"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

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SUMMARY

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I. INTRODUCTION

> "He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach to himself."[1]

The "State Sponsors of Terrorism" exception to sovereign immunity was an ill-conceived solution to very real problems: ending terrorism and compensating its American victims. In dealing with the latter it placed the burden of deciding the proper compensation of victims in the hands of the courts and thereby made the former more difficult to achieve. This paper argues that the flaws inherent in the terrorism exception *before* September 11, 2001, were not minimized by the events of that date. Rather, they were magnified and exposed.[2] Perhaps the most obvious flaw in the exception is that the primary sponsor of the terrorists was not even denominated a "State Sponsor of Terrorism" at the time of the attack.[3] There are many other flaws.

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1. Thomas Paine, *Dissertation on First Principles of Government*, *in* THE COMPLETE WRITINGS OF THOMAS PAINE 570, 588 (P. Foner ed. 1945), *quoted in* United States v. Alvarez-Machain, 504 U.S. 655, 688 (1988) (Stevens, J., dissenting).

2. In the preceding five years, there have been more than 2100 terrorist attacks around the world but only fifteen in North America, resulting in seven casualties. *See* Niall Ferguson, *2011*, N.Y. TIMES MAG., December 2, 2001, § 6, at 76. In one sense, the events of September 11 make the provision of lesser importance. Clearly, the war has shifted to the home front and personal jurisdiction issues will no longer be the focus of debate.

3. Of course, Afghanistan could be added to the list as a result of the attack, but this creates other problems. *See infra* Part IV.F.2.a.

Inherent in the term "state sponsors of terrorism" are three questions, none of which are as easy as they appear at first blush: (1) What is a "state"? (2) Who is a "sponsor"? and (3) What is "terrorism"? There are many additional questions. What quantum of support characterizes one as a state sponsor? Once a state has become a state sponsor of terrorism, how quickly can that state fall off the list, or what good deeds can get that state off the list? Must the terrorism that the state sponsors be directed against the United States? Who belongs on the list today? Who decides who belongs on the list? Are state sponsors of terrorism entitled to constitutional protections such as Due Process?[4]

As a final introductory note, if U.S. courts declare that, as a matter of international law, a U.S. court has jurisdiction over a sovereign state because the U.S. executive branch has declared it a state sponsor of terrorism, then only two results can logically flow from that decision. First, only the United States can gain jurisdiction over state sponsors of terrorism. Of course, that conclusion can only be justified by the threat of pure force: America *will* exercise domestic jurisdiction over foreign sovereigns whenever it chooses because it *can*, as the world's only remaining "superpower," exercise domestic jurisdiction over foreign sovereigns. The only other alternative, and the only one both logical and "fair," is that any nation's domestic courts can appropriately exercise jurisdiction over a foreign state—including the United States—that it considers a state sponsor of terrorism. Since there are many states that would consider the United States a state sponsor of terrorism, the United States should expect to be haled into diverse foreign domestic courts by victims of "terrorists" funded and supplied by the United States, and should, collaterally, expect to see its foreign assets attached to satisfy judgments.[5] In fact, Iran has passed legislation allowing Iranian victims of United States "interference" to sue the United States in Iranian courts.[6]

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4. *See generally* Keith Sealing, *"State Sponsors of Terrorism" Are Entitled to Due Process Too: The Amended Foreign Sovereign Immunities Act is Unconstitutional*, 15 AM. U. INT'L L. REV. 395 (1999). *See also* Daniel E. Reitz, Comment, *Raising a Paper Tiger: Public Law 105–277 § 117(D) and the Gutting of the State-Sponsored Terrorism Exception to the Foreign Sovereign Immunities Act*, 69 U. CIN. L. REV. 357 (2000); Sean P. Vitrano, Comment, *Hell-Bent on Awarding Recovery to Terrorism Victims: The Evolution and Application of the Antiterrorism Amendments to the Foreign Sovereign Immunities Act*, 19 DICK. J. INT'L L. 213 (2000); *but see* Joseph Glannon & Jeffrey Atik, *Politics and Personal Jurisdiction: Suing State Sponsors of Terrorism Under the 1996 Amendments to the Foreign Sovereign Immunities Act*, 87 GEO. L.J. 675 (1999); Kevin Todd Shook, Note, *State Sponsors of Terrorism are Persons Too: The* Flatow *Mistake*, 61 OHIO ST. L.J. 1301 (2000) (arguing that states are "persons" for purposes of personal jurisdiction under the FSIA); Joseph W. Dellapenna, *Civil Remedies for International Terrorism*, 12 DEPAUL BUS. L.J. 169 (1999).

