient use of the SST exception as a foreign policy tool. Brendan F. Ward, a lieutenant commander with the U.S. Navy, although ultimately concluding that the SST exception is not a useful tool, pointed out that the SST exception allows for a “nearly cost free” enforcement mechanism because plaintiffs’ attorneys are motivated by the contingency fees they will receive if they recover for their clients, that the exception serves an important deterrence purpose, and that it could be a unique avenue in the “fight against terrorism.”<sup>92</sup> Despite these potential benefits, a panoply of disadvantages plague the SST exception.<sup>93</sup>

The stated purposes of the SST exception are noble, but the means of effectuating these purposes raise concern. The SST exception presents several challenges. First, the deterrence purposes of the exception are not effectuated because recovery against SST defendants is extremely rare, and thus there is no incentive for potential defendants to stop alleged terror activities. Second, there is a significant risk of reciprocal litigation that could expose the United States to liability for activities affecting citizens of other countries. Third, there are separation-of-powers concerns associated with allowing the judiciary to incur on the foreign policy objectives of the executive branch. Finally, the SST exception tends to treat similarly situated plaintiffs differently depending on whether they are harmed by a designated state sponsor of terror or not. These disadvantages weaken the legal foundations of judgments entered pursuant to the

90. *Id.*

91. See Ruthann M. Deutsche, *Suing State-Sponsors of Terrorism Under the Foreign Sovereign Immunities Act: Giving Life to the Jurisdictional Grant After Cicippio-Puleo*, 38 INT’L LAW. 891, 891–92 (2004). See generally ORDE F. KITTRIE, *LAWFARE: LAW AS A WEAPON OF WAR* (2016) (arguing for the continued and increasing use of legal maneuvering as an alternative to armed conflict and military intervention in the foreign policy arena).

92. Ward, *supra* note 86, at 8–9.

93. See, e.g., Anne-Marie Slaughter & David Bosco, Essay, *Plaintiff’s Diplomacy*, FOREIGN AFF., Sept.–Oct. 2000, at 102, 112–16; Gartenstein-Ross, *supra* note 35, at 910–30; Jack Goldsmith & Ryan Goodman, *U.S. Civil Litigation and International Terrorism* 21–26 (Univ. of Chi. Pub. Law & Legal Theory, Working Paper No. 26, 2002), [https://papers.ssrn.com/sol3/papers2.cfm?abstract\\_id=312451](https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=312451) [<https://perma.cc/64PE-EG97> (staff-uploaded archive)] (offering a balanced view of the costs and benefits of permitting civil actions against international terrorist (state and non-state) defendants).

exception, and may prove to be useful tools to justify restructuring such judgments if the President deems such action necessary.

## 2. Failure to Deter

The difficulty associated with actually recovering the massive judgments awarded to terror victims mitigates the deterrence goals of the amendment.<sup>94</sup> Despite Congress's dogged efforts to help SST plaintiffs,<sup>95</sup> recovery remains extremely difficult.<sup>96</sup> The Victims of Trafficking and Violence Protection Act of 2000 embodied a compromise between the executive branch and Congress that required the Treasury to pay damages out of its accounts for certain specified plaintiffs.<sup>97</sup> This compromise signals the important role that frozen assets play for the executive branch as it attempts to negotiate with belligerent regimes. However, the Clinton administration was unwilling to relinquish control over these assets because they would be useful for future negotiations. President Clinton's invocation of the waiver option built in to the FSIA<sup>98</sup> ensured plaintiffs could not attach domestic frozen assets belonging to judgment debtors.<sup>99</sup> During negotiations with Iran, the frozen assets that President Clinton protected constituted a bargaining chip for negotiators, and they were key to bringing Iran to the negotiating table.<sup>100</sup>

Despite this positive outcome for the executive branch, the 2000 compromise circumvented the deterrence purpose of the SST exception because SST defendants were not required to pay anything

94. See Baletsa, *supra* note 84, at 1291–99 (noting that the deterrent effect of the exception is mitigated by the various obstacles to recovery of judgments).

95. See *supra* Section I.C.1.

96. Aryeh S. Portnoy et al., Crowell & Moring LLP, *The Foreign Sovereign Immunities Act: 2012 Year in Review*, 20 LAW & BUS. REV. AM. 565, 604 (2014) (detailing the various challenges to recovery); see also ELSEA, *supra* note 55, at 69–74 (providing a breakdown on which plaintiffs have been paid, by whom, and how much they have been paid); Barry E. Carter, *Terrorism Supported by Rogue States: Some Foreign Policy Questions Created by Involving U.S. Courts*, 36 NEW ENG. L. REV. 933, 937 (2002) (noting that countries designated as SSTs have little incentive to cooperate with the judgments, and that most countries at risk of running afoul of the U.S. government have learned to keep very little money in U.S. bank accounts because of the risk of attachment).

97. See ELSEA, *supra* note 55, at 12; see also JENNIFER K. ELSEA, CONG. RESEARCH SERV., RS22094, *LAWSUITS AGAINST STATE SUPPORTERS OF TERRORISM: AN OVERVIEW* 3 (2005).

98. See *supra* Section I.C.1.

99. Kim, *supra* note 33, at 520.

100. See Rob Garver, *Here's What's in Iran's \$100 Billion in Assets That Will Become Unfrozen by the Nuclear Deal*, BUS. INSIDER (July 14, 2015, 7:20 PM), <http://www.businessinsider.com/whats-in-irans-100-billion-in-frozen-assets-2015-7> [https://perma.cc/BSZ9-QYQV].

at all. This problem was exacerbated further with the passage of the Justice for United States Victims of State Sponsored Terrorism Act in 2015, which requires the United States to pay the victims of state-sponsored terror, rather than forcing the judgment debtors to pay.<sup>101</sup> The inability to recover judgments from SST defendants presents a serious problem for the exception: if the purpose of the SST exception is deterrence, failure to recover judgments eviscerates the very purpose of the law, leading one to ask whether the SST exception creates more trouble than it is worth.<sup>102</sup>

### 3. Risk of Reciprocal Litigation

At the time of the amendment, the State Department and the Department of Justice warned of the risk of reciprocal litigation, retaliatory litigation, and unwise judicial precedent that could stem from the amendment.<sup>103</sup> The fear of reciprocal litigation is borne out of legitimate concerns. If holding state sponsors of terror accountable through the use of civil judgments is a successful means of deterring terrorism, there is no logical or legal path toward denying foreign powers the use of similar legislation to drag the U.S. government into foreign courts to face liability for violence perpetrated against foreign civilians by the United States.<sup>104</sup> This concern is particularly acute for the United States because of its unprecedented international financial exposure—the United States is a perennial target for this sort of litigation.

The risk of retaliatory litigation became a reality when Iran responded to the passage of the Justice for Victims of Terrorism Act of 2000 (“JVTA”).<sup>105</sup> Daveed Gartenstein-Ross, a counter-terrorism scholar and analyst notes:

101. See *supra* text accompanying notes 79–81.

102. See Gartenstein-Ross, *supra* note 35, at 931–33; see also Ward, *supra* note 86, at 12–13 (exposing deterrence failures).

103. See *Foreign Sovereign Immunities Act: Hearing on S. 825 Before the Subcomm. on Courts & Admin. Practice of the S. Comm. on the Judiciary*, 103d Cong. 8–15 (1994) (statements of Stuart Schiffer, Deputy Assistant Att’y Gen., Civil Division, and Jamison S. Borek, Deputy Legal Adviser, U.S. Department of State); Thomas W. Lippman, *Panels Lift Immunity in Terrorism; Proposals Open Nations to Lawsuits by Victims*, WASH. POST, July 3, 1995, at A10 (“We are on record as having a problem with this kind of thing . . . . It doesn’t solve the problems it’s supposed to solve, and it just creates foreign relations problems.” (quoting Jamison Borek)).

104. See Gartenstein-Ross, *supra* note 35, at 917–18.

105. Note that the original Senate bill was called the JVTA, Justice for Victims of Terrorism Act, S. 1796, 106th Cong. (1999) (introduced October 26, 1999), but the name changed later on. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 2002, 114 Stat. 1464, 1541–43 (codified as amended at 28 U.S.C. §§ 1606, 1610 note (2012)); see also Gartenstein-Ross, *supra* note 35, at 935–38 (describing the JVTA in

Shortly after the U.S. government announced that it would distribute around \$213 million to the families of victims of Iranian-backed terrorism, Iran's proreform parliament passed a bill that "will allow lawsuits in Iranian courts by 'any victims of US [interference] . . .'" The bill's passage was accompanied by cries of "Down with America!" The potential for retaliatory legislation may be particularly high because other countries often look to the FSIA's standards, as a matter of reciprocity, in determining the extent to which they will allow lawsuits against the United States.<sup>106</sup>

Examples of legislation allowing for reciprocal litigation against the United States have been documented in a range of other countries as well—from Sudan to Libya to Cuba.<sup>107</sup> In addition, the SST exception

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greater detail); Sean K. Mangan, Note, *Compensation for "Certain" Victims of Terrorism Under Section 2002 of the Victims of Trafficking and Violence Protection Act of 2000: Individual Payments at an Institutional Cost*, 42 VA. J. INT'L L. 1037, 1039–40 (2002) (critiquing § 2002 of the Act).

106. See Gartenstein-Ross, *supra* note 35, at 918 (alteration in original) (footnotes omitted) (quoting *Iran MPs Cry "Down with America," Approve Lawsuits Against United States*, AGENCE FR. PRESSE, Nov. 1, 2000, LEXIS, News Library).

107. Ward, *supra* note 86, at 16 (detailing reciprocal litigation from Cuban litigants); see also LAW LIBRARY OF CONG., LAWS LIFTING SOVEREIGN IMMUNITY IN SELECTED COUNTRIES 1–16 (2016), <https://www.loc.gov/law/help/sovereign-immunity/lifting-sovereign-immunity.pdf> [<https://perma.cc/6DC4-YRT9>] (documenting various retaliatory laws passed in Cuba, Iran, Libya, Russia, Sudan, and Syria as well as accompanying litigation). A single complaint filed in Cuba demanded approximately \$170 billion against the United States for damages associated with the loss of Cuban lives at the hands of the U.S. government. *Demanda del Pueblo de Cuba al Gobierno de Estados Unidos por Daños Humanos* [Complaint of the People of Cuba Against the United States Government for Human Damages], PORTAL CUBA (May 31, 1999), <http://www.cuba.cu/gobierno/DEMANDA.html> [<https://perma.cc/ZE3N-ELWL>]. In 2003, a Tehran court awarded a half-billion dollar judgment to an Iranian businessman who had been abducted by American agents while visiting the Bahamas. LAW LIBRARY OF CONG., *supra*, at 8. This judgment was levied pursuant to an Iranian law passed in the late 1980s, and the court rejected a plea to attach the now defunct U.S. embassy in Tehran. *Id.* More recently, the Iranian government has responded with more retaliatory legislation in light of increased SST judgments. Marina Alshalan, *داریابی قضایی احکام طریق از کرد سعی آمریکا آمریکا از ایران شکایت*, *کند مصادره را ایران* [Iran's Grievance Against the United States Attempts by Court Order to Confiscate Iranian Assets.], SPUTNIK (May 16, 2016), <http://ir.sputniknews.com/iran/20160516/1500555.html> [<https://perma.cc/V82L-M9K7>] (in Farsi); باید دولت: اسلامی شورای مجلس [بخواد خسارت آمریکا از -بخواد-خسارت-آمریکا-از-باید-دولت-اسلامی-شورای-مجلس] [Parliament: Government Must Demand Damages from the United States], RFI (May 17, 2016), <http://fa.rfi.fr/mجلس> [<https://perma.cc/F5H3-JNCW>] (in Farsi); دو به اسلامی شورای مجلس قاطع رای [Islamic Consultative Assembly of Iran Passes Urgent Outline of Bill to Demand Damages from United States], ROOBAHNEWS.COM (May 15, 2016), <http://www.roobahnews.com/index.php/component/content/article/74-latest-news/16916-1395-02-26-10-35-35> [<https://perma.cc/Y6KV-XR9W> (staff-uploaded archive)] (in Farsi); شدید اعتراض: [Iranian Ministry of Foreign Affairs' Strong Protest Against U.S. Court Judgments], TASNIMNEWS.COM (Apr. 26,

has resulted in litigation in the International Court of Justice—where Iran has alleged violations of an international treaty.<sup>108</sup>

The question is simple: If the United States were levied with an astronomical civil judgment adjudicated by a legitimate justice system for the deaths of civilians in, say, Syria at the hands of an American supported rebel group, would the United States pay up? To ask is to answer.<sup>109</sup> The more difficult question is whether the United States would be entitled to any colorable legal argument for not cooperating with such a judgment. Such an argument would be difficult to make considering the United States' role in developing the very legal machinery that ultimately would expose the United States to such liability.<sup>110</sup>

2016), <http://www.tasnimnews.com/fa/news/1395/02/07/1058859/>-اعتراض-شدید-وزارت-خارجہ-ایران-بہ-آراء-ی-دادگاه-ہای-امریکا [https://perma.cc/F6ZB-URTY] (in Farsi).

108. Press Release, Int'l Court of Justice, Iran Institutes Proceedings Against the United States with Regard to a Dispute Concerning Alleged Violations of the 1955 Treaty of Amity 1–3 (June 15, 2016), <http://www.icj-cij.org/docket/files/164/19032.pdf> [https://perma.cc/CT39-VDAS]. For an in-depth analysis of the merits of these allegations, see Elena Chachko, *Iran Sues the U.S. in the ICJ—Preliminary Thoughts*, LAWFARE (June 18, 2016, 8:09 AM), <https://www.lawfareblog.com/iran-sues-us-icj—preliminary-thoughts> [https://perma.cc/JLP4-ZW4H].

109. The United States is aware of only three cases where foreign courts in countries designated as SSTs have levied judgments against the United States. The Congressional Research Service provided a report to Congress detailing these cases. ELSEA, *supra* note 55, at 66–67. Beyond these cases, there are no others on point, which may signal the inability of plaintiffs to bring such suits against the United States. Notably, however, the United States does have a history of reaching settlement agreements when it is undeniable that the United States committed a wrong. A clear example occurred when the United States agreed to compensate the families of those killed when the USS Vincennes shot Iran Air Flight 655 (a passenger flight) out of the air over the Persian Gulf in 1988. See Settlement Agreement on the Case Concerning the Aerial Incident of 3 July 1988 Before the International Court of Justice, Iran-U.S., ¶¶ 1–11, Feb. 9, 1996, Iran-U.S., 35 I.L.M. 572, 572–74. There are examples of covert, informal compensation practices as well, especially following the increase in high-profile civilian deaths as a result of drone strikes. See Lesley Wexler & Jennifer K. Robbennolt, *Designing Amends for Lawful Civilian Casualties*, 42 YALE J. INT'L L. (forthcoming 2017) (manuscript at 139–48) (on file with the North Carolina Law Review).

110. At the heart of this reality is the immensely complicated doctrine of comity. Comity, at its core, demands deference in the forum state to the laws of foreign sovereigns insofar as the foreign sovereign would enforce reciprocal laws if the parties to the case were inverted. See Joel R. Paul, *Comity in International Law*, 32 HARV. INT'L L.J. 1, 8–9 (1991). These very concerns were voiced by constitutional law scholars and foreign policy experts at a hearing on the Justice Against Sponsors of Terrorism Act prior to its passage, a law that is similar in form but differs in substance from the SST exception. See *Justice Against Sponsors of Terrorism Act: Hearing on H.R. 2040 Before the Subcomm. on the Constitution & Civil Justice of the H. Comm. on the Judiciary*, 114th Cong. 16–22, 60–71 (2016) (statements of Anne W. Patterson, Assistant Secretary of State for Near Eastern Affairs, U.S. Department of State, and Paul B. Stephan, Professor, University of Virginia School of Law).

## 4. Separation-of-Powers Concerns

Another common critique of the exception is that it intrudes upon constitutional separation-of-powers principles. The SST exception perpetually places the interests of private plaintiffs and judgments granted by the judiciary at odds with the interests of the executive branch in its fulfillment of foreign policy objectives.<sup>111</sup> Traditionally, an inherent power within the purview of the executive branch has been the power to dictate U.S. diplomacy, and more recently, the power to make policy decisions about how to fight terrorism. The President's inherent power to direct U.S. diplomacy efforts flows from his constitutional role as commander in chief.<sup>112</sup> The President's power over matters such as recognition of a foreign state's sovereignty is exclusive and conclusive, and thus solely within the ambit of the executive branch.<sup>113</sup>

Various commentators have noted the problematic nature of the SST exception because of its incursion into areas that are exclusively within the President's bailiwick.<sup>114</sup> To be sure, Congress maintains the right to pass laws governing foreign policy.<sup>115</sup> However, the SST exception places this power into the hands of the judiciary, where lawyers have the opportunity to act as "private secretar[ies] of state."<sup>116</sup> This allows private citizens to choose when and how to engage state sponsors of terror, which creates myriad complications for the executive branch as it navigates the precarious waters of international affairs. This activity incurs directly upon the familiar

111. This reality has been borne out repeatedly in cases where the State Department has supported the positions of state sponsors of terror in order to ensure that the United States does not violate certain international conventions and legal norms. *See* Baletsa, *supra* note 84, at 1292–93 (noting that following the decision in *Flatow v. Iran*, Flatow sought to enforce his judgment against Iran by attaching an old embassy building, at which point government attorneys successfully intervened to ensure that the United States complied with Article 22(3) of the Vienna Convention, and to avoid the seizure of American embassies in other countries); *see also* Ward, *supra* note 86, at 11 (citing Robert Schmidt, *U.S. Man Suing Iran Finds State Dep't His Foe: Bid to Collect Assets Collides with Foreign Policy Concerns*, LEGAL TIMES, Aug. 10, 1998, at 1, 6).