5. *See* Roger Parloff, *Sue Afghanistan!*, N.Y. TIMES BOOK REVIEW, December 23, 2001, at 9, (reviewing ALLAN GERSON & JERRY ADLER, THE PRICE OF TERROR (2000)) "Do we really want Chinese courts deciding whether the United States' unintended bombing of the Chinese embassy in Belgrade in 1999 was a violation of international law? Do we want Saudi courts opining on whether Israel engages in state-sponsored racism and terrorism?" *Id.*

6. *Iran MPs cry "Down with America," approve lawsuit against United States*, AGENCE FRANCE-PRESSE, Nov. 1, 2000, *available at* 2000 WL 24749300.

II. A BRIEF HISTORY OF SOVEREIGN IMMUNITY, THE FSIA AND THE "STATE SPONSORS OF TERRORISM" EXCEPTION

A. Sovereign Immunity, Pre-FSIA

The classic theory of sovereign immunity[7] holds that states are all equal sovereigns and one state cannot exercise jurisdiction over another state or its instrumentalities in its domestic courts.[8] The theory was first articulated in the United States by Chief Justice Marshall in *The Schooner Exchange v. M'Faddon*.[9] The theory became less workable as states began engaging in greater and greater volumes of commercial activity.[10] The Supreme Court began deferring the question of immunity to the executive branch,[11] which in turn responded with the "Tate Letter" and affirmed that the State Department would thereafter apply a restrictive form of sovereign immunity pursuant to which sovereign immunity would be recognized "with regard to sovereign or public acts (*jure imperii*) of state, but not with respect to private acts (*juri gestionis*)."[12] This delineation left open the question of where to draw the line between *juri imperii* and *juri gestionis*.[13]

B. The FSIA Pre-Lockerbie

Congress' purpose in enacting the Foreign Sovereign Immunities Act (FSIA) was to codify and clarify the restrictive theory and to shift the burden of deciding whether the Act applied to a given transaction or event from the executive branch to the judicial branch.[14] The FSIA contained seven exceptions to sovereign immunity based upon: (1) international agreements to which the United States was a party as of October 21, 1976;[15] (2) explicit or implicit waiver;[16] (3) commercial activities;[17] (4) property taken in violation of international law;[18] (5) injuries to person or property caused by certain tortious activities "occurring in the United States;"[19] and (6) arbitration agreements entered into by the parties which are capable of settlement within the United States.[20]

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7. The concept has been covered extensively elsewhere and need only be considered briefly here. *See, e.g.*, RUSSELL WEINTRAUB, INTERNATIONAL LITIGATION AND ARBITRATION 281–334 (3d ed. 2001); *see generally* M. Scott Bucci, *Breaking Through the Immunity Wall? Implications of the Terrorism Exception to the Foreign Sovereign Immunities Act*, 3 J. INT'L LEGAL STUD. 293, 294 (1997).

8. Bucci, *supra* note 7 (citing LOUIS HENKIN ET AL., INTERNATIONAL LAW CASES AND MATERIALS 891 (2d ed. 1987)).

9. 11 U.S. (7 Cranch) 116 (1812) (holding that a French warship, although formerly taken on the high seas from its rightful, American civilian owner, was not subject to libel action when weather forced it into a U.S. port).

10. *Cf.* Berizzi Bros. v. S.S., 271 U.S. 562 (1926) (upholding sovereign immunity in the case of a ship owned and used by Italy for a public purpose, even though it was operating for commercial rather than naval purposes).

11. *See Ex parte* Republic of Peru, 318 U.S. 578 (1943) (holding that the judiciary will defer to the executive branch on questions of sovereign immunity); *see also* Mexico v. Hoffman, 324 U.S. 30 (1945).