112. U.S. CONST. art. II.

113. *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2096 (2015).

114. *See* Ward, *supra* note 86, at 13–14 (arguing that when the President participates in waiving SST exception attachment proceedings, he concedes power by participating in congressional self-aggrandizement in the arena of foreign policy). *See generally* Kim, *supra* note 33 (detailing the various separation-of-powers concerns implicated by the SST exception).

115. *Zivotofsky*, 135 S. Ct. at 2096 (“[T]he Court does not question the substantial powers of Congress over foreign affairs in general . . .”).

116. Kim, *supra* note 33, at 525 (alteration in original).

notion that the nation must “speak . . . with one voice” in regard to certain foreign policy matters.<sup>117</sup>

In a recent separation-of-powers decision, *Zivotofsky v. Kerry*,<sup>118</sup> the Supreme Court relied heavily on the “one voice” doctrine to find that the President has the exclusive and conclusive power to recognize the legitimacy of foreign sovereigns.<sup>119</sup> Although the Court conceded that “[t]he Executive is not free from the ordinary controls and checks of Congress merely because foreign affairs are at issue[,]” the Court found that recognizing the legitimacy of a foreign state requires unitary decision making that is best left for the President alone.<sup>120</sup> *Zivotofsky* took a functionalist approach<sup>121</sup> to the inherent authority of the President.<sup>122</sup>

Under a functionalist approach, a key consideration is whether the activity in question is one that requires characteristics such as unity, “[d]ecision, activity, secrecy, and dispatch.”<sup>123</sup> The *Zivotofsky* Court noted that “[t]he President is capable, in ways Congress is not, of engaging in the delicate and often secret diplomatic contacts that may lead to a decision on recognition. . . . [and] is also better positioned to take the decisive, unequivocal action necessary to recognize other states at international law.”<sup>124</sup> Much like the decision about whether to recognize a foreign sovereign, decisions about when and how to hold foreign sovereigns accountable for terrorist activities often require unequivocal and consistent action on behalf of the United States. In other words, these activities require the nation to “speak . . . with one voice.”<sup>125</sup>

The SST exception, however, results in a nation speaking through thousands of voices in the form of plaintiffs, lawyers, and federal judges. The disparate, disjointed, disorderly cacophony that

117. *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 424 (2003).

118. 135 S. Ct. 2076 (2015).

119. *Id.* at 2086. *But see id.* at 2123 (Scalia, J., dissenting) (“In the end, the Court’s decision does not rest on text or history or precedent. It instead comes down to ‘functional considerations’—principally the Court’s perception that the Nation ‘must speak with one voice’ about the status of Jerusalem.” (quoting majority opinion)).

120. *Id.* at 2090 (majority opinion).

121. Functionalism, as opposed to formalism, requires a court to consider “constitutional policy and practice” when determining where power should be allocated among the branches of government. William N. Eskridge, Jr., *Relationships Between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J.L. & PUB. POL’Y 21, 21 (1998).

122. *Zivotofsky*, 135 S. Ct. at 2086.

123. *Id.* (alteration in original) (quoting THE FEDERALIST NO. 70, at 424 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

124. *Id.* at 2086 (citations omitted).

125. *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 424 (2003).

emerges from SST litigation makes it difficult for the President's position to be heard loud and clear from oceans away. From this abstract constitutional struggle flow the practical obstacles the President must resolve.

The other side of the constitutional coin is equally troublesome. It is the sole duty of Congress to determine the subject matter jurisdiction of Article III courts.<sup>126</sup> However, the SST exception delegates designation power to the Secretary of State, an arm of the executive branch.<sup>127</sup> Therefore, the executive branch, rather than Congress, dictates the jurisdiction of the federal courts in this area, raising the specter of "an unconstitutional delegation of core legislative power."<sup>128</sup> This issue was raised in *Rein v. Socialist People's Libyan Arab Jamahiriya*,<sup>129</sup> but was ultimately left unresolved.<sup>130</sup> The *Rein* court concluded that Libya lacked standing to challenge the constitutionality of delegating the power to determine the jurisdiction of federal courts to the Secretary of State.<sup>131</sup> In so doing, the Second Circuit quietly evaded the sticky constitutional issue embedded in the SST exception. The court explicitly reserved the possibility that the delegation issue might be litigated in the future if the sovereign party was not a designated state sponsor of terror at the time § 1605(a)(7) was passed.<sup>132</sup>

126. U.S. CONST. art. III, §§ 1–2.

127. See 22 U.S.C. § 2371 (2012); 50 U.S.C. app. § 2405(j) (2012). Designations under these statutes are made by the Secretary of State for the purposes of regulating, respectively, exports and foreign aid. But since the passage of § 1605(a)(7) in 1996, the Secretary's designations affect sovereign immunity as well. See 28 U.S.C. § 1605A(h)(6) (2012).

128. *Rein v. Socialist People's Libyan Arab Jamahiriya*, 162 F.3d 748, 763 (2d Cir. 1998).

129. 162 F.3d 748 (2d Cir. 1998).

130. In that case, families of victims of the Pan Am Flight 103 bombing sued Libya under the SST exception. *Id.* at 754–55. Libya challenged the constitutionality of Congress delegating the power to determine the jurisdiction of federal courts to the Secretary of State. *Id.* at 762. The Second Circuit held, in effect, that Libya did not have standing to challenge the constitutionality of the exception because Libya had been designated as a state sponsor of terror prior to the activation of the exception. *Id.* at 764. Therefore, there was no delegation of jurisdiction-creating power to begin with in Libya's case. *Id.* ("[I]n the particular case before us there was no delegation at all. The decision to subject Libya to jurisdiction under § 1605(a)(7) was manifestly made by Congress itself rather than by the State Department. At the time that § 1605(a)(7) was passed, Libya was already on the list of state sponsors of terrorism. No decision whatsoever of the Secretary of State was needed to create jurisdiction over Libya for its alleged role in the destruction of Pan Am 103. That jurisdiction existed the moment that the AEDPA amendment became law.").

131. *Id.* at 764.

132. *Id.* ("The issue of delegation might be presented if another foreign sovereign—one not identified as a state sponsor of terrorism when § 1605(a)(7) was passed—was



Other separation-of-powers concerns arise from efforts by Congress to dictate the disposition of attachment proceedings on behalf of SST plaintiffs, an issue recently taken up by the Supreme Court in *Bank Markazi v. Peterson*.<sup>133</sup> As evidenced above, there are a variety of constitutional defects associated with the SST exception that weaken the foundations of judgments entered pursuant to it. Beyond these constitutional concerns, core questions remain about the fairness of the SST exception.

### 5. Inequality and Unfairness Among Similarly Situated Plaintiffs

Another common critique of the SST exception is that it leaves similarly situated individuals with disparate opportunities for relief. If a U.S. citizen is killed or injured in a terrorist attack that is orchestrated or supported by a sovereign *not* designated as an official state sponsor of terror, there is no right of action in U.S. courts unless another exception to the FSIA applies.<sup>134</sup> The State Department retains broad discretion to designate state sponsors of terror.<sup>135</sup> The Secretary of State can designate any country whose government “has repeatedly provided support for acts of international terrorism” as a state sponsor of terror.<sup>136</sup> In reality, designation as a state sponsor of terror often has very little to do with terrorism, and more to do with policy.<sup>137</sup> These policy decisions can result in substantial unfairness

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placed on the relevant list by the State Department and, on being sued in federal court, interposed the defense that Libya now raises.”).

133. 136 S. Ct. 1310, 1316–17 (2016) (holding that Congress could constitutionally direct the outcome of pending litigation by passing a law effectively disposing of Iranian assets in favor of SST plaintiffs).

134. See, e.g., 28 U.S.C. §§ 1330, 1602, 1605–1607 (2015) (discussing the purpose of the FSIA, and characterizing a determination that a foreign sovereign lacks immunity as an “exception” to the general rule that foreign sovereigns are immune); Justice Against Sponsors of Terrorism Act, Pub. L. No. 144-222, § 3, 130 Stat. 852, 853 (2016) (codified at 28 U.S.C. § 1605B).

135. *Id.* § 1605A(h)(6) (“[T]he term ‘state sponsor of terrorism’ means a country the government of which the Secretary of State has determined, for purposes of section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)), section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371), section 40 of the Arms Export Control Act (22 U.S.C. 2780), or any other provision of law, is a government that has repeatedly provided support for acts of international terrorism . . .”).

136. *Id.* Of course, if the state actor is deemed a state sponsor of terror as a result of the event, liability could attach retroactively pursuant to the FSIA. *Id.* § 1605A(a)(2)(A)(i)(I).

137. See COOPER-HILL, *supra* note 33, at 189 (“[F]or reasons both political and economic, [some] countries have never been placed on the list [of designated state sponsors of terror]”); Keith Sealing, “State Sponsors of Terrorism” Is a Question, Not an Answer: The Terrorism Amendment to the FSIA Makes Less Sense Now Than It Did Before 9/11, 38 TEX. INT’L L.J. 119, 138–41 (2003) (arguing that various other states should

among similarly situated parties. One example of this inherent unfairness is especially stark.

Following the attacks at the World Trade Center in New York City on September 11th, 2001, plaintiffs who were injured or lost loved ones brought suit in the Southern District of New York against hundreds of defendants allegedly involved in the attacks. One of these defendants was Saudi Arabia.<sup>138</sup> The complaint submitted against Saudi Arabia set forth a range of allegations detailing significant ties between the House of Saud, Saudi princes, Saudi charities, and Al-Qaeda.<sup>139</sup> Saudi Arabia was dismissed from the lawsuit by the district court judge in 2008, despite no factual investigation or determination about Saudi Arabia's alleged role in 9/11.<sup>140</sup> The judge found that Saudi Arabia's sovereign immunity could not be pierced because it was not a designated state sponsor of terror.<sup>141</sup> Because none of the designated state sponsors of terror<sup>142</sup> could be conclusively connected to the 9/11 attacks, many plaintiffs from those attacks were unable to collect from anyone at all.<sup>143</sup> On the other hand, victims of other terrorist attacks are awarded massive judgments merely because the alleged supporting state of the terrorism is or was at one time a designated state sponsor of terror.<sup>144</sup>

Notably, Congress has taken steps to correct this inequity and to remove any executive determinations regarding sovereign immunity. Fifteen years after 9/11, Congress attempted to correct this unfairness by passing the Justice Against Sponsors of Terrorism Act ("JASTA") in defiance of President Obama's veto of the legislation.<sup>145</sup> The law

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be designated state sponsors of terror, including Pakistan, Saudi Arabia, Israel, and Somalia); see also Dennis Jett, *Why the State Sponsors of Terrorism List Has So Little To Do with Terrorism*, HUFFINGTON POST (June 29, 2016), [http://www.huffingtonpost.com/dennis-jett/state-sponsors-of-terrorism-list\\_b\\_7658880.html](http://www.huffingtonpost.com/dennis-jett/state-sponsors-of-terrorism-list_b_7658880.html) [<https://perma.cc/E6YX-ZZYK>].

138. *In re Terrorist Attacks on September 11, 2001*, 538 F.3d 71, 75 (2d Cir. 2008).

139. *Id.* at 76–79.

140. *See id.* at 78.

141. *Id.* (noting that none of the other exceptions to the FSIA applied).

142. Currently, Iran, Sudan, and Syria are listed as state sponsors of terrorism. *State Sponsors of Terrorism*, U.S. DEP'T STATE, <http://www.state.gov/j/ct/list/c14151.htm> [<https://perma.cc/7R6Y-PCH6>]. In 2004, the list was much longer, with Sudan, Cuba, Iran, Iraq, North Korea, Syria, and Libya all making the cut. Kim, *supra* note 33, at 523.

143. Kim, *supra* note 33, at 523–24. *But see infra* Section III.A. (arguing that precisely because these plaintiffs were unable to collect against Saudi Arabia, some of them brought suit against Iran, even though the evidence supporting the contention that Iran was involved in the 9/11 attacks is scant).

144. *See, e.g.,* Flatow v. Islamic Republic of Iran, 999 F. Supp. 1, 6, 25–34 (D.D.C. 1998).

145. *See* Justice Against Sponsors of Terrorism Act, Pub. L. No. 114-222, § 3, 130 Stat. 852, 853 (codified at 28 U.S.C. § 1605B); Message to the Senate Returning Without Approval the Justice Against Sponsors of Terrorism Act, 2016 DAILY COMP. PRES. DOC.

creates a cause of action against any foreign state for causing harm to Americans through an international act of terrorism.<sup>146</sup> However, collecting under the new statute will be excessively difficult because traditional enforcement and collection mechanisms available under § 1605A (the SST exception) of the FSIA are not available to claimants who fall under the JASTA exception.<sup>147</sup> President Obama argued vehemently against the bill and vetoed its passage (a veto that was ultimately overridden).<sup>148</sup> Ironically, in his veto message, President Obama justified the veto by emphasizing many of the disadvantages discussed in this Part—disadvantages shared by the SST exception and JASTA.<sup>149</sup> Soon after passing the law, members of Congress expressed a sense of buyer's remorse as they comprehended the unintended consequences of the law. Senators Lindsey Graham and John McCain have already discussed legislation that would narrow the scope of the law in order to avoid the risk of retaliatory litigation, while commentators have proposed fixing the law by including a presidential waiver provision.<sup>150</sup> Because of these challenges, a remedy to the unfairness of the SST exception remains elusive.

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1–3 (Sept. 23, 2016) [hereinafter President Obama Veto Message] (President Obama voicing his reasons for the veto).

146. Justice Against Sponsors of Terrorism Act § 3.

147. For instance, JASTA claimants cannot take advantage of § 1610(a)(7) and (b)(2), which provide the enforcement mechanisms available to claimants under the traditional SST exception. Ingrid Wuerth, *Justice Against Sponsors of Terrorism Act: Initial Analysis*, LAWFARE (Sept. 29, 2016, 2:19 PM), <https://www.lawfareblog.com/justice-against-sponsors-terrorism-act-initial-analysis> [<https://perma.cc/EDR8-DEW3>].

148. President Obama Veto Message, *supra* note 145.

149. *Id.* at 2–3 (“JASTA threatens to reduce the effectiveness of our response to indications that a foreign government has taken steps outside our borders to provide support for terrorism, by taking such matters out of the hands of national security and foreign policy professionals and placing them in the hands of private litigants and courts . . . . Enactment of JASTA could encourage foreign governments to act reciprocally and allow their domestic courts to exercise jurisdiction over the United States or U.S. officials—including our men and women in uniform—for allegedly causing injuries overseas via U.S. support to third parties.”).

150. See John Bellinger, *How Congress Could Fix JASTA: Give the President Waiver Authority*, LAWFARE (Oct. 5, 2016, 8:40 PM), <https://www.lawfareblog.com/how-congress-could-fix-jasta-give-president-waiver-authority> [<https://perma.cc/23ZE-V95T>]; Marcy Kreiter, *JASTA: Congress May Be Experiencing Buyer's Remorse over Sept. 11 Bill; Lawmakers May Address the Issue Again in November*, INT'L BUS. TIMES (Sept. 29, 2016, 4:59 PM), <http://www.ibtimes.com/jasta-congress-may-be-experiencing-buyers-remorse-over-sept-11-bill-lawmakers-may-2424212> [<https://perma.cc/26VV-LBR3>]; Austin Wright, *Graham, McCain Unveil 'Fix' to 9/11 Saudi Law*, POLITICO (Nov. 30, 2016, 5:48 PM), <http://www.politico.com/story/2016/11/graham-mccain-saudi-arabia-911-232026> [<https://perma.cc/B4ZC-ZP97>].

Beyond the inherent unfairness of allowing for recovery against some countries and not others, the arbitrariness of designation decisions is also a looming concern. For instance, although many would view North Korea as a pariah state because of its nuclear program and aggressive tactics, North Korea is no longer a designated state sponsor of terror.<sup>151</sup> This example alone provides valuable insight as to why many view the designation decisions to be arbitrary and contradictory. Designation as a state sponsor of terror can be used as a stick, and the prospect of removal from the list can be used as a carrot. This foreign policy strategy might be acceptable if it were simply used to designate pariah states, but when the designation interacts with the SST exception, arbitrary results occur. Furthermore, designation as a state sponsor of terror tends to engender hostility towards the United States, and may diminish respect for the rule of law within the international community.<sup>152</sup> There is also evidence to suggest that there is an implicit bias among judges when considering the lawsuits brought under the SST exception—it is exceedingly difficult to remain impartial when one party is an American citizen and another party is a foreign state designated as a state sponsor of terror.<sup>153</sup>

151. *State Sponsors of Terrorism*, *supra* note 142; *see also* Kim, *supra* note 33, at 523 (noting that North Korea was once on the list).

152. Gartenstein-Ross, *supra* note 35, at 919–21 (noting that the hypocrisy of the exception engenders direct hostility and “erodes [the] credibility [of the United States] on jurisprudential matters”).

153. The dicta in D.C. District Court Judge Royce Lamberth’s opinions demonstrate this point. *See* *Estate of Bland v. Islamic Republic of Iran*, 831 F. Supp. 2d 150, 158 (D.D.C. 2011) (“In closing, the Court appreciates plaintiffs’ selfless sacrifice and their persistent efforts to hold Iran and MOIS accountable for their support of terrorism. The Court concludes that defendants Iran and MOIS must be punished to the fullest extent legally possible for the bombing in Beirut on October 23, 1983. This horrific act impacted countless individuals and their families, nearly one hundred of whom are parties to this lawsuit. This Court hopes that the victims and their families may find some measure of solace from this Court’s final judgment.”); *Murphy v. Islamic Republic of Iran*, 740 F. Supp. 2d 51, 83 (D.D.C. 2010) (“Iran and MOIS are responsible for the deaths and injuries of hundreds of American servicemen; are liable for physical, emotional, and pecuniary injuries suffered as a result; and deserve to be punished to the fullest legal extent possible. In a recent interview, Iranian President Mahmoud Ahmadinejad declared that he and his country ‘oppose terrorism. We strongly oppose’ it. The Court sincerely hopes that the compensatory damages awarded today help to alleviate plaintiffs’ and intervenors’ injuries, and that the punitive damages also awarded inspire Iran to adhere to its professed opposition to terrorism.” (quoting Interview by George Stephanopoulos, Chief Political Correspondent, ABC News, with Mahmoud Ahmadinejad, President, Iran (May 5, 2010), <http://abcnews.go.com/print?id=10558442> [<https://perma.cc/U9ST-LJG9>])); *Valore v. Islamic Republic of Iran*, 700 F. Supp. 2d 52, 90 (D.D.C. 2010) (“Iran and MOIS are responsible for the deaths and injuries of hundreds of American servicemen, are liable for the emotional injuries their family members have suffered as a result, and deserve to be

As discussed above, the SST exception to the FSIA has been debated since its inception.<sup>154</sup> There are significant disputes about whether the exception is wise, valid, useful, and, most importantly, constitutional in its current form.<sup>155</sup> The SST exception is plagued by controversy; it impedes executive foreign policy objectives and requires constant tweaking to ensure recovery is possible.<sup>156</sup> These realities establish fertile soil for a President who may seek to alter, amend, renegotiate, or restructure judgments entered under the exception—especially when key foreign policy goals hang in the balance. Although the constitutionality of the SST exception has never been challenged,<sup>157</sup> such a challenge may become plausible if the exception continues to be exposed as a serious obstacle to the executive branch in its resolution of foreign policy matters.<sup>158</sup>

## II. OBSTACLES TO IMPLEMENTATION OF THE ACCORD CREATED BY STATE-SPONSORED TERROR JUDGMENTS AGAINST IRAN

The judgments against Iran are a substantial obstacle to the normalization of relations between Iran and the United States. More specifically, these judgments create a genuine risk that the Accord will fail. As discussed in Part I, the United States has invested monumental sums of political, financial, and diplomatic capital to ensure the Accord's success. Allowing the foreign policy objectives of

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punished to the fullest legal extent possible. World-renowned Iranian poet Simin Behbahani . . . recently implored her nation to 'Stop this screaming, mayhem, and bloodshed. Stop doing what makes God's creatures mourn with tears.' The Court sincerely hopes that the compensatory damages awarded today help to alleviate plaintiffs' physical, emotional, and financial injury and that the punitive damages also awarded inspire Iran to heed Ms. Behbahani's words." (quoting Mark Memmott, *Poet Simin Behbahani: Neda Is 'Voice of the People of Iran'*, NPR (June 26, 2009, 4:30 PM), [http://www.npr.org/sections/thetwo-way/2009/06/poet\\_simin\\_behbahani\\_says\\_neda.html](http://www.npr.org/sections/thetwo-way/2009/06/poet_simin_behbahani_says_neda.html) [<https://perma.cc/RHF9-S353>])).

154. See *supra* text accompanying notes 91–93.

155. See generally, e.g., Baletsa, *supra* note 84 (challenging the validity of AEDPA's withdrawal of sovereign immunity because of the inability of private suits to effectuate their stated purpose of combatting state-sponsored terrorism); Gartenstein-Ross, *supra* note 35 (arguing that, in the wake of 9/11, only the political branches should engage in combatting terrorism through military and diplomatic powers, not politically unaccountable actors through the terrorism exception to the FSIA); Kim, *supra* note 33 (exploring the tendency of the SST exception to undermine the executive branch's ability to fight terrorism and how constitutional separation-of-powers problems potentially arise).

156. Kim, *supra* note 33, at 519–21 (discussing the struggle between the executive branch and Congress over recovery of foreign frozen assets pursuant to the amendments).

157. But see *Rein v. Socialist People's Libyan Arab Jamahiriya*, 162 F.3d 748, 762–64 (2d Cir. 1998) (challenging the constitutionality of the delegation of jurisdiction decisions to the executive branch, but not challenging the SST exception more generally).

158. Of course, the political question doctrine is a pesky impediment to such challenges.

the President to falter because of these judgments would be a regrettable mistake, a mistake that might result in a military confrontation between two of the world's most polarized countries. This Part begins by briefly exploring the nature of the judgments pending against Iran, and then discusses the various diplomatic obstacles posed by these judgments. First, the judgments impede normalization efforts. Second, the judgments simultaneously inhibit Iranian integration into the international economy and stunt the infiltration of American soft power. Third, the judgments pose political challenges for the President because of their emotional and political appeal. Finally, the judgments place American businesses seeking opportunity in Iran at a disadvantage. The executive branch and Iran can avoid these downfalls by skillfully resolving these judgments.<sup>159</sup>

#### A. *The Judgments Against Iran*

Although there are judgments pending against a number of SST defendants, Iran leads the way in pending judgments.<sup>160</sup> As of August 2015, total damages assessed by U.S. courts against Iran are estimated to exceed \$46 billion, arising from more than eighty-five reported decisions—these numbers continue to grow.<sup>161</sup> These judgments arise from a number of incidents: over \$9.6 billion for attacks on U.S. embassies in Dar es Salaam and Nairobi in 1998,<sup>162</sup> more than \$9.5 billion for attacks on the U.S. embassy in Beirut in 1983 and 1984,<sup>163</sup>

159. *See infra* Part IV.

160. ELSEA, *supra* note 55, at 69–74. As of 2008, Libya was a distant second in terms of total damages assessed against it, owing approximately \$1.6 billion. *Id.* at 75. Other countries still owing damages as of 2008 included Sudan, Iraq, and Cuba. *Id.* Many of these damages have been settled since that time. *See, e.g.*, Libyan Claims Resolution Act, Pub. L. No. 110-301, §§ 3–5, 122 Stat. 2999, 2999–3002 (2008) (codified as amended at 28 U.S.C. § 1605A note (2012)) (settling claims against Libya and removing Libya from the state sponsor of terror list).

161. CONG. RESEARCH SERV., TERRORISM JUDGMENTS AGAINST IRAN 4, <https://www.kirk.senate.gov/pdfs/AmericanIranianJudgments.pdf> [<https://perma.cc/56K2-S5JW>]; *see also, e.g.*, *In re Terrorist Attacks on September 11, 2001*, No. 03-MDL-1570, 2016 WL 1029552, at \*2 (S.D.N.Y. Mar. 9, 2016) (awarding over \$10 billion against Iran).

162. *See, e.g.*, *Owens v. Republic of Sudan*, 71 F. Supp. 3d 252, 256 (D.D.C. 2014) (\$622 million); *Amduso v. Republic of Sudan*, 61 F. Supp. 3d 42, 46 (D.D.C. 2014) (\$1.7 billion); *Onsongo v. Republic of Sudan*, 60 F. Supp. 3d 144, 148 (D.D.C. 2014) (\$199 million); *Opati v. Republic of Sudan*, 60 F. Supp. 3d 68, 76 (D.D.C. 2014) (\$3.1 billion); *Wamai v. Republic of Sudan*, 60 F. Supp. 3d 84, 89 (D.D.C. 2014) (\$3.5 billion); *Mwila v. Islamic Republic of Iran*, 33 F. Supp. 3d 36, 40 (D.D.C. 2014) (\$419 million).

163. *See, e.g.*, *Estate of Doe v. Islamic Republic of Iran*, 943 F. Supp. 2d 180, 184 (D.D.C. 2013) (\$8.4 billion); *Brewer v. Islamic Republic of Iran*, 664 F. Supp. 2d 43, 57–59 (D.D.C. 2009) (\$309.5 million); *Welch v. Islamic Republic of Iran*, No. 1:01-CV-00863, 2007 WL 7688043, at \*35 (D.D.C. Sept. 20, 2007) (\$32.7 million); *Dammarell v. Islamic*

over \$7 billion for the 9/11 attacks,<sup>164</sup> and over \$9 billion for attacks on Marine barracks in Beirut in 1983.<sup>165</sup> In almost every case that has been brought against Iran, Iran has chosen not to show up in court and thus defaulted.<sup>166</sup> Many speculate that Iran has defaulted because it does not recognize the jurisdiction of the United States over these suits as legitimate, while others speculate that the difficulty of collecting on SST judgments creates little incentive for Iran to show up and defend itself in U.S. courthouses.<sup>167</sup>

The stories of victims killed by these terrorist attacks are horrific. Most were killed or injured in terrorist attacks in Israel, Lebanon, and other countries. Groups supported by Iran, such as Hamas or Hezbollah, carried out many of the attacks. A sampling of cases reveals the varying nature of these attacks: Judith Greenbaum died in a bombing caused by Hamas,<sup>168</sup> Alisa Flatow was killed when her bus collided with a van full of explosives in Israel,<sup>169</sup> Yekutieli “Tuly”

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Republic of Iran, No. 1:01-02224, 2006 WL 2583043, at \*1 (D.D.C. Sept. 7, 2006) (\$316.92 million); *Salazar v. Islamic Republic of Iran*, 370 F. Supp. 2d 105, 117 (D.D.C. 2005) (\$18.3 million); *Wagner v. Islamic Republic of Iran*, 172 F. Supp. 2d 128, 138 (D.D.C. 2001) (\$316.28 million).

164. See, e.g., *In re Terrorist Attacks on September 11, 2001*, No. 03-MDL-1570, 2012 WL 4711407, at \*3 (S.D.N.Y. Oct. 3, 2012) (\$6.05 billion).

165. See, e.g., *Spencer v. Islamic Republic of Iran*, 71 F. Supp. 3d 23, 31 (D.D.C. 2014) (\$453.6 million); *Taylor v. Islamic Republic of Iran*, 881 F. Supp. 2d 19, 25 (D.D.C. 2012) (\$657.12 million); *Fain v. Islamic Republic of Iran*, 885 F. Supp. 2d 78, 84 (D.D.C. 2012) (\$67.79 million); *Estate of Brown v. Islamic Republic of Iran*, 872 F. Supp. 2d 37, 45–46 (D.D.C. 2012) (\$813.77 million) (“Iran is racking up quite a bill from its sponsorship of terrorism. After this opinion, this Court will have issued over \$8.8 billion in judgments against Iran as a result of the 1983 Beirut bombing.”); *Davis v. Islamic Republic of Iran*, 882 F. Supp. 2d 7, 17 (D.D.C. 2012) (\$2.16 billion); *O’Brien v. Islamic Republic of Iran*, 853 F. Supp. 2d 44, 49 (D.D.C. 2012) (\$44.62 million); *Anderson v. Islamic Republic of Iran*, 839 F. Supp. 2d 263, 268 (D.D.C. 2012) (\$33.3 million); *Estate of Bland v. Islamic Republic of Iran*, 831 F. Supp. 2d 150, 158 (D.D.C. 2011) (\$1.23 billion); *Valore v. Islamic Republic of Iran*, 700 F. Supp. 2d 52, 84–90 (D.D.C. 2010) (\$1.02 billion); *Peterson v. Islamic Republic of Iran*, 515 F. Supp. 2d 25, 60–67 (D.D.C. 2007) (\$2.66 billion); *Prevatt v. Islamic Republic of Iran*, 421 F. Supp. 2d 152, 162 (D.D.C. 2006) (\$2.5 million). See generally CONG. RESEARCH SERV., *supra* note 161 (tabling pending judgments against Iran, complete with damage awards).

166. See *infra* Part III; see also Hoye, *supra* note 87, at 136 (“[A]ll but one of the cases filed under the Act to date have proceeded on the basis of default judgments entered against foreign state defendants *in absentia*.”). But see generally *Bank Markazi v. Peterson*, 136 S. Ct. 1310 (2016) (revealing that Iran does choose to litigate under certain circumstances).

167. Hoye, *supra* note 87, at 136 (“Until a more broadly based group of successful plaintiffs are able to collect routinely on judgments awarded under the Act, without the extraordinary and unusual remedy of special legislation, there seems to be little incentive for foreign state defendants or their agents to appear, much less to defend themselves aggressively, in Antiterrorism Act cases.”).

168. *Greenbaum v. Islamic Republic of Iran*, 451 F. Supp. 2d 90, 96 (D.D.C. 2006).

169. *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 6–7 (D.D.C. 1998).

Wultz was wounded and his son Daniel was killed in a suicide bombing in Tel Aviv,<sup>170</sup> Chapour Bakhtiar, a former Prime Minister of Iran, was murdered in Paris,<sup>171</sup> and Petty Officer Robert Holland was killed, along with hundreds of others, in a Marine barracks bombing in Beirut carried out by Hezbollah.<sup>172</sup> The list of victims could go on for pages, and their backgrounds are as diverse as they are tragic. Some of the victims were students studying abroad,<sup>173</sup> some were exiled military or political leaders who previously served the Shah,<sup>174</sup> and others served in the U.S. Armed Forces.<sup>175</sup>

The victims were innocent of any wrongdoing. Although disdain for the United States is palpable in some regions of the Middle East, many of these victims were killed in regions generally considered safe—urban centers such as Tel Aviv, Paris, or Beirut. However, many of the plaintiffs seeking to hold Iran liable for these heinous acts of terror ask courts to take a logical leap that is not always legally or factually sound.<sup>176</sup> The various shortcomings of these lawsuits, and especially the problems created by default judgments, are considered in Part III of this Comment. The remainder of this Part considers the role that these judgments play as obstacles to full implementation of the Accord.

### B. SST Judgments Impede Normalization

Daveed Gartenstein-Ross noted the impediments to diplomatic normalization created by the SST exception soon after its inception.<sup>177</sup>

170. *Wultz v. Islamic Republic of Iran*, 864 F. Supp. 2d 24, 27 (D.D.C. 2012).

171. *Bakhtiar v. Islamic Republic of Iran*, 571 F. Supp. 2d 27, 30–31 (D.D.C. 2008).

172. *Holland v. Islamic Republic of Iran*, 496 F. Supp. 2d 1, 4 (D.D.C. 2005); *see also id.* at 6–12 (detailing the factual findings surrounding the 1983 Beirut Marine barracks bombing).

173. *Flatow*, 999 F. Supp. at 7.

174. *Oveissi v. Islamic Republic of Iran*, 879 F. Supp. 2d 44, 50 (D.D.C. 2012); *Bakhtiar*, 571 F. Supp. 2d at 29.

175. *Holland*, 496 F. Supp. 2d at 4.

176. Consider the case of Terry Anderson, an American journalist who was kidnapped in Beirut and kept as a hostage for nearly seven years. Anderson alleged that Iran utilized Hezbollah as an agent for the purposes of keeping him hostage, and was awarded \$24,540,000 in damages. *See Anderson v. Islamic Republic of Iran*, 90 F. Supp. 2d 107, 108–09, 109 n.1, 114 (D.D.C. 2000). However, it was later reported that Iran had actually paid Hezbollah between \$1 million and \$2 million to release Anderson. *See ELAINE SCIOLINO, PERSIAN MIRRORS: THE ELUSIVE FACE OF IRAN* 350 (2000). It should be noted, however, that Schiolino framed Iran's actions as an exercise in political maneuvering, not goodwill. *Id.* (“[A]fter the hostages had outlived their political usefulness and Iran was eager to improve its international standing in the aftermath of the Persian Gulf war, Iran reportedly paid the kidnappers between \$1 million and \$2 million for the release of each hostage.”).