12. Changed Policy Concerning the Granting of Sovereign Immunity to Foreign Governments, May 19, 1952, 26 DEP'T ST. BULL., June 1952, at 984 (1952). The letter was authored by the legal advisor to the State Department, Jack Tate.

13. *See* discussion in Bucci, *supra* note 7, at 299–301 and cases cited therein.

14. Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified at 28 U.S.C. §§ 1330, 1332(a)–(4), 1391(f), 1441(d), 1602–11 (2000)).

15. *Id.* § 160.

16. *Id.* § 1605(a)(1).

17. *Id.* § 1605(a)(2).

18. *Id.* § 1605(a)(3).

19. *Id.* § 1605(a)(4).

20. 28 U.S.C. § 1605(a)(5).

C. Lockerbie, Smith*, and the 1996 Amendments*

A bomb which had apparently been placed on the airplane in Germany or England exploded while Pan Am Flight 103 was over Lockerbie, Scotland.[21] Two hundred seventy people, including persons on the ground in Lockerbie, were killed.[22] The suspects, two former Libyan intelligence agents, Abdelbasset Ali Mohmed Al Megrahi and Al Amin Khalifa Fhimah, finally surrendered in April 1999, thereby ending seven years of United Nations sanctions against Libya.[23] After many delays, the two were tried under Scottish law in the Netherlands. Khalifa Fhimah was acquitted and Al Megrahi was convicted and sentenced to life in prison,[24] since Scotland has no death penalty. An appeal by Al Megrahi was denied.[25]

Two Americans who lost their wives on the flight brought suit in the United States District Court for the Eastern District of New York.[26] The court held that the plaintiffs lacked jurisdiction under the FSIA and dismissed the case.[27] The Second Circuit affirmed, noting in particular that violation of a *jus cogens* norm did not constitute an implied waiver of sovereign immunity.[28] This decision was, of course, correct under the FSIA as then written.

Efforts were made to amend the Act in response to the court's decision in *Smith*, but the efforts dragged on, partially as a result of State Department opposition. It was in fact a domestic act of terrorism, the Oklahoma City bombing, that provided the impetus, and the terrorism exception was added to the FSIA as part of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), signed by President Clinton on April 23, 1996.[29] The amendment added a new Subsection to Section 1605 which provides that a foreign state shall not be immune from jurisdiction in a suit:

> (7) not otherwise covered by paragraph (2), in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources (as defined in section 2339A of title 18) for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope

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21. The flight was en route from Frankfurt, Germany to Detroit, Michigan. There is speculation that the bomb was timed to explode while the plane was over the Atlantic Ocean, but because of a delay in the flight the plane was still over land when the explosion went off. *But see* ALLAN GERSON & JERRY ADLER, THE PRICE OF TERROR 19 (2000) (arguing (1) that the bombers set the timer in Malta forgetting that London time was an hour earlier and (2) that it is not necessarily correct to assume that the bombers did not want the wreckage to be found since not finding the wreckage would not have served their terroristic purposes because the crash could have been deemed an accident).

22. *See* Leslie McKay, *A New Take on Antiterrorism:* Smith v. Socialist People's Libyan Arab Jamahiriya, 13 AM. U. INT'L. L. REV. 439, 440 n.5 and sources cited therein.

23. Anthony Deutsch, *Libya delivers bomb suspects; sanctions off*, ATLANTA J.-CONST., Apr. 6, 1999, at A3.

24. Her Majesty's Advocate v. Al Megrahi, No. 1475/99, 2001 WL 14966, ¶ 85 (H.C.J. Jan. 31, 2001).

25. Anthony Deutsch, *Lockerbie Appeal is Rejected*, CHI. TRIB., Mar. 15, 2002, at 2, *available at* 2002 WL 2633999.

26. Smith v. Socialist People's Libyan Arab Jamahiriya, 886 F. Supp. 306 (E.D.N.Y. 1995).

27. *Id.* at 315. The court reasoned that it did not have authority *sua sponte* to assume jurisdiction based upon a violation of *jus cogens*.