177. Gartenstein-Ross, *supra* note 35, at 925–30; *see also* Ward, *supra* note 86, at 17.



Gartenstein-Ross's scholarship presaged the very normalization challenges now posed by SST judgments. Although a state sponsor of terror can easily be delisted as such by the State Department, the judgments against the SST defendants are not as easy to eliminate.<sup>178</sup> This reality seriously limits the range of methods by which the executive branch can incentivize belligerent regimes to cooperate. Ironically, although the exception was created to make it easier to fight terrorism, the exception might actually hamper efforts to do so because the judgments create a cloud of apprehension over normalization discussions.<sup>179</sup> The United States' recent Accord with Iran illuminates this problem: although sanctions are slowly being lifted, SST judgments remain unresolved and provide a ready excuse for either party to back away from further negotiations or other attempts at normalization.<sup>180</sup> This Section discusses how these outstanding damage awards pose a threat to normalizing relations with Iran.

As part of the Accord, the United States has agreed to release a substantial portion of frozen Iranian assets held in American banks, and countries around the world will also lift sanctions against Iran.<sup>181</sup> Although there is significant disagreement about Iran's immediate financial benefits as a result of the Accord, estimates range from \$50 billion to \$150 billion, with some of the assets considered "unusable" because they are committed to other claims and payments.<sup>182</sup> This is a

178. See Gartenstein-Ross, *supra* note 35, at 925 (finding that "once judgments are entered under the exception, the executive has little control over them" and emphasizing the reduced executive flexibility associated with SST judgments).

179. See *id.* at 928 ("The executive's ability to swiftly normalize relations can bolster all of the antiterrorism techniques on which the United States has relied. The prospects of normalization can encourage other countries to support U.S. military operations, contribute to policing efforts, and participate in sanctions regimes. To the extent that the terrorism exception undermines this important carrot, it damages the full range of antiterrorist measures.").

180. In fact, Curtis Bradley, Professor of Law at Duke University, formerly at the University of Virginia, noted this exact problem in 2002 during a telephone interview with Daveed Gartenstein-Ross when he highlighted the risk that these sorts of lawsuits might one day thwart attempts to normalize relations with countries across the world. See *id.* at 920–21 (citation omitted). Professor Bradley noted in the interview that this "will be one issue in negotiation in the future that we have to resolve with those countries to have closer relations: If there are huge damage awards on the table, we would have to somehow resolve that." *Id.* at 928.

181. Jessica Schulberg, *Treasury: No, Iran Is Not Getting \$150 Billion from the Nuclear Deal*, HUFFINGTON POST (July 29, 2015), [http://www.huffingtonpost.com/entry/treasury-iran-150-billion-nuclear-deal\\_55b8dc41e4b0224d88348e1c](http://www.huffingtonpost.com/entry/treasury-iran-150-billion-nuclear-deal_55b8dc41e4b0224d88348e1c) [https://perma.cc/BSS9-HKBS].

182. See *id.*; see also Garver, *supra* note 100; Bijan Khajepour, *Will Iran Get Its Billions Back?*, U.S. NEWS (July 30, 2015, 1:52 PM), <http://www.usnews.com/news/articles>

significant sum of money for Iran, where the GDP was \$400 billion in 2014.<sup>183</sup> Iran has stated repeatedly that these funds will be put to good use to improve infrastructure, update oil production facilities, and jumpstart the struggling Iranian economy.<sup>184</sup> Iran's access to these funds was a key motivator and bargaining chip during negotiations, and Iran is likely to be hesitant to allow any depletion of these funds.

After implementation day, which occurred on January 16, 2016, these funds were to be released directly to Iran.<sup>185</sup> However, as the victims' attorneys prepare to take their share of this windfall before it reaches Iranian banks, there is a risk that this linchpin incentive holding the Accord in balance may vanish.<sup>186</sup> In fact, Ayatollah

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/2015/07/30/will-iran-get-its-billions-back [https://perma.cc/22A7-FM2Y]; Northam, *supra* note 25.

183. Northam, *supra* note 25.

184. Khajepour, *supra* note 182 ("President Rouhani has instructed officials to use [the released funds] for infrastructure projects and to promote domestic industries. This decree reflects two key issues: Rouhani remaining focused on job creation as both infrastructure and domestic industry have strong employment effects, as well as the government's desire to empower Iranian industry as it feels vulnerable to a potential opening of the domestic market.").

185. The full results of implementation day are yet to be seen, but implementation day begins the process of lifting sanctions against Iran and returning blocked Iranian assets. See U.S. DEP'T. OF TREASURY, FREQUENTLY ASKED QUESTIONS RELATING TO THE LIFTING OF CERTAIN U.S. SANCTIONS UNDER THE JOINT COMPREHENSIVE PLAN OF ACTION (JCPOA) ON IMPLEMENTATION DAY 1-2 (2016), [https://www.treasury.gov/resource-center/sanctions/Programs/Documents/jcpoa\\_faqs.pdf](https://www.treasury.gov/resource-center/sanctions/Programs/Documents/jcpoa_faqs.pdf) [https://perma.cc/QZ3Q-2J7Q]; *Implementation Day Statement*, U.S. DEP'T. TREASURY (Jan. 16, 2016), [https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/jcpoa\\_implementation.aspx](https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/jcpoa_implementation.aspx) [https://perma.cc/Z4FF-8M43]; *The JCPOA Timeline*, CTR. FOR STRATEGIC & INT'L STUD., <http://csis.org/ppp/index.htm> [https://perma.cc/THB4-DQL7 (staff-uploaded archive)].

186. See Rebecca Davis O'Brien, *Saudi Arabia Is Dismissed as Defendant in 9/11 Lawsuits*, WALL ST. J. (Sept. 29, 2015, 10:56 PM), <http://www.wsj.com/articles/saudi-arabia-is-dismissed-as-defendant-in-9-11-lawsuits-1443581766> ("Plaintiffs' attorneys have said a nuclear deal with Iran could open that country's bank accounts to damage claims from the lawsuit and other terrorism cases."). Notably, it appears that the U.S. government recognizes the risk that Iranian assets will be attached by creditors and has taken steps to avoid such attachment. For instance, in January 2016, the U.S. government transferred \$400 million in cash contained in an Iranian cargo plane to Iran to pay debts owed from a pre-Islamic Revolution contract between the Pentagon and the Shah's regime. Jay Solomon & Carol E. Lee, *U.S. Held Cash Until Iran Freed Prisoners*, WALL ST. J. (Aug. 18, 2016, 10:32 AM), <http://www.wsj.com/articles/u-s-held-cash-until-iran-freed-prisoners-1471469256>. Some viewed this as a "ransom" payment for the release of U.S. hostages, while the Obama administration characterized the funds as "leverage" for the release of hostages. Carol E. Lee & Jay Solomon, *U.S. Acknowledges Cash Payment to Iran was 'Leverage' in Prisoner Release*, WALL ST. J. (Aug. 18, 2016, 7:24 PM), <http://www.wsj.com/articles/u-s-acknowledges-cash-payment-to-iran-was-leverage-in-prisoner-release-1471558389>. The fact that the U.S. government transferred these funds in cash, and has not publicly accounted for the transfer of the remainder of the funds owed to Iran as part of the pre-Islamic Revolution contract, may indicate that the government is protecting against the risk of attachment by creditors, including SST plaintiffs.

Khamenei, the Supreme Leader of Iran, has warned that the Accord will be terminated if there are any “repetitive and self-made pretexts” of new sanctions.<sup>187</sup>

Khamenei’s comment alludes to the possibility of “sanctions” in the form of judgments for human rights abuses or terrorist activity.<sup>188</sup> In October 2015, Khamenei clarified this position when he tweeted that “[t]hroughout the 8-year term imposition of sanctions at any level and under any pretext . . . will be considered as [a] violation of the JCPOA.”<sup>189</sup> The irony inherent in the SST exception is manifest—if the victims are successful in recovering their judgments against Iran, it could spell doom for the Accord, which would give Iran an excuse to return to unabated and intensive uranium enrichment.<sup>190</sup> In other words, the more plaintiffs recover from Iranian assets released as part of the Accord, the more likely a nuclear Iran becomes, which would pose a major security threat to the world. As noted earlier, the exception is a troublesome foreign policy tool that places the diplomatic goals of the executive branch at direct odds with the goals of private plaintiffs, as Iran’s case demonstrates.<sup>191</sup>

### C. *SST Judgments Inhibit Iranian International Economic Integration and the Influence of American Soft Power*

There are deeper issues associated with the judgments against Iran. Even if judgment creditors are unable to grasp assets before they are returned to Iran as part of the Accord, Iran will remain inhibited and discouraged from reentering the international financial and trade community. This is largely a result of recent amendments passed by Congress that make it far easier to attach commercial assets

187. Thomas Erdbrink, *Iran Nuclear Deal Wins Tepid Endorsement From Ayatollah Ali Khamenei*, N.Y. TIMES (Oct. 21, 2015), [http://www.nytimes.com/2015/10/22/world/middleeast/iran-nuclear-deal-ayatollah-ali-khamenei.html?hp&action=click&pgtype=Homepage&module=second-column-region&region=top-news&WT.nav=top-news&\\_r=1](http://www.nytimes.com/2015/10/22/world/middleeast/iran-nuclear-deal-ayatollah-ali-khamenei.html?hp&action=click&pgtype=Homepage&module=second-column-region&region=top-news&WT.nav=top-news&_r=1) [<https://perma.cc/BG7F-ZFMX>].

188. *Id.*; see also Ayatollah Khamenei (@khamenei\_ir), TWITTER (Oct. 21, 2015, 5:36 AM), [https://twitter.com/khamenei\\_ir/status/656811370609012736/photo/1](https://twitter.com/khamenei_ir/status/656811370609012736/photo/1) [<https://perma.cc/78VN-RFES>].

189. Khamenei, *supra* note 188.

190. JCPOA, *supra* note 1, at 17 (noting that when a dispute arises, “[i]f the issue still has not been resolved to the satisfaction of the complaining participant [after exhausting other methods of dispute resolution], and if the complaining participant deems the issue to constitute significant non-performance, then that participant could treat the unresolved issue as grounds to cease performing its commitments under this JCPOA in whole or in part and/or notify the UN Security Council that it believes the issue constitutes significant non-performance”).

191. See *supra* Section I.D.4.

belonging to an SST judgment debtor, even if the commercial assets are unrelated to terrorist activity.<sup>192</sup> Thus, the judgments could not only deprive Iran of the benefit of the Accord's bargain—economic parity with the rest of the world—but might also deprive the United States of the tacit benefit of its bargain—bringing about actual transformational change, beyond mere behavioral change, in Iran.<sup>193</sup> One of the Accord's implicit goals is to create opportunities for future regime transformation within Iran. The best means of doing this, short of covert or overt military action, is through diplomacy and soft power.<sup>194</sup> In fact, Iranian hardliners who sustain this regime, including the Iranian Revolutionary Guard Corps (“IRGC”), are most afraid of this very power.<sup>195</sup> Thus, if members of the Iranian financial community fear that their assets will be seized the moment they land in an American bank account, there is little hope that economic

192. See *supra* Section I.C.1.

193. ROBERT LITWAK, IRAN'S NUCLEAR CHESS: AFTER THE DEAL 5 (2014), [https://www.wilsoncenter.org/sites/default/files/irans\\_nuclear\\_chess\\_calculating\\_americas\\_moves.pdf](https://www.wilsoncenter.org/sites/default/files/irans_nuclear_chess_calculating_americas_moves.pdf) [<https://perma.cc/B7YK-QMLK>] (noting the important difference between bringing about *behavioral* change in Iran as opposed to transformational *regime* change). Litwak also concluded that, “for Obama, the tacit transformational potential of this transactional deal is a hope; for Khamenei, it is a fear.” Robert S. Litwak, *Nuclear Diplomacy with Iran: A Deal, Not a Grand Bargain*, VIEWPOINTS, July 2015, at 3, [https://www.wilsoncenter.org/sites/default/files/nuclear\\_diplomacy\\_with\\_iran\\_deal\\_not\\_grand\\_bargain.pdf](https://www.wilsoncenter.org/sites/default/files/nuclear_diplomacy_with_iran_deal_not_grand_bargain.pdf) [<https://perma.cc/RQV6-TWES>].

194. See generally JOSEPH S. NYE, JR., *SOFT POWER: THE MEANS TO SUCCESS IN WORLD POLITICS* (2004) (describing the theory of soft power as a means of bringing about change in foreign regimes).

195. Majid Rafizadeh, *Iran Nuclear Deal: Four Concentric Circles*, WORLD POST (July 18, 2015), [http://www.huffingtonpost.com/majid-rafizadeh/iran-nuclear-deal-four-co\\_b\\_7825108.html](http://www.huffingtonpost.com/majid-rafizadeh/iran-nuclear-deal-four-co_b_7825108.html) [<https://perma.cc/Y6LM-2USN>] (“What the hardliners and ruling establishment fear the most is political (or economic) liberalization, which might lead to a soft cultural revolution and empowerment of the secular or oppositional groups. What they fear most is the cultural soft power of the West, mainly the United States, infiltrating Iranian society. Iranian leaders are cognizant of the fact that economic liberalization accompanied with political liberalization can endanger their hold on power. In other words, a more closed-off Iran ensures the current leadership of their rule and control over the population.”); see also David Ignatius, *Despite the Nuclear Deal, Iran Continues its Economic Sabotage*, WASH. POST (Dec. 29, 2015), [https://www.washingtonpost.com/opinions/iran-is-not-yet-open-for-business/2015/12/29/83deab38-ae42-11e5-9ab0-884d1cc4b33e\\_story.html](https://www.washingtonpost.com/opinions/iran-is-not-yet-open-for-business/2015/12/29/83deab38-ae42-11e5-9ab0-884d1cc4b33e_story.html) [<https://perma.cc/2DAX-6YK6>] (“Since the agreement was reached in July, Supreme Leader Ali Khamenei has repeatedly said that Iran won’t allow economic ‘infiltration’ by a United States he described last month as a ‘deceitful, crafty, skillful, fraudulent and devilish enemy.’” (first quoting Ishaan Tharoor, *Khamenei Says Iran Will Block U.S. Influence, No Matter the Nuclear Deal*, WASH. POST (Aug. 18, 2015), [https://www.washingtonpost.com/news/worldviews/wp/2015/08/18/khamenei-says-iran-will-block-u-s-influence-no-matter-the-nuclear-deal/?tid=a\\_inl&utm\\_term=.35441b857f42](https://www.washingtonpost.com/news/worldviews/wp/2015/08/18/khamenei-says-iran-will-block-u-s-influence-no-matter-the-nuclear-deal/?tid=a_inl&utm_term=.35441b857f42) [<https://perma.cc/FPA4-REMG>]; then quoting *Khamenei’s Counterrevolution Is Underway*, FOREIGN POL’Y (Dec. 9, 2015), <http://foreignpolicy.com/2015/12/09/khameneis-counter-revolution-is-underway/> [<https://perma.cc/78W6-VYEW>]).

liberalization will occur, and that American soft power will be able to infiltrate the Iranian political economy.<sup>196</sup> In short, the civil judgments against Iran may help the regime get exactly what it wants—the release of their assets—while depriving the United States of its ultimate goal of transformational regime change.

#### D. SST Judgments Pose Political Challenges

The judgments awarded to SST plaintiffs also pose a political obstacle to the Accord. The judgments hold special emotional appeal based on the horrific nature of the crimes committed against the victims.<sup>197</sup> The emotional potency of the stories underlying these judgments is evident in former Republican presidential candidate and Texas Senator Ted Cruz's speech to the House Judiciary Subcommittee in November 2015, where he began by discussing the gory details of an attack on an American family in Jerusalem.<sup>198</sup> These ostensibly sincere concerns for terrorist victims have, at times, been used for other purposes. In fact, several members of Congress have already taken steps to convert this emotional appeal into political energy used to impede the Accord itself. Following the Accord, in October 2015, a bill known as the Justice for Victims of Iranian Terrorism Act was passed in the House of Representatives that would disallow lifting any sanctions on Iran until all judgments levied against Iran were paid in full.<sup>199</sup> Several members of Congress attempted to drum up support for the bill by launching a public relations campaign

196. *But see* Ignatius, *supra* note 195 (detailing the work of groups such as iBridges and Atieh Bahar Consulting that seek to gather entrepreneurs and advise Western businesses interested in pursuing opportunities within Iran, but also noting the chilling effect that recent arrests of Iranian-American businessmen in Iran have had on trade talks). Iran is understandably wary of putting any assets of value in America; plaintiffs in the past have even gone after Iranian antiquities and artifacts in American museums to collect on their judgments. *See Rubin v. Islamic Republic of Iran*, 709 F.3d 49, 50 (1st Cir. 2013).

197. *See supra* Section II.A.

198. SenTedCruz, *Sen. Ted Cruz Opening Statement on Victims of Iranian and Palestinian Terrorism*, YOUTUBE (Nov. 17, 2015), <https://www.youtube.com/watch?v=ug90Leeyj5k> [<https://perma.cc/5UBN-7T2B>] (“[A] Palestinian suicide bomber struck, sending shrapnel into [the victim’s] right eye and blood across her face . . . nearby a bone was sticking out of her mother’s leg. Even worse, a woman’s severed head laid just a few feet away.”).

199. Justice for Victims of Iranian Terrorism Act, H.R. 3457, 114th Cong. (2015). The bill was cosponsored by four North Carolina representatives. *See H.R.3457—Justice for Victims of Iranian Terrorism Act*, CONGRESS.GOV, <https://www.congress.gov/bills/114/congress/house-bill/3457/cosponsors?q=%7B%22cosponsor-state%22%3A%22North+Carolina%22%7D> [<https://perma.cc/8E98-R8MJ>].

that included a YouTube video<sup>200</sup> and a Twitter hashtag (“#NotOneCent”).<sup>201</sup>

Although the bill did not pass in the Senate, it drew a spirited response from the executive branch.<sup>202</sup> In an official statement, the Obama administration laid out several key positions, notably (1) any attempts to tie the JCPOA to *collateral* issues such as civil judgments will result in the unraveling of the Accord and (2) “[t]he Administration supports efforts by U.S. terrorism victims to pursue compensation, *consistent with our national security*, and the JCPOA does nothing to impede those efforts.”<sup>203</sup> These comments provide a rare glance into the motivations of those inside the Obama administration. First, the administration appeared unwilling to recognize the reality that judgments against Iran and the JCPOA, though not legally linked, must be dealt with simultaneously or the JCPOA will be jeopardized by the sort of political posturing discussed above.<sup>204</sup> Second, the administration made clear that it did not oppose to recovery of the judgments—as long as that recovery was consistent with national security.<sup>205</sup> Beyond these political challenges, judgments against Iran also cause serious disadvantages for American businesses that would like to enter the lucrative Iranian market.

#### *E. SST Judgments Disadvantage American Business Prospects in Iran*

The judgments also limit the ability of certain Iranian agencies to purchase American products, which in turn infringes upon American businesses and individuals seeking to take advantage of the vast and largely untapped Iranian consumer market. A simple example

200. RepMeehan, #NotOneCent for Iran Until It Compensates Its Victims, YOUTUBE (Sept. 26, 2015), <https://www.youtube.com/watch?Source=GovD&v=DJwQ3ivy2Lg#sthash.6eDz5W8k.dpuf> [https://perma.cc/92F2-KWQT].

201. See *id.*; see also Madaline Donnelly, *Inspired to Stop Terrorism, Congressman Continues to Fight Iran Deal*, DAILY SIGNAL (Sept. 29, 2015), <http://dailysignal.com/2015/09/29/inspired-to-stop-terrorism-congressman-continues-to-fight-iran-deal/> [https://perma.cc/SQH4-VGJN] (including statements from Rep. Meehan, who sponsored the Justice for Victims of Iranian Terror Act); #NotOneCent: Meehan Bill Brings Justice for Victims of Iranian Terror, PAUL RYAN: SPEAKER (Oct. 1, 2015), <http://www.speaker.gov/video/notonecent-meehan-bill-brings-justice-victims-iranian-terror> [https://perma.cc/PWH2-AVRS] (detailing Speaker of the House Paul Ryan’s endorsement of Rep. Meehan’s bill).

202. *Statement of Administration Policy: H.R. 3457—Justice for Victims of Iranian Terrorism Act*, AM. PRESIDENCY PROJECT (Sept. 30, 2015), <http://www.presidency.ucsb.edu/ws/index.php?pid=111314> [https://perma.cc/8USC-M96Z].

203. *Id.* (emphasis added).

204. See *supra* notes 197–201 and accompanying text.

205. See *infra* Part IV.

epitomizes the point. If IranAir wanted to purchase a half dozen Boeing 747s to update its aging fleet,<sup>206</sup> IranAir would place its funds in an American bank account as escrow while the planes were manufactured.<sup>207</sup> The Iranian government owns IranAir,<sup>208</sup> so these funds would be subject to attachment by judgment creditors.<sup>209</sup> Accordingly, IranAir and similar Iran-affiliated entities would be expected to do business through back channels or through foreign banks to avoid attachment by SST judgment creditors. This example shows how SST judgments can discourage trade between Iran and the United States, placing American businesses, financial institutions, and individuals seeking economic opportunities in Iran at a disadvantage while the rest of the world enters the Iranian market bearing gifts and leaving with suitcases full of cash.<sup>210</sup> Ultimately, American businesses and Iranian entities may conclude that the profit potential outweighs the litigation risk of doing business, as Boeing appears to have done

206. Iran Air has one of the worst safety records in the world because of its inability to purchase American airplanes and airplane parts from manufacturers such as Boeing. Kieron Monks, *Iran's Aviation Industry: Back in Business?*, CNN (Sept. 9, 2015, 6:50 AM), <http://www.cnn.com/2015/09/09/travel/irans-aviation-industry/> [https://perma.cc/293E-8Y8Z]. The average age of the Iran Air fleet is approximately twenty-two years. *Id.* Iran is estimated to buy 300 new airplanes over the next ten years at a value of \$18 billion. *Id.*

207. See *Escrow Services*, AERO-SPACE REPORTS, <https://aerospacereports.com/services/escrow> [https://perma.cc/82MM-XRTX] (offering “aircraft escrow services with a level of confidentiality and security that is unmatched”); see also *Sample Aircraft Purchase/Sales Agreement*, AOPA, <https://www.aopa.org/go-fly/aircraft-and-ownership/buying-an-aircraft/forms-for-buying-and-selling-aircraft/sample-purchase-sales-agreement> [https://perma.cc/CYC7-32R4]. Of course, there are ways to evade this result, such as using intermediaries outside of the United States. See, e.g., Erin Banco, *How Iran's Airlines Purchased Boeing and Airbus Planes, Bypassing US Sanctions*, INT'L BUS. TIMES (June 29, 2016, 8:19 AM), <http://www.ibtimes.com/how-irans-airlines-purchased-boeing-airbus-planes-bypassing-us-sanctions-2387924> [https://perma.cc/K594-FWC5].

208. *About Us*, IRANAIR, <http://www.iranair.de/en/about.html> [https://perma.cc/4D8S-8CNP].

209. See *supra* Section I.C.1. But see OFFICE OF FOREIGN ASSETS CONTROL, U.S. DEPT OF THE TREASURY, STATEMENT OF LICENSING POLICY FOR ACTIVITIES RELATED TO THE EXPORT OR RE-EXPORT TO IRAN OF COMMERCIAL PASSENGER AIRCRAFT AND RELATED PARTS AND SERVICES (2016), [https://www.treasury.gov/resource-center/sanctions/Programs/Documents/lic\\_pol\\_statement\\_aircraft\\_jcpoa.pdf](https://www.treasury.gov/resource-center/sanctions/Programs/Documents/lic_pol_statement_aircraft_jcpoa.pdf) [https://perma.cc/APW2-RLWS] (allowing licenses to be granted on a case-by-case basis for the sale of airplanes and airplane parts to Iran, which may provide a ready defense against attachment of escrow accounts created for the purpose of purchasing American airplane parts).

210. Or vice versa. For example, China has continued to purchase Iranian oil despite the sanctions regime. See Northam, *supra* note 25. In the meantime, money owed to Iran for this oil has accumulated in banks around the world and Iran has purchased Chinese products on credit. *Id.* When sanctions lift, the remaining funds on the Iranian ledger will flood Iranian banks for the first time in years, and Chinese businesspeople have already created trade inroads due to years of sales on oil credit. *Id.*

by agreeing to sell dozens of 737 and 777 aircraft models to Iran.<sup>211</sup> Regardless, the increased risk of litigation remains a powerful barrier to international trade among the two countries.<sup>212</sup>

Perhaps allowing plaintiffs to collect on Iran's frozen assets and other assets is exactly what justice requires, despite the fact that American businesses will be disadvantaged. This is especially true considering the fact that Iran could utilize these funds to support terror in the Middle East and beyond.<sup>213</sup> However, this elides a simple reality succinctly clarified by President Obama: "We're not writing Iran a check, . . . This is Iran's money that we were able to block from them having access to."<sup>214</sup> In other words, releasing the funds is simply one of the realities (and requirements) associated with reaching a diplomatic compromise.<sup>215</sup> Furthermore, if American lawmakers are seriously concerned about Iran using newly accessed assets to support terrorism, it would seem that the worst policy decision available would be to create an incentive structure that would encourage Iran to hide assets and develop phantom accounts.<sup>216</sup> However, the ability to attach Iranian assets held in American banks will encourage Iran to do just that. It is better to know where the money is and sacrifice attachment than to risk forcing Iranian money underground, where it

211. See Golnar Motevalli & Deena Kamel, *Iran Air Agrees to Buy Boeing 737, 777 Jets in Landmark Deal*, BLOOMBERG (June 21, 2016, 1:49 PM), <https://www.bloomberg.com/news/articles/2016-06-21/iran-air-signs-agreement-to-buy-boeing-737-777-airplanes> [https://perma.cc/68NR-GB57].

212. Emanuele Ottolenghi, *The Risks of the Iran-Boeing Deal*, HILL (June 21, 2016, 11:59 AM), <http://thehill.com/blogs/pundits-blog/international/284269-the-risks-of-the-iran-boeing-deal> [https://perma.cc/2JTM-H2KC] (noting the risk that lawyers for SST plaintiffs will levy lawsuits to attach assets transferred as part of Boeing transaction).

213. Northam, *supra* note 25 (recounting Executive Director of the Foundation for Defense of Democracies Mark Dubowitz's assertion that "[w]e have no ability to constrain Iran if they want to spend all \$100 billion on funding Hezbollah or other terrorist organizations . . . But when you're getting a \$100 billion-plus cash windfall, even if you're spending 5 to 10 percent of that only on the regional activities and your support for terrorism, that's an extra \$5 to \$10 billion dollars-plus").

214. *Id.*

215. This point is certainly debatable. However, it is supported by the fact that the executive branch froze Iranian assets to create a bargaining chip for later negotiations, not for the purpose of compensating SST plaintiffs. See *supra* Section I.C.1.

216. If Iran can't hold its assets in international banks, it is certain to find other methods of trading, making it more difficult to track the flow of Iranian assets. Steven R. Perles & Edward B. MacAllister, *Counter-Terrorism Civil Litigation: An Ever-Widening Net*, 9 ANDREWS BANK & LENDER LIABILITY LITIG. REP. 12 (2003) (pointing out that banks should not do business with state sponsors of terrorism in any capacity if they wish to avoid civil liability that has been created by the rise of criminal anti-terror funding statutes following 9/11).



may be routed more easily to terrorist organizations.<sup>217</sup> Yet, there are some who view the funds that Iran will access after the Accord as only a small portion of the total benefit to Iran.

Elizabeth Rosenberg, who worked on Iran sanctions matters at the U.S. Treasury Department as a senior advisor to the Assistant Secretary for Terrorist Financing as well as a senior advisor to the Under Secretary for Terrorism and Financial Intelligence,<sup>218</sup> presents a more optimistic perspective. Rosenberg notes that, “while \$100 billion sounds like a lot of money, it pales in comparison to the economic relief Iran can expect if and when companies begin to trade and invest with it. And this would be an incentive for Iran to stick to the agreement.”<sup>219</sup> From this perspective, even if all the SST plaintiffs are awarded every dime they are owed, Iran would still come out with approximately \$57 billion,<sup>220</sup> with more to come once trade ramps up.<sup>221</sup> The problem with such a perspective is that, although Iran might not miss \$43 billion in the long run, those funds are necessary to jumpstart its lagging economy and can be put to immediate use improving oil infrastructure, telecommunications, and other important development initiatives. If those funds go missing, hardliners in Iran have a convenient excuse for breaking the rules of the Accord.<sup>222</sup>

In sum, there are many obstacles created by the billions of dollars in judgments pending against Iran. Both Iran and the United States stand to lose access to the very benefits of the Accord that made it a bargain for each of them, respectively. From the Iranian perspective, the judgments might take a massive bite out of the frozen assets it is set to access. The judgments might also make it difficult for ordinary Iranian agencies, such as IranAir, to purchase necessary American products, and these judgments will impede long-term

217. This theory has been noted in the context of Alternative Remittance Systems as well, where a policy of registration of such systems is preferred over outright prohibition in order to avoid driving such systems further underground. UNITED NATIONS COUNTER-TERRORISM IMPLEMENTATION TASK FORCE, TACKLING THE FINANCING OF TERRORISM 13 (2009), [http://www.un.org/en/terrorism/ctitf/pdfs/ctitf\\_financing\\_eng\\_final.pdf](http://www.un.org/en/terrorism/ctitf/pdfs/ctitf_financing_eng_final.pdf) [<https://perma.cc/4UU5-H6TL>].

218. Elizabeth Rosenberg, CNAS, <https://www.cnas.org/people/elizabeth-rosenberg> [<https://perma.cc/J232-QL6C>].

219. Northam, *supra* note 25.

220. This assumes a payout of \$100 billion and that judgments currently pending against Iran total \$43 billion. See CONG. RESEARCH SERV., *supra* note 161, at 4.

221. Northam, *supra* note 25.

222. See *supra* notes 185–91 and accompanying text. Even if Iran were to pay its judgment creditors over an extended time period, this would provide ample and ongoing opportunities for withdrawal from the Accord.

normalization efforts. From the American perspective, the judgments discourage trade between American corporations and Iran, which diminishes opportunities for economic liberalization and the exercise of American soft power. Furthermore, the judgments remain a politically and emotionally polarizing tool that can be leveraged to create apprehension among the American public about the Accord. Taken together, these factors inevitably increase the likelihood that the Accord may fall apart when the issue of judgments presents itself. If the Accord dissolves, it could set into motion a series of events that culminates in a nuclear Iran or a military confrontation.<sup>223</sup> Although the Accord has been hailed by some as “one of the greatest diplomatic achievements of the 21st century[.]”<sup>224</sup> its failure may well be remembered as a depressing end to a story that could have reignited the world’s faith in diplomacy.<sup>225</sup> In pursuit of averting such a disastrous result, the following two Parts present steps that Iran and the United States can take, respectively, to protect the Accord that took herculean efforts to construct.

223. The risk of a military confrontation is real, especially in the uncertain aftermath of the recent presidential election. Greg Jaffe & Adam Entous, *As a General, Mattis Urged Action Against Iran. As a Defense Secretary, He May Be a Voice of Caution*, WASH. POST (Jan. 8, 2017), [https://www.washingtonpost.com/world/national-security/as-a-general-mattis-urged-action-against-iran-as-a-defense-secretary-he-may-be-a-voice-of-caution/2017/01/08/5a196ade-d391-11e6-a783-cd3fa950f2fd\\_story.html?hpid=hp\\_rhp-top-table-main\\_mattis-iran-715pm%3Ahomepage%2Fstory&utm\\_term=.633098abb8fe](https://www.washingtonpost.com/world/national-security/as-a-general-mattis-urged-action-against-iran-as-a-defense-secretary-he-may-be-a-voice-of-caution/2017/01/08/5a196ade-d391-11e6-a783-cd3fa950f2fd_story.html?hpid=hp_rhp-top-table-main_mattis-iran-715pm%3Ahomepage%2Fstory&utm_term=.633098abb8fe) [https://perma.cc/NMT5-YXLC].

224. 161 CONG. REC. H5901 (2015) (statement of Rep. Pelosi).

225. Through such efforts, the United States may achieve the sort of diplomatic peace envisioned years ago by President John F. Kennedy when he encouraged

a more practical, more attainable peace, based not on a sudden revolution in human nature but on a gradual evolution in human institutions—on a series of concrete actions and effective agreements which are in the interest of all concerned. There is no single, simple key to this peace, no grand or magic formula to be adopted by one or two powers. Genuine peace must be the product of many nations, the sum of many acts. It must be dynamic, not static, changing to meet the challenge of each new generation. For peace is a process, a way of solving problems. With such a peace there will still be quarrels and conflicting interests, as there are within families and nations. World peace, like community peace, does not require that each man love his neighbor; it requires only that they live together in mutual tolerance, submitting their disputes to a just and peaceful settlement.

Towards a Strategy of Peace, *supra* note 15. President Obama invoked these very words upon his acceptance of the Nobel Peace Prize and, once again, after finalizing the Accord. Obama, *supra* note 15; Obama, *supra* note 2.