28. Smith v. Socialist People's Libyan Arab Jamahiriya, 101 F.3d 239, 246–47 (2d Cir. 1996).

29. 28 U.S.C. § 1605(a)(7). *See, e.g.*, David MacKusick, *Human Rights vs. Sovereign Rights: The State Sponsored Terrorism Exception to the Foreign Sovereign Immunities Act*, 10 EMORY INT'L L. REV. 741, 742–43 (1996).

> of his or her office, employment, or agency, except that the court shall decline to hear a claim under this paragraph-
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> > (A) if the foreign state was not designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C.App. 2405 (j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371) at the time the act occurred, unless later so designated as a result of such act;[30]

Following up on the original change, Representative Jim Saxton sponsored the "Flatow Amendment" which expressly provided that punitive damages would be available in such cases.[31] The Supreme Court has held that "the FSIA provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country . . . ."[32]

III. THE CASES INTERPRETING THE AMENDED FSIA

A. Rein

Following Congress' enactment of the AEDPA, the plaintiffs refiled in *Rein v. Socialist People's Libyan Arab Jamahiriya*[33] against defendants who were the state of Libya, the Libyan External Security Organization, Libyan Arab Airlines, and Abdel Basset Ali Megrahi and Lamen Khalifa Fhimah.[34]

The District Court first concluded that it had subject matter jurisdiction based upon the amended FSIA.[35] It then turned to the question of personal jurisdiction. The court, based upon *Texas Trading*,[36] held that the question of whether there is personal jurisdiction over an absent defendant is governed by the formula: "subject-matter jurisdiction together with proper service of process gives the court personal jurisdiction."[37]

The Second Circuit affirmed that the lower court had subject matter jurisdiction.[38] Significantly, it did not consider any of the other issues because the appeal was interlocutory.[39] Thus, the court did not reach many of the questions presented in this paper, particularly whether Due Process allows a court to assert personal jurisdiction over a state sponsor of terrorism without minimum contacts analysis, and, the question most feared by plaintiffs' attorneys,[40] whether the law violated the separation of powers doctrine. Because

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30. 28 U.S.C. § 1605(a)(7).

31. Civil Liability for Acts of State Sponsored Terrorism, part of the 1997 Omnibus Consolidated Appropriations Act, Pub. L. 104-208, § 589(a), 110 Stat. 3009-172, *reprinted at* 28 U.S.C.A. § 1605 (West Supp. 2001).

32. Argentine Republic v. Amarada Hess Shipping Corp., 488 U.S. 428, 439 (1989).

33. 995 F. Supp. 325 (E.D.N.Y. 1998).

34. In discussing *Rein*, the terms "defendants" or "Libya" will be used to represent all of the defendants.

35. Rein v. Socialist People's Libyan Arab Jamahiriya, 995 F. Supp. 325, 329 (E.D.N.Y. 1998).

36. Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300 (2d Cir. 1981) (holding that, because of sufficient contacts with the United States, jurisdiction existed under the FSIA over claims against a foreign country's breach of contract).

37. *Rein*, 995 F. Supp. at 330 (citing *Texas Trading & Milling*, 647 F.2d at 308). More extensive analysis of the court's reasoning here is contained in Sealing, *supra* note 4, at 428–31, 436–40, 452–54.

38. Rein v. Socialist People's Libyan Arab Jamahiriya, 162 F.3d 748, 764 (2d Cir. 1998).

39. *Id.* at 753–54.

40. GERSON & ADLER, *supra* note 21, at 241.

the Supreme Court denied certiorari without comment the issues have not been addressed by a court beyond the district court level to date.[41]

B. Post-Rein *FSIA cases*

This section examines fourteen other cases that have been brought under the FSIA and the AEDPA through October 31, 2001, involving Libya, Cuba, Iraq, and Iran. They are presented in chronological order.