### III. SHOW UP IN COURT: DEFAULT JUDGMENTS AND IRAN'S ROLE IN MITIGATING OBSTACLES CREATED BY SST JUDGMENTS

The United States is not the only party that has work to do in order to overcome the obstacles posed by the SST judgments. Iran, like many other sovereigns, has chosen to default on almost every lawsuit brought against it under the SST exception.<sup>226</sup> As Professor William P. Hoyer notes:

As a result, a very unusual and lopsided body of case law has developed under the Act, comprised almost entirely of unrefuted and unchallenged evidence presented by plaintiffs in the cases. Until a more broadly based group of successful plaintiffs are able to collect routinely on judgments awarded under the Act, without the extraordinary and unusual remedy of special legislation, there seems to be little incentive for foreign state defendants or their agents to appear, much less to defend themselves aggressively, in Antiterrorism Act cases.<sup>227</sup>

This Comment argues that challenging these lawsuits would help Iran conduct damage control and even to challenge the validity of some of the massive judgments levied against them.<sup>228</sup> It also argues that doing so would help minimize the impact these judgments may have on the Accord. As judgments mount, the opportunity for a settlement diminishes. If the odds of a settlement are reduced, the likelihood that these judgments will remain an impediment to the Accord is increased. Therefore, mitigating the value of the judgments will serve to strengthen the Accord and improve the likelihood of normalization.

There are multiple disadvantages to default that Iran could remedy should it choose to defend against future lawsuits: (1) Iran can dispute the evidence put forward by plaintiffs establishing the key element required for recovery—that Iran provided material support to the organization that victimized them; (2) Iran can challenge the substantial punitive damages awarded to plaintiffs; and (3) in some

226. It appears this may be changing. Very recently, Iran chose to dispute the attachment of bonds held by the Central Bank of Iran as foreign currency reserves. *See* Brief for Petitioner at 1–2, *Bank Markazi v. Peterson*, 136 S. Ct. 1310 (2016) (No. 14-770); Nina Totenberg, *In Iranian Funds Case, Justices Ponder Extent of Congressional Influence*, NPR (Jan. 13, 2016, 4:42 PM), <http://www.npr.org/2016/01/13/462950424/supreme-court-divided-over-iranian-terrorism-compensation-case> [<https://perma.cc/R7YC-Q7JV>]. Notable exceptions where other foreign sovereigns have chosen not to default include *Daliberti v. Republic of Iraq*, 97 F. Supp. 2d 38 (D.D.C. 2000), and *Rein v. Socialist People's Libyan Arab Jamahiriya*, 995 F. Supp. 325 (E.D.N.Y. 1998).

227. Hoyer, *supra* note 87, at 136

228. *See infra* Sections III.A–C.

cases, Iran will be able to challenge lawsuits on procedural and evidentiary grounds.

A. *Litigating “Material Support”*

Many of the cases brought against Iran allege that material support was provided for terrorist organizations, such as Hezbollah or Hamas, that committed terrorist acts against Americans.<sup>229</sup> One key issue that has never been challenged is the meaning of “material support” as it is used in the SST exception.<sup>230</sup> U.S. courts have consistently held that Iran provides material support to the aforementioned terrorist groups.<sup>231</sup> However, Iran has never challenged the notion that financial support to a group such as Hamas for some purposes is not necessarily equivalent to financial support for terrorist purposes.<sup>232</sup> For example, if Iran provides medical supplies to Hamas in the Gaza Strip, where millions of people face an Israeli embargo on such supplies,<sup>233</sup> is Iran then liable for any terrorist crimes that Hamas may commit?

Furthermore, Iran has never challenged whether Hamas or Hezbollah condoned the various terrorist attacks or whether rogue members of the groups carried them out.<sup>234</sup> In the face of Iranian

229. See, e.g., *Leibovitch v. Islamic Republic of Iran*, 697 F.3d 561, 562 (7th Cir. 2012); *Rubin v. Islamic Republic of Iran*, 637 F.3d 783, 785 (7th Cir. 2011); *Weinstein v. Islamic Republic of Iran*, 609 F.3d 43, 46 (2d Cir. 2010); *Oveissi v. Islamic Republic of Iran*, 573 F.3d 835, 838 (D.C. Cir. 2009); *Hegna v. Islamic Republic of Iran*, 376 F.3d 226, 230 (4th Cir. 2004); *Bettis v. Islamic Republic of Iran*, 315 F.3d 325, 327 (D.C. Cir. 2003); *Flatow v. Islamic Republic of Iran*, 308 F.3d 1065, 1067 (9th Cir. 2002); *Peterson v. Islamic Republic of Iran*, 515 F. Supp. 2d 25, 37 (D.D.C. 2007); *Bennett v. Islamic Republic of Iran*, 507 F. Supp. 2d 117, 126 (D.D.C. 2007); *Greenbaum v. Islamic Republic of Iran*, 451 F. Supp. 2d 90, 94 (D.D.C. 2006); *Campuzano v. Islamic Republic of Iran*, 281 F. Supp. 2d 258, 270 (D.D.C. 2003); *Sutherland v. Islamic Republic of Iran*, 151 F. Supp. 2d 27, 46 (D.D.C. 2001).

230. 28 U.S.C. § 1605A(a)(1) (2012); see also 18 U.S.C. § 2339A(b)(1)(2012) (defining material support).

231. See, e.g., *Bodoff v. Islamic Republic of Iran*, 907 F. Supp. 2d 93, 102 (D.D.C. 2012); *Wultz v. Islamic Republic of Iran*, 864 F. Supp. 2d 24, 35 (D.D.C. 2012); *Anderson v. Islamic Republic of Iran*, 753 F. Supp. 2d 68, 84 (D.D.C. 2010), *judgment entered* 839 F. Supp. 2d 263 (D.D.C. 2012); *Murphy v. Islamic Republic of Iran*, 740 F. Supp. 2d 51, 71 (D.D.C. 2010).

232. See generally Haim Malka, *Hamas: Resistance and Transformation of Palestinian Society*, in UNDERSTANDING ISLAMIC CHARITIES 98 (Jon B. Alterman & Karin von Hippel eds., 2007) (discussing the various welfare activities carried out by Hamas in Gaza).

233. 2016 Marks Ten Years of Israeli Siege, *Illegal Blockade of Gaza*, GLOBAL RES. (Jan. 4, 2016), <http://www.globalresearch.ca/2016-marks-ten-years-of-israeli-siege-illegal-blockade-of-gaza/5499129> [<https://perma.cc/J888-ZWMK>].

234. This theory has proven successful in at least one case, despite the fact that Iran defaulted and the theory was merely a consequence of the judge’s independent reasoning

silence, courts have ruled liberally in favor of plaintiffs. For instance, courts have found that there need not be a nexus between the funding provided by Iran and the terrorist activity that is carried out, relying on a proximate causation test rather than the more stringent but-for causation test traditionally relied upon in tort law.<sup>235</sup> Considering, for instance, that the key element of an intentional tort is the requisite *intent*,<sup>236</sup> Iran might find a variety of favorable legal arguments at its disposal if it would enter the courthouse.

An example highlights the point. In *Havlish v. Bin Laden (In re Terrorist Attacks on September 11, 2001)*,<sup>237</sup> a federal district court awarded over \$6 billion in damages to family members of Americans killed in the World Trade Center on September 11th, 2001.<sup>238</sup> Iran was earlier found liable for materially supporting the individuals associated with the attacks,<sup>239</sup> in spite of the fact that the National Commission on Terrorist Attacks Upon the United States found “no evidence that Iran or Hezbollah was aware of the planning for what later became the 9/11 attack[.]”<sup>240</sup> and President Bush’s comments that “[t]here was no direct connection between Iran and the attacks of Sept. 11.”<sup>241</sup> These plaintiffs were forced to concentrate their recovery efforts on Iran because the FSIA barred them from seeking judgments against another potentially culpable 9/11 supporter—Saudi Arabia—which is not designated as a state sponsor of terror.<sup>242</sup>

on the matter. See *Ungar v. Islamic Republic of Iran*, 211 F. Supp. 2d 91, 93, 100 (D.D.C. 2002).

235. See *Kilburn v. Socialist People’s Libyan Arab Jamahiriya*, 376 F.3d 1123, 1127–28 (D.C. Cir. 2004) (noting that, in the FSIA SST exception, “the words ‘but for’ simply do not appear; only ‘caused by’ do”).

236. *Chen v. United States*, 674 F. Supp. 1078, 1086 (S.D.N.Y. 1987) (“The elements of prima facie tort are infliction of intentional harm; lack of excuse or justification; harm inflicted by an act that would otherwise be lawful; and special damages.”), *aff’d*, 854 F.2d 622 (2d Cir. 1988).

237. No. 03-MDL-1570, 2012 U.S. Dist. LEXIS 110673 (S.D.N.Y. July 30, 2012).

238. *Id.* at \*92.

239. *Havlish v. Bin Laden (In re Terrorist Attacks on September 11, 2001)*, No. 03-MDL-1570, 2011 U.S. Dist. LEXIS 155899, at \*197 (S.D.N.Y. Dec. 22, 2011).

240. NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 241 (2004). *But see* Benjamin Weiser & Scott Shane, *Court Filings Assert Iran Had Link to 9/11 Attacks*, N.Y. TIMES (May 19, 2011), [http://www.nytimes.com/2011/05/20/world/middleeast/20terror.html?\\_r=1](http://www.nytimes.com/2011/05/20/world/middleeast/20terror.html?_r=1) [<https://perma.cc/RV9B-V9K7> (staff-uploaded archive)] (noting some of the evidence supporting the claim that Iran played a role in 9/11).

241. Ken Timmerman, *Lawsuit: Iran Knew About 9/11 Attack*, NEWSMAX (May 19, 2011, 2:12 PM), <http://www.newsmax.com/KenTimmerman/al-qaida-osamabinladen-911-september11/2011/05/19/id/396993/> [<https://perma.cc/X9K6-7JDN>].

242. *In re Terrorist Attacks on September 11, 2001*, 538 F.3d 71, 75 (2d Cir. 2008). This changed on September 28, 2016, with the passage of the Justice Against Sponsors of Terrorism Act (“JASTA”), which creates a cause of action against *any* foreign state that causes injury to American citizens on American soil. See Justice Against Sponsors of

This uncomfortable reality illuminates the collateral effects of the unfair characteristics of the SST exception.<sup>243</sup> Under the current framework, deserving plaintiffs have no choice but to bring weak claims against sovereigns tangentially responsible for their injuries because the sovereign happens to be a designated state sponsor of terror. Meanwhile, sovereigns not on the list that may bear moral and factual responsibility for plaintiffs' injuries avoid legal culpability. Iran stands a chance to win cases like this one, or at least balance out the facts, if it would show up in court. Challenging SST judgments could help curtail the mounting judgments obtained against Iran, thereby mitigating the risk that these judgments will destroy the Accord.

*B. Litigating the Validity of Hyper-Inflated Judgments*

Iran would benefit from defending these lawsuits in another realm as well. Judges consistently award SST plaintiffs astronomical judgments that include compensatory damages, solatium, pain and suffering, and punitive damages.<sup>244</sup> Although Iran may be unable to defend against certain substantive claims in cases where Iran is factually responsible, Iran should still litigate to temper and balance the hyper-inflated<sup>245</sup> damages awarded to SST plaintiffs. If Iran participated, for example, damage awards for severe emotional distress to immediate family members of victims could be challenged.<sup>246</sup> Although a key element of such claims is that the family member was present during the attack,<sup>247</sup> courts have waived this element in the unique context of terrorism cases.<sup>248</sup> Iran would have

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Terrorism Act, Pub. L. No. 114-222, § 3, 130 Stat. 852, 853 (codified at 28 U.S.C. § 1605B). A complaint against Saudi Arabia for its involvement in 9/11 was filed only weeks after the passage of this legislation, and more complaints are expected. Complaint at 1, *McCarthy v. Saudi Arabia*, No. 1:16-cv-08884 (S.D.N.Y. Nov. 15, 2016).

243. See *supra* Section I.D.5.

244. 28 U.S.C. § 1605A(c)(4) (2012).

245. The damages awarded to SST plaintiffs tend to be astronomical. Although making a comparison between the amounts awarded in these cases and the amount of damages awarded in regular wrongful death actions is difficult due to insufficient data, damage awards to SST plaintiffs reaching the hundreds of millions of dollars appear excessive, *prima facie*. See generally Ralph Peeples & Catherine T. Harris, *What is a Life Worth in North Carolina? A Look at Wrongful-Death Awards*, 37 CAMPBELL L. REV. 497 (2015) (empirically studying 123 wrongful death claims in North Carolina over a five-year period).

246. See *Murphy v. Islamic Republic of Iran*, 740 F. Supp. 2d 51, 74–76 (D.D.C. 2010).

247. RESTATEMENT (SECOND) OF TORTS § 46(1)–(2)(a) (AM. LAW INST. 1965).

248. See *Murphy*, 740 F. Supp. 2d at 75–76 (D.D.C. 2010) (The court stated that “[i]f the defendants’ conduct is sufficiently outrageous and intended to inflict severe emotional harm upon a person which is not present, no essential reason of logic or policy prevents

the opportunity to litigate the validity of waiving this key element, if only Iran would come to court.

In the arena of punitive damages, Iran would also benefit from litigating damage awards. In *Murphy v. Islamic Republic of Iran*,<sup>249</sup> Judge Royce Lamberth, who sits on the U.S. District Court for the District of Columbia, noted a problem with punitive damages in the context of the FSIA: “Recurrent awards in case after case arising out of the same facts can financially cripple a defendant, over-punishing the same conduct through repeated awards with little additional deterrent effect, and awards in several cases arising out of the same facts can differ, creating anomalous results.”<sup>250</sup> Despite these considerations, once a compensatory-punitive damages ratio is established for one SST case, it is often applied to all related actions.<sup>251</sup> Therefore, it is important that Iran defend against any damages claim, because failure to do so could set a precedent for future actions with similar facts.

An example is instructive: For the Beirut barracks bombings in 1983, Judge Lamberth (who has described the negative consequences of over-punishing SST defendants) departed from existing FSIA precedent and awarded plaintiffs punitive damages equivalent to five times the amount that Iran allegedly funded terrorist organizations in the preceding calendar year.<sup>252</sup> Before this decision, courts had remained conservative and opted for the minimum punitive damages necessary for deterrence, as testified to by experts, which was approximately three times the amount that Iran allegedly funded terrorist organizations in the preceding calendar year.<sup>253</sup> If Iran had shown up in court, Iran may have at least mitigated the massive judgments levied against it and thereby avoided an unfavorable precedent.

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liability.’ . . . As this Court has noted, ‘[t]errorism, unique among the types of tortious activities in both its extreme methods and aims, passes this test easily.’ ” (first and third alterations in original) (quoting *Estate of Heiser v. Islamic Republic of Iran*, 659 F. Supp. 2d 20, 27 (D.D.C. 2009))).

249. 740 F. Supp. 2d 51 (D.D.C. 2010).

250. *Id.* at 81.

251. *Id.* at 81–83 (applying the same compensatory-punitive damages ratio (3.44) found in a related action).

252. *Valore v. Islamic Republic of Iran*, 700 F. Supp. 2d 52, 88–90 (D.D.C. 2010). In a bizarre attempt to explain this departure from precedent, Lamberth noted that Iran’s recent increased responsiveness to litigation was part of the reason for the increased damages award. Lamberth stated, “This higher number is based on the suggestion by Dr. Clawson that Iran has recently begun to more actively participate in litigation in the United States and elsewhere.” *Id.* at 89.

253. *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 34 (D.D.C. 1998).

C. *Litigating Cases on Procedural Grounds*

Finally, if Iran appeared in court, some of the claims brought against it would likely be dismissed on procedural grounds. Any action brought under the SST exception must be filed within ten years of the date the cause of action arose, or, if the cause of action arose prior to enactment of the exception, within ten years of April 24, 1996.<sup>254</sup> Despite this temporal limitation, a U.S. court has never chosen to enforce it because it has been deemed waived by the defendants' absence.<sup>255</sup> Iran could save itself from more massive judgments simply by asserting the time limitation. For example, in 2015, a civil action was filed on behalf of military personnel injured in the 1983 Beirut bombing.<sup>256</sup> Iran, once again, defaulted.<sup>257</sup> The plaintiffs in that case seek a total of approximately \$2.5 billion in damages.<sup>258</sup> Although the lawsuit clearly falls outside the time limitations prescribed by Congress because Iran has defaulted, the statute of limitations will likely be deemed waived.

There are also certain evidentiary disadvantages that Iran could remedy through litigation. For example, if an SST defendant defaults, evidence "satisfactory to the court" must be found to hold the SST defendant liable.<sup>259</sup> In default, "[t]he court may accept all uncontroverted evidence as true, which may take the form of sworn affidavits or prior transcripts. A court may also take judicial notice of findings and conclusions in related proceedings."<sup>260</sup> This standard is lower than the traditional "preponderance of the evidence standard"

254. 28 U.S.C. § 1605A(b) (2012).

255. Out of the cases reviewed, the matter was never raised or even considered. *See supra* Section II.A.

256. First Amended Complaint at 3, *Relvas v. Islamic Republic of Iran*, No. 1:14-cv-01752-RCL (D.D.C. Mar. 6, 2015), <http://www.cohenmilstein.com/media/pnc/7/media.1737.pdf> [<https://perma.cc/ZXH3-JPUZ>].

257. Default Order at 1, *Relvas v. Islamic Republic of Iran*, No. 1:14-cv-01752 (D.D.C. Nov. 30, 2015), <http://www.cohenmilstein.com/media/pnc/1/media.1851.pdf> [<https://perma.cc/3SST-HXZA>].

258. *See* First Amended Complaint, *supra* note 256, at 27–32.

259. § 1608(e) ("No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court."); *see also* COOPER-HILL, *supra* note 33, at 142–44 (discussing, in detail, the interaction of default judgments proceedings in SST cases and the Federal Rules of Civil Procedure).

260. Portnoy et al., *supra* note 96, at 612 (citing *Fain v. Islamic Republic of Iran*, 856 F. Supp. 2d 109, 115 (D.D.C. 2012)).



used in most civil tort cases.<sup>261</sup> Courts have rarely found evidence presented in SST cases against Iran to be unsatisfactory.<sup>262</sup>

Iran may also be able to challenge attachment proceedings on procedural grounds if Iran is willing to come to court. In the U.S. District Court for the District of Columbia, for instance, if a judgment is not renewed within twelve years of being entered, the judgment expires.<sup>263</sup> Therefore, if plaintiffs' attorneys have overlooked the periodic revival of judgments, any attachment proceedings on the basis of those underlying judgments are void if the judgments are older than twelve years.

Thus, from the Iranian perspective, there is much to gain by showing up in court. Iran would be able to challenge the enormous damage awards that have been granted, enforce procedural requirements, and litigate the substantive grounds upon which the judgments are based. Furthermore, Iran's presence in the courtroom would be beneficial as a counterweight to the oftentimes prejudiced and one-sided precedent that is currently churning out of U.S. federal courthouses. By defending against these judgments, Iran can mitigate the sheer size of the judgments that continue to pile up against it. As judgments mount and reach unprecedented levels, the possibility of a settlement becomes more abstract because even a settlement would be extremely costly.<sup>264</sup> Without a settlement of these judgments, the Accord becomes less tenable.<sup>265</sup> Therefore, if Iran defends itself, it can help ensure that the SST judgments do not sabotage the Accord.

#### IV. THE UNITED STATES' ROLE IN PROTECTING THE ACCORD

From the American perspective, there are also a variety of options available that could help mitigate the risk that the SST judgments adversely affect the Accord. First, the executive branch

261. *E.g.*, *Lilienthal's Tobacco v. United States*, 97 U.S. 237, 266 (1878); *Livanovitch v. Livanovitch*, 131 A. 799, 800 (Vt. 1926).

262. When default judgments are not granted because evidence is unsatisfactory, it is usually because the plaintiffs do not have sufficient standing, *Mohammadi v. Islamic Republic of Iran*, 947 F. Supp. 2d 48, 54 (D.D.C. 2013), or because a foreign law was found to be applicable, *Estate of Botvin ex rel. Ellis v. Islamic Republic of Iran*, 684 F. Supp. 2d 34, 36 (D.D.C. 2010) (applying Israeli law).

263. D.C. CODE § 15-101 (LEXIS through Jan. 2017).

264. Even under current judgments, a settlement that awarded twenty cents on the dollar to all SST plaintiffs would result in at least \$10 billion in liability for Iran. This would be a massive settlement, especially relative to the liability arising from the U.S.-Iran Claims Tribunal, which amounted to more than \$2.5 billion. *See Iran-U.S. Claims Tribunal*, U.S. DEPT STATE, <http://www.state.gov/s/l/3199.htm> [<https://perma.cc/496A-9QPE>].

265. *See supra* Part II.

retains access to a powerful argument that the SST judgments pose a risk to national security.<sup>266</sup> Second, there is precedent for resolving terrorism-related judgments as part of an executive agreement or settlement with the foreign sovereign. Solving the judgment crisis will not be an easy task—both lawmakers and the President must balance the goal of compensating victims for horrific acts of violence against the goal of maintaining a tenuous Accord with Iran which is intended to avert catastrophic results in the Middle East and beyond. This Part considers how to strike this balance.

A review of existing case law and examples in this area proves helpful. There are two key historical examples of the executive branch restructuring judgments: Iran after the 1979 Islamic Revolution and Libya in 2008.

A. *Dames & Moore v. Reagan: Restructuring Judgments Against Iran Post-1979 Islamic Revolution*

Early in his presidency, President Ronald Reagan nullified terrorism-related judgments against Iran. Following the Islamic Revolution in 1979 and at the direction of President Jimmy Carter, the United States blocked any Iranian assets held in American banks to create leverage for the release of hostages held by Iranian revolutionaries at the U.S. embassy in Tehran.<sup>267</sup> On January 20, 1981, 444 days after the American embassy was raided, the American hostages were released pursuant to an agreement that obligated the United States

to terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises, to nullify all attachments and judgments obtained therein, to prohibit all further litigation based on such claims, and to bring about the termination of such claims through binding arbitration.<sup>268</sup>

266. See *supra* Part II.

267. See Exec. Order No. 12,170, 44 Fed. Reg. 65,729, 65,729 (Nov. 14, 1979). See generally STEPHEN KINZER, *ALL THE SHAH'S MEN: AN AMERICAN COUP AND THE ROOTS OF MIDDLE EAST TERROR* (2003) (providing a detailed and in-depth discussion of the history of relations between the United States and Iran).

268. *Dames & Moore v. Reagan*, 453 U.S. 654, 665 (1981) (quoting Declaration of the Government of the Democratic and Popular Republic of Algeria, Iran-U.S., *initialed* Jan. 19, 1981, 20 I.L.M. 224, 224).

President Reagan ratified a number of executive orders effectuating this agreement, which required that any judgments be nullified and referred to the Iran-U.S. Claims Tribunal.<sup>269</sup>

The seminal case of *Dames & Moore v. Regan*<sup>270</sup> arose directly out of these events. In that case, Dames & Moore, an engineering and construction firm that often contracted for the U.S. government, had successfully brought suit against Iran for Iran's failure to pay for work that it contracted with Dames & Moore to perform.<sup>271</sup> Dames & Moore was awarded more than \$3 million in damages, Iranian assets in American bank accounts were blocked, and Dames & Moore attempted to execute the judgment through writs of garnishment.<sup>272</sup> However, pursuant to President Reagan's executive orders and the agreement with Iran, all prejudgment attachments of Iranian property were vacated, all future litigation against the Central Bank of Iran was suspended, and the case was referred to the Iran-U.S. Claims Tribunal.<sup>273</sup> Dames & Moore then brought suit against the United States alleging that

the actions of the President and the Secretary of the Treasury implementing the Agreement with Iran were beyond their statutory and constitutional powers and, in any event, were unconstitutional to the extent they adversely affect petitioner's final judgment against the Government of Iran and the Atomic Energy Organization, its execution of that judgment in the State of Washington, its prejudgment attachments, and its ability to continue to litigate against the Iranian banks.<sup>274</sup>

The Supreme Court held that the executive orders enforcing the agreement with Iran were constitutional. The Court concluded that the International Emergency Economic Powers Act ("IEEPA")<sup>275</sup>

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269. *Id.* at 666. *See generally* THE IRAN-UNITED STATES CLAIMS TRIBUNAL AND THE PROCESS OF INTERNATIONAL CLAIMS RESOLUTION: A STUDY BY THE PANEL ON STATE RESPONSIBILITY OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW (David D. Caron & John R. Crook eds., 2000) (using personal accounts from Tribunal participants to document the procedural and institutional "life" of the Iran-U.S. Claims Tribunal). For more information about the Iran-U.S. Claims Tribunal, see *About the Tribunal*, IRAN-U.S. CLAIMS TRIBUNAL, <https://www.iusct.net/Pages/Public/A-About.aspx> [<https://perma.cc/P376-BPLE>]; *Iran-U.S. Claims Tribunal*, *supra* note 264.

270. 453 U.S. 654 (1981).

271. *Id.* at 663–64. Ironically, Dames & Moore was conducting site studies for a proposed nuclear facility in Iran. *Id.* at 664.

272. *See id.* at 664, 666.

273. *Id.* at 666.

274. *Id.* at 667.

275. International Emergency Economic Powers Act, Pub. L. No. 95-223, 91 Stat. 1626 (1977) (codified as amended at 50 U.S.C. §§ 1701–06 (2012)).

implicitly authorized the nullification of claims against Iran,<sup>276</sup> and that the “general tenor” of existing laws and presidential practice authorized the suspension of all pending claims against Iran.<sup>277</sup> The Court recognized that congressional authorization combined with the President’s inherent duty to manage foreign relations justified the President’s choice to block Iranian assets.<sup>278</sup> The Court noted that a key function of blocking foreign assets is to create leverage for negotiations, essentially placing a “bargaining chip” in the hands of the president.<sup>279</sup> The Court reasoned that allowing individual claimants to dissolve this bargaining chip through attachments would weaken the President’s negotiating power.<sup>280</sup>

In regard to the suspension of all pending claims against Iran, the Court did not find any *explicit* congressional authorization for the President to take such action.<sup>281</sup> The Court nonetheless found that the “general tenor” of legislation in the area and historical practice demonstrating acquiescence to presidential settlements supported the President’s settling of claims against Iran.<sup>282</sup> The Court’s dictum on this matter was telling. The Court recognized that executive settlement of international claims is an accepted and long-standing tool that has been wielded to reach agreements with hostile or belligerent foreign states.<sup>283</sup> The Court also noted “many of these settlements were encouraged by the United States claimants themselves, since a claimant’s only hope of obtaining any payment at all might lie in having his Government negotiate a diplomatic settlement on his behalf.”<sup>284</sup> Finally, the Court pointed out that, between 1952 and the time of the decision, the President had entered

276. *Dames & Moore*, 453 U.S. at 681–82; *see also* 50 U.S.C. § 1702 (2012). Notably, the IEEPA is still in force today; although there have been some amendments, the pertinent portions of the Act remain intact. *See, e.g.*, § 1702(a)(1)(B).

277. *Dames & Moore*, 453 U.S. at 678, 686.

278. *See id.* at 674.

279. *Id.* at 673.

280. *Id.*

281. *Id.* at 678.

282. *Id.*; *see also id.* at 686. (noting that the legislative history of the IEEPA “stressed that nothing in the IEEPA was to impede the settlement of claims of United States citizens”). This reasoning clearly evinces a functionalist approach to the matter. *See supra* notes 123–25 and accompanying text.

283. *Dames & Moore*, 453 U.S. at 679–80.

284. *Id.* at 679. *But see id.* at 679–80 (“But it is also undisputed that the ‘United States has sometimes disposed of the claims of its citizens without their consent, or even without consultation with them, usually without exclusive regard for their interests, as distinguished from those of the nation as a whole.’” (quoting LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 262–63 (1972))).

into at least ten binding settlements with foreign nations.<sup>285</sup> Even without the advice and consent of the Senate, other cases have held that the President's power to settle international claims is a "modest implied power"<sup>286</sup> that is "integrally connected with normalizing United States' relations with a foreign state."<sup>287</sup>

In *Dames & Moore*, the Court also considered whether the FSIA had any practical effect on the executive power to settle international claims.<sup>288</sup> The Court held that the President had not altered the jurisdiction of the Article III courts in violation of the Constitution.<sup>289</sup> Further, the Court held, the FSIA was meant to remove one barrier to suit (namely, sovereign immunity), but did not *prohibit* the President from settling claims by American citizens against foreign sovereigns.<sup>290</sup>

In sum, *Dames & Moore* sets out important guidelines for any President who might wish to nullify, void, or restructure judgments against a foreign sovereign. The unique context of the *Dames & Moore* case is important, though not determinative, in considering the weight that it should be given. It is notable that the President's choice to move claims against Iran to a tribunal was part of an agreement to ensure the safe release of dozens of American hostages.<sup>291</sup> Although the context is different today, the actors remain the same. Iran and the United States seek to enforce a mutual agreement that depends on navigating the complexities of the U.S. justice system. That mutual agreement would not culminate in the release of hostages, but it would culminate in an equally compelling result: compensating victims of terrorism and avoiding nuclear proliferation in the Middle East.

#### B. *Libyan Claims Resolution Act: Restructuring Judgments Against Libya*

Another, more recent, example of executive claims settlement is equally instructive. American relations with Libya remained tumultuous throughout much of the 1980s and 1990s.<sup>292</sup> These

285. *Id.* at 680.

286. *See, e.g.,* *United States v. Pink*, 315 U.S. 203, 229–30 (1942).

287. *Dames & Moore*, 453 U.S. at 683 (citing *Pink*, 315 U.S. at 229–30).

288. *Id.* at 684–85.

289. *Id.*

290. *Id.* at 685.

291. *See supra* text accompanying notes 267–69.

292. CLYDE R. MARK, CONG. RESEARCH SERV., IB93109, LIBYA 5–9 (2005) (documenting various tense moments between the United States and Libya, ranging from

relations were particularly harmed by Libya's terrorist attacks, including the 1988 bombing of Pan Am Flight 103, which resulted in the deaths of hundreds of Americans.<sup>293</sup> A number of lawsuits against Libya brought under the SST exception were filed as a result of this attack.<sup>294</sup> In 2008, Congress passed the Libyan Claims Resolution Act ("LCRA"), which explicitly authorized the President to settle these claims.<sup>295</sup> Following this authorization, President Bush promulgated Executive Order 13,477, which terminated all claims against Libya and required all existing judgments to be settled in accordance with the Claims Settlement Agreement reached with Libya.<sup>296</sup> As part of this agreement, President Bush agreed to end Libya's designation as a state sponsor of terror and lift remaining sanctions on the Libyan government.<sup>297</sup> In return, the Libyan government paid around \$4 billion to victims of terror, including \$2.7 billion to victims of the Pan Am bombing who were awarded damages based on a formula that gave \$10 million for wrongful death claims and \$3 million for personal injury claims.<sup>298</sup>

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attacks on American airplanes over the Mediterranean Sea, assassination attempts, air and sea battles, an attack on the U.S. embassy, and souring diplomatic relations).

293. Tony Burton, *Pan Am Flight 103 Destroyed Midair over Lockerbie, Scotland in 1988, Killing More Than 200 People*, N.Y. DAILY NEWS (Dec. 21, 2015, 11:55 AM), <http://www.nydailynews.com/news/world/pan-flight-103-destroyed-mid-air-lockerbie-1988-article-1.2472679> [<https://perma.cc/7GAZ-RW8S>] (originally published Dec. 22, 1988); Sewell Chan, *2 Lockerbie Bombing Suspects, Libyans, Sought by U.S. and Scotland*, N.Y. TIMES (Oct. 15, 2015), [http://www.nytimes.com/2015/10/16/world/europe/lockerbie-bombing-libya.html?rref=collection%2Ftimestopic%2FPan%20Am%20Flight%20103&action=click&contentCollection=world&region=stream&module=stream\\_unit&version=latest&contentPlacement=1&pgtype=collection](http://www.nytimes.com/2015/10/16/world/europe/lockerbie-bombing-libya.html?rref=collection%2Ftimestopic%2FPan%20Am%20Flight%20103&action=click&contentCollection=world&region=stream&module=stream_unit&version=latest&contentPlacement=1&pgtype=collection) [<https://perma.cc/88ZP-L4A8>].

294. See *Rein v. Socialist People's Libyan Arab Jamahiriya*, 995 F. Supp. 325, 327 (E.D.N.Y. 1998); *Smith v. Socialist People's Libyan Arab Jamahiriya*, 886 F. Supp. 306, 308–09 (E.D.N.Y. 1995).

295. Libyan Claims Resolution Act, Pub. L. No. 110-301, § 3, 122 Stat. 2999, 2999 (2008) (codified as amended at 28 U.S.C. § 1605A note (2012)) ("Congress supports the President in his efforts to provide fair compensation to all nationals of the United States who have terrorism-related claims against Libya through a comprehensive settlement of claims by such nationals against Libya pursuant to an international agreement between the United States and Libya as a part of the process of restoring normal relations between Libya and the United States.").

296. Exec. Order No. 13,477, 73 Fed. Reg. 65,965, 65,965–66 (Oct. 31, 2008).

297. See Press Release, Sec'y Condoleezza Rice, U.S. Dep't of State, U.S. Diplomatic Relations with Libya (May 15, 2006), <https://2001-2009.state.gov/secretary/rm/2006/66235.htm> [<https://perma.cc/T5GE-3CY4>]; see also Eben Kaplan, *How Libya Got off the List*, COUNCIL ON FOREIGN REL. (Oct. 16, 2007), <http://www.cfr.org/libya/libya-got-off-list/p10855> [<https://perma.cc/SH9G-KUCB>].

298. Nicole Hong, *Terror Victims Eye Thawing with Iran*, WALL ST. J. (Aug. 2, 2015, 7:04 PM), <http://www.wsj.com/articles/terror-victims-eye-thawing-with-iran-1438556669>.