1. *Alejandre*

Cuba has had direct experience with the amended FSIA in *Alejandre v. Republic of Cuba*,[42] the first FSIA case not based on the Lockerbie incident. Cuba did not defend but rather responded through a diplomatic note that the court had no jurisdiction.[43] As will be seen in a number of the cases discussed, *infra*, when the defendant state fails to appear the court is required to conduct a bench trial in which the plaintiffs must establish their right to relief with evidence "satisfactory to the court."[44]

The case arose when Cuban fighter planes shot down two unarmed Brothers to the Rescue planes in international waters off Cuba. The planes were engaged in the humanitarian mission of looking for rafters who had attempted to escape Cuba for the United States but might have been in distress and in need of U.S. Coast Guard rescue.[45] When their plane was shot down, three Americans were killed; the fourth victim, a Cuban citizen, could not participate in the suit.[46] The act was arguably not terrorism but rather an extrajudicial killing as that term is defined in the Torture Victim Protection Act (TVPA).[47] Presented with no defenses, the court concentrated on the issue of damages. The court concluded that punitive damages were an appropriate remedy in international law,[48] and found this decision to be in keeping with cases brought under the Alien Tort Claims Act (ATCA)[49] and the TVPA.[50] The court awarded compensatory damages for the three Americans of $49,927,911 and punitives of $137,700,000.[51] Of note, in awarding the

41. It is safe to conclude that the Court denied certiorari for the same reason—lack of ripeness—as the appellate court.

42. 996 F. Supp. 1239 (S.D. Fla. 1997).

43. *Id.* at 1242.

44. 28 U.S.C. § 1608(e) (2000).

45. *Alejandre*, 996 F. Supp. at 1242. Of course, because Cuba presented no defense, the court took all of plaintiffs' facts as true. *Id.* at 1243. It is hard to argue against the proposition that the act was "in outrageous contempt for international law." *Id.*

46. *Id.* at 1242.

47. *Id.* at 1248 (citing Torture Victim Protection Act of 1991, 28 U.S.C. § 1350, note (1994), and Lafontant v. Aristide, 844 F. Supp. 128, 138 (E.D.N.Y. 1994) (holding that assassination of a political opponent is extrajudicial killing)).

48. *Id.* at 1250 (citing The Marianna Flora, 24 U.S. (11 Wheat.) 1, 41 (1825)).

49. *Alejandre*, 996 F. Supp. at 1251 (citing Filartiga v. Pena-Irala, 577 F. Supp. 860 (E.D.N.Y. 1984) (holding that the torture and murder of a son for his father's political beliefs in Paraguay warranted imposition of punitive damages)).

50. *Id.* at 1251 (citing Xuncax v. Gramajo, 886 F. Supp. 162, 199 n.45 (D. Mass. 1995), which lists seven cases in which punitive damages had been awarded).

51. *Id.* at 1253.

punitives the court seemed to suggest that it was bound by the *BMW* test,[52] which suggests that Cuba was entitled to Due Process.[53] Nothing of the total of nearly $200 million has been collected.[54]

2. *Flatow*

Iran did not appear in *Flatow*[55] either. Here the defendants included the state of Iran and the Iranian Ministry of Information and Security (MOIS) as well as the Ayatollah Khomenei and two other individual named defendants.[56] While on a foreign study program in Israel, Brandeis University student Alisa Flatow was on a bus to a beach resort with other young students when a suicide bomber, who knew that Americans frequently rode the bus, drove a van loaded with explosives into the bus. Flatow's skull was pierced with shrapnel; she suffered for three to five hours before lapsing into a coma and then died when taken off life support on April 10, 1995.[57] The Shaqaqi faction of the Palestine Islamic Jihad was responsible for the atrocity. The Shaqaqi faction's sole purpose was to conduct terrorist activities in Gaza and its sole source of funding was the state of Iran.[58]

The court began its analysis by noting that Iran had been a state sponsor of terrorism since 1984.[59] After discussing sovereign immunity in general and the FSIA in particular, the court turned to the Flatow Amendment[60] holding that the Amendment and Section 1605(a)(7) should be construed *in pari materia*, and, when so construed, applied retroactively for purposes of establishing subject matter jurisdiction and personal jurisdiction.[61]

After finding subject matter jurisdiction,[62] the court then turned to the issue of personal jurisdiction. Although admitting that "Congress cannot grant jurisdiction where it would be improper under the Constitution,"[63] the Court held that the FSIA conferred personal jurisdiction wherever there was subject matter jurisdiction and proper service of process.[64] The court based its conclusion on two independent grounds. First, and apparently the most important and dispositive ground, a state is not a "person" entitled to Due Process protection,[65] and second, even if a state were entitled to Due Process, the requirements of Due Process were met here.[66]

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52. BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996) (applying three factors to determine if a punitive damages award violates Due Process: (1) degree of reprehensibility of the act; (2) ratio of actual damages to punitives; and (3) sanctions for similar misconduct).