Soon after the agreement was reached, Assistant Secretary for Near Eastern Affairs David Welch of the George W. Bush administration gave insightful commentary on the utility of the arrangement.<sup>299</sup> Welch noted that the United States and Libya had been working for a number of years on improving relations, but that “this relationship ha[d] been bedeviled by claims on both sides arising from these past incidents, and it’s been problematic to fix those.”<sup>300</sup> He also pointed out the agreement’s efficiency: “as compared to pursuing these claims through litigation, which can be time-consuming, expensive and difficult to the victims involved, we thought that this offered a more promising route; that is, to use diplomacy to try and meet the expectations on all sides about how this might be done.”<sup>301</sup>

The U.S. settlement and subsequent normalization with Libya stands as an attractive model for a President who hopes to settle similar claims against Iran. However, there are important differences. The sheer enormity of the claims pending against Iran is one major issue, whereas the judgments against Libya were comparatively miniscule (although still massive). Furthermore, President Bush’s executive order earned congressional support, putting it outside the realm of Justice Jackson’s “twilight zone.”<sup>302</sup> Regardless, the successful recovery of fair compensation for victims of Libyan terror coupled with the normalization of relations with Libya embodied a win-win situation for the United States that American leaders should mimic with Iran.

299. C. David Welch, Assistant Sec’y for Near E. Affairs, U.S. Dep’t of State, Briefing on the U.S.-Libya Comprehensive Claims Settlement Agreement in Wash., D.C. (Oct. 31, 2008), <http://2001-2009.state.gov/p/nea/rls/rm/111493.htm> [<https://perma.cc/X3LN-5YQK>].

300. *Id.*

301. *Id.* As an interesting aside, Welch appeared uncomfortable when asked about the origins of the money used to compensate victims. One journalist implied that the funds came from American companies hoping to do business in Libya upon the termination of sanctions. *Id.* Also of note, the agreement contained a provision that required the United States to pay Libyan victims of American airstrikes a total of \$300 million, underscoring the fact that the SST exception is rarely a one-way street. *Id.*

302. In *Youngstown Sheet & Tube Co. v. Sawyer*, Justice Jackson laid out his famous tripartite framework for determining the power of the President in foreign affairs. 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring). Under this framework, a “zone of twilight” exists when there is no explicit grant of power from Congress to the president and the president and “Congress may have concurrent authority, or in which its distribution is uncertain.” *Id.* at 637.

### C. *Takings Clause Issues*

Despite the presence of meaningful guidance, caution must be exercised when restructuring the SST judgments. In both *Dames & Moore* and in cases arising out of the LCRA, courts have shown a willingness to allow takings claims against the United States in cases where existing judgments are nullified and referred to a claims tribunal.<sup>303</sup> A takings claim against the United States brought under the Fifth Amendment is ripe when an existing judgment is voided, referred to a claims tribunal, and the claims tribunal reaches a settlement decision the plaintiffs believe is insufficient.<sup>304</sup> Although such a claim has not, to date, succeeded, the door for such claims was opened in *Dames & Moore*.<sup>305</sup> The Court in *Dames & Moore* found that the takings claim was not ripe for review and disposed of the long-standing “treaty exception” to Court of Claims jurisdiction that previously foreclosed such claims.<sup>306</sup> This move has potentially massive implications for the federal government when negotiating international settlement claims. If unhappy plaintiffs can bring takings claims against the government, the risk of astronomical judgments could shift from Iran to the U.S. Treasury.<sup>307</sup> This must be a major consideration for the executive branch if SST judgments are to be restructured.

303. See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654, 689 (1981); *Clay v. Socialist People’s Libyan Arab Jamahiriya*, 614 F. Supp. 2d 21, 25 n.5 (D.D.C. 2009) (citing *Dames & Moore*, 453 U.S. at 689) (holding that, although the court would dismiss the case pursuant to executive orders, the plaintiffs were not precluded from bringing a Fifth Amendment takings claim in a separate proceeding); *Harris v. Socialist People’s Libyan Arab Jamahiriya*, 620 F. Supp. 2d 1, 4 n.5 (D.D.C. 2009) (citing *Dames & Moore*, 453 U.S. at 689); Gartenstein-Ross, *supra* note 35, at 914. For a detailed discussion of takings claims under a settlement agreement, see Daveed Gartenstein-Ross, Note, *Resolving Outstanding Judgments Under the Terrorism Exception to the Foreign Sovereign Immunities Act*, 77 N.Y.U. L. REV. 496, 525–34 (2002).

304. See *Dames & Moore*, 453 U.S. at 689; see also 13B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3532.1.1 (3d ed. 2008).

305. See *Dames & Moore*, 453 U.S. at 689; see also Gartenstein-Ross, *supra* note 35, at 914.

306. See *Dames & Moore*, 453 U.S. at 689; see also Gartenstein-Ross, *supra* note 35, at 915.

307. But see Gartenstein-Ross, *supra* note 35, at 917 n.5 (“Arguments can be advanced in favor of the Executive’s ability to terminate the judgments. The Court’s discussion of the treaty exception [in *Dames & Moore*] is dicta, and the Court is free to take a different position in the future. Moreover, the lack of a jurisdictional obstacle to the plaintiff’s takings claim only means that the Court of Federal Claims has jurisdiction, not that the United States automatically loses and pays compensation. However, there is a good chance that the court would find a taking. Even the prospect of such massive takings claims could deter the Executive from terminating these judgments.”).



*D. The Path to Protecting the Accord*

After reviewing the Iran-U.S. Claims Tribunal and the resolution of claims against Libya, it is clear that buried underneath the piles of litigation documents filed by SST plaintiffs there is a path for the President to void, nullify, or restructure the judgments that have been imposed against Iran.<sup>308</sup> While the exact contours of that path are unclear, there are at least two alternative options for the President.

First, the President could attempt to work with Congress. If the President could convince Congress to pass something along the lines of the LRCA, he would have express congressional permission to settle claims filed against Iran through a tribunal or according to a formula. Another option that could help limit the continued imposition of judgments against Iran would be to repeal or amend some aspects of the SST exception. As the negative effects of the SST exception coincide with critiques of JASTA,<sup>309</sup> some speculate that “members of Congress and their staffs . . . will want to respond with new legislation.”<sup>310</sup> However, considering the current state of Congress, the politicized nature of these judgments, and the emotional appeal of the underlying events giving rise to them,<sup>311</sup> the President would be well advised to prepare a plan that does not require explicit congressional approval.

As demonstrated by *Dames & Moore*, the President can take steps to settle international claims without *express* congressional approval if the “general tenor” of legislation and historical practice supports such activity.<sup>312</sup> The legislation cited in *Dames & Moore* that gave rise to the “general tenor” of congressional intent in that case still exists, in large part, today.<sup>313</sup> One potential roadblock to this solution is that the IEEPA requires a state of national emergency

308. It is worth noting that this Comment proposes a means of dealing with the claims against Iran *specifically*; others have discussed a range of methods by which the SST exception, on a more general level, might be improved upon. See, e.g., Ward, *supra* note 86, at 18–20 (proposing the establishment of a “terrorism court” at the U.N. in place of the SST exception).

309. Karen Halverson, *Is a Foreign State a “Person”? Does it Matter?: Personal Jurisdiction, Due Process, and the Foreign Sovereign Immunities Act*, 34 N.Y.U. J. INT’L L. & POL. 115, 115–19 (2001); Sealing, *supra* note 137, at 120; Kevin Todd Shook, Note, *State Sponsors of Terrorism Are Persons Too: The Flatow Mistake*, 61 OHIO ST. L.J. 1301, 1301–04 (2000).

310. COOPER-HILL, *supra* note 33, at 188.

311. See *supra* Section II.D.

312. See *supra* Section IV.A.

313. See, e.g., 22 U.S.C. § 1623 (2012); 50 U.S.C. § 1702 (2012).

declared on legitimate grounds before it can be invoked.<sup>314</sup> In the past, President Bush invoked his powers under the IEEPA to limit the ability of plaintiffs to attach assets belonging to the government of Iraq.<sup>315</sup> Through executive order, President Bush declared that the attachment proceedings obstructed the orderly reconstruction of Iraq and the maintenance of peace in Iraq, thereby creating an “extraordinary threat to the national security and foreign policy of the United States.”<sup>316</sup> Clearly, the “national security threat” threshold is not very difficult to meet. As discussed earlier, protecting the Accord is likely to pass such a test with flying colors.<sup>317</sup> Thus, the President can rely on the express grants of authority contained in the IEEPA<sup>318</sup> to buttress executive nullification of existing claims against Iran. The President also finds support for settling the claims on the basis of congressional acquiescence through the International Claims Settlement Act of 1949, as noted by the *Dames & Moore* decision.<sup>319</sup>

Furthermore, Congress has been unable to pass legislation, or even a resolution, that expresses any level of discontent or disapproval of the President pursuing a comprehensive settlement agreement with Iran regarding the SST judgments. This is a factor that was noted as a key component to the Court’s decision in *Dames & Moore*.<sup>320</sup> An expression of congressional disapproval would place the President at the “lowest ebb” in presidential power, forcing

314. 50 U.S.C. § 1701(a) (2012) (“Any authority granted to the President by section 1702 of this title may be exercised to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat.”).

315. Exec. Order No. 13,303, 68 Fed. Reg. 31,931, 31,931–32 (May 22, 2003) (“[T]he threat of attachment . . . obstructs the orderly reconstruction of Iraq, the restoration and maintenance of peace and security in the country, and the development of political, administrative, and economic institutions in Iraq. This situation constitutes an unusual and extraordinary threat to the national security and foreign policy of the United States and I hereby declare a national emergency to deal with that threat.”).

316. *Id.*

317. *See supra* Part II.

318. § 1702(a) (“[T]he President may . . . compel, nullify, [or] void . . . any right . . . with respect to . . . any property in which any foreign country . . . has any interest by any person.”).

319. *Dames & Moore v. Regan*, 453 U.S. 654, 680 (1981) (“The Act had two purposes: (1) to allocate to United States nationals funds received in the course of an executive claims settlement with Yugoslavia, and (2) to provide a procedure whereby funds resulting from future settlements could be distributed. To achieve these ends Congress created the International Claims Commission, now the Foreign Claims Settlement Commission, and gave it jurisdiction to make final and binding decisions with respect to claims by United States nationals against settlement funds.”).

320. *Id.* at 687–88.

reliance on inherent presidential powers alone.<sup>321</sup> Proving that the President has the inherent power to interfere with final judgments reached by the judiciary would implicate serious separation-of-powers concerns. However, in the absence of disapproving legislation or resolution, the President's power remains at its highest peak, as demonstrated above.

If the President finds it wise to negotiate a comprehensive settlement agreement with Iran in order to protect the Accord, he can buttress his constitutional strength by creating an alternative forum that can provide "meaningful relief."<sup>322</sup> The President might also satisfy claimants by creating a forum that lifts various jurisdictional and procedural impediments to recovery traditionally faced in U.S. courts.<sup>323</sup> Furthermore, many of these plaintiffs would be more than happy to recover something (rather than nothing) for the immense grief and pain they have suffered, and a settlement agreement could ensure such a result. SST plaintiffs are unlikely to subscribe to an all-or-nothing ideology. A comprehensive settlement agreement would serve as an efficient means of compensating victims of state-sponsored terror.<sup>324</sup>

Although the legal path to a comprehensive settlement plan with Iran may appear somewhat straight and narrow, there are various obstacles along the way. First, the United States does not currently hold the same leverage over Iran that it held over Libya. Libya had something to gain by reaching a settlement agreement with the United States, namely, the lifting of economic sanctions. Iran has already achieved this goal (although there is much to be improved upon). However, the United States can still use Iran's status as a state sponsor of terror as a carrot to bring them to the negotiation table. Iran might be enticed by the possibility of doing away with its designation as a state sponsor of terror.

Another obstacle specific to Iran (and distinguishing Iran's case from Libya's situation) is the sheer enormity of the judgments levied against them. Even a settlement that awards twenty cents on the dollar to every plaintiff would result in more than \$8 billion in

321. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637–38 (1952) (Jackson, J., concurring).

322. *Dames & Moore*, 453 U.S. at 686–87.

323. *Id.* This was a successful public relations move during the Iran-U.S. Claims Tribunal movement: "The Solicitor General also suggests that the provision of the Claims Tribunal will actually *enhance* the opportunity for claimants to recover their claims, in that the Agreement removes a number of jurisdictional and procedural impediments faced by claimants in United States courts." *Id.* at 687.

324. See text accompanying *supra* notes 284, 301.

liability. The size of these numbers may steer Iran away from the negotiating table. However, this problem can be remedied by leveraging the immense economic trade and growth that is possible if the Accord holds up and Iran reenters the international economy.<sup>325</sup>

#### CONCLUSION

John Kees is a man from Fort Mill, South Carolina.<sup>326</sup> Members of Hezbollah killed his father, Marion Kees, in 1983 when the U.S. Marine barracks in Beirut, Lebanon, was blown up by a bomb smuggled into the complex.<sup>327</sup> John was eleven years old when his father was killed.<sup>328</sup> Stories like John's are repeated time and again in the annals of the U.S. court system.<sup>329</sup> These horrendous acts of violence are detailed on thousands and thousands of pages of court documents. Sometimes the details are broadcasted to congressional committees or spewed across the airwaves to millions of Americans. Through the SST exception to the FSIA, Congress acted upon the understandable temptation to make *someone* pay for acts of violence like these. Today, the results of such a decision are on full display. The SST exception has allowed billions of dollars in judgments to pile up. Very few plaintiffs have been paid. Very few international terrorist groups have been deterred. But now, despite these costs, the litigious offspring of the exception threaten an Accord that, if successful, could avert mass violent confrontation in the Middle East.

The things that have happened to people like Marion Kees are unconscionable. But the SST exception has proven to be an ill-fated method of recourse. As John Kees said about his lawsuit to recover damages for his father's death, "[I]t won't bring back my dad. I was robbed of that years ago."<sup>330</sup> Despite the various objections to the exception, it has existed in full force for nearly two decades. Today, judgments reached pursuant to the exception constitute substantial obstacles to the Accord. The goals of compensating John Kees and other victims of state-sponsored terror, preserving the Accord, and maintaining the President's foreign policy flexibility appear polarized.

325. See Northam, *supra* note 25.

326. Joe Marusak, *Fort Mill, SC, Man Seeks Damages Against Iran*, CHARLOTTE OBSERVER (Mar. 14, 2015, 6:13 PM), <http://www.charlotteobserver.com/news/local/article14438657.html> [https://perma.cc/3MYL-FLXQ].

327. *Id.*

328. *Id.*

329. See *supra* Section II.A.

330. Gwendolyn Glenn, *Setback for Fort Mill Man's Lawsuit Against Iran*, CHARLOTTE OBSERVER (Dec. 21, 2015, 7:56 AM), <http://www.charlotteobserver.com/news/local/community/news-alliance/article50871365.html> [https://perma.cc/9N73-RWK7].

This Comment contends that, in fact, these goals are commensurate with one another—the achievement of one need not come at the expense of the others.

If the judgments stand as they are, they are likely to destroy the very bargain that drew Iran and the United States to reach the Accord in the first place. Iran will lose access to some of its blocked funds and will be dissuaded from participating in the international economy if the judgments are enforced in full. As Iran seeks international economic integration, it will face obstructions at every turn if investments abroad can be liquidated and attached by plaintiffs seeking to collect their judgments. Meanwhile, if the judgments are enforced, the United States may see Iran resume intensive uranium production in response. Furthermore, hardliners in Iran will reduce the influence of American soft power because trading with the West would result in the attachment of assets.

For these reasons, Iran and the United States must take action to ensure that SST judgments do not become the proverbial “Achilles’ heel” of the Accord. For Iran, this means coming to court and putting an end to default judgments that allow inherently biased decisions in favor of SST plaintiffs. For the United States, this means taking executive action that will bring Iran to the negotiating table and convince Iran to immediately pay at least a portion of the outstanding judgments. Congressional support may be an advantage, but explicit authorization does not appear to be a requirement if the President wishes to take such action under the authority of the IEEPA and other statutes.

Preserving the Accord and providing relief to victims’ families is ideal for both parties. SST plaintiffs would gain access to the compensation they deserve. The United States would maintain an Accord that took years to construct and that allows the United States to exercise more influence via soft power than previously existed. Iranian moderates would be able to continue their quest for normalization and integration within the world economy.<sup>331</sup> Most of all, one less country will be on the path towards a nuclear weapon, and the United States will avoid another military confrontation in the Middle East. To allow a few isolated (yet deserving) plaintiffs to inadvertently obstruct an international agreement that seeks to protect the security of the United States and the world would be a regrettable commentary on the current state of American-style

331. See Aresu Egbali & Asa Fitch, *Iran Election to Test Nuclear Deal’s Impact*, WALL ST. J., Feb. 25, 2016, at A7.

litigation. The United States and Iran should immediately work to avert such a result. Through such a solution, the United States and Iran may fulfill the venerable vision articulated by President John F. Kennedy so many years ago when he implored us to “focus . . . on a more practical, more attainable peace, based not on a sudden revolution in human nature but on a gradual evolution in human institutions[.]”<sup>332</sup>

TROY C. HOMESLEY III<sup>\*\*</sup>

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332. Towards a Strategy of Peace, *supra* note 15.

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