53. *Alejandre*, 996 F. Supp. at 1253 n.14. The court ambiguously stated, "*To the extent that these considerations are applicable in this case*, the Court is guided by them in determining its award of punitive damages." *Id.* (emphasis added).

54. A final note, Cuban spy Gerardo Hernandez, who conspired in shooting down the planes, was sentenced to life in prison recently. WALL ST. J., Dec. 13, 2001, at A1, *available at* 2001 WL-WSJ 29680603.

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

56. *Id.* at 5.

57. *Id.* at 7.

58. *Id.* at 8.

59. *Id.* at 9.

60. *Id.* at 12 (citing Civil Liability for Acts of State Sponsored Terrorism, 28 U.S.C. § 1605, Pub. L. 104-208, 110 Stat. 3009-172 (1996)).

61. *Flatow*, 999 F. Supp. at 12–13.

62. *Id.* at 16–19.

63. *Id.* at 19 (citing Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 491 (1983), and Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 308 (1981).

64. *Id.* at 18.

65. *Id.* at 18–21.

66. *Id.* at 21–23. I disagree with the first argument and find the second a muddled and confused analysis. The court's finding that a foreign state is not a person for Due Process purposes rests primarily on dicta in two

3. *Cicippio*

In *Cicippio v. Iran*,[67] three Americans living in Beruit, Lebanon were taken hostage, kidnapped, and tortured for periods of a year and a half to more than five years.[68] Their captors were the Hizballah,[69] a terrorist organization funded and controlled by Iran.[70] Iran did not respond to service, and the court tried the case *ex parte*.[71] The court found that, in accordance with the prevailing theory, subject matter jurisdiction plus proper service of process equaled personal jurisdiction over Iran;[72] that despite the fact that the abductions took place more than a decade before the enactment of Section 1605(a)(7), Congress had intended that it be retroactive;[73] and that the ten-year statute of limitations did not bar relief because the statute had been equitably tolled during the time the suit was impossible before the adoption of the state sponsors of terrorism exception.[74] After detailing the three captives' horrific ordeals, the court awarded the three men and the wives of the two married men a total of $65 million.[75]

4. *Anderson*

Anderson[76] involved the tragic and well-documented case of journalist Terry Anderson, who was kidnapped in 1985 in Beirut, Lebanon and kept as a hostage in horrible conditions for nearly seven years.[77] There was uncontroverted evidence—uncontroverted because, although properly served under 28 U.S.C. § 1608(a)(4), the defendants failed to respond in any way to the complaint[78]—that the captors were the Hizballah terrorists operating in Lebanon under the direction of Iran and MOIS.[79] Was the hostage taking terrorism?[80] Dr. Patrick Clawson, director of the Washington Institute of Near East Policy, described the Hizballah's motivation as follows:

Supreme Court cases: *Verlinden*, 461 U.S. at 484 n.5, and Republic of Argentina v. Weltover, 504 U.S. 607, 619–20 (1992). In *Flatow,* the court concluded that "these brief analyses indicate that foreign states may not be entitled to all aspects of Constitutional Due Process guaranteed to individuals." *Flatow*, 999 F. Supp at 19. I have argued elsewhere that this analysis is wrong and will not expand on that analysis here.

67. 18 F. Supp. 2d 62 (D.D.C. 1998).

68. *Id.* at 64.

69. There are various spellings of this organization used throughout the cases. I will follow the lead of the State Department in its official documents. *See, e.g.*, Wagner v. Islamic Republic of Iran, 172 F. Supp. 2d 128, 130 n.1 (D.D.C. 2001). The term means "party of god."

70. *Cicippio*, 18 F. Supp. 2d at 64.

71. *Id.*

72. *Id.* at 66. The court stated, "This Court concludes that it has in personam jurisdiction over defendant Iran pursuant to 28 U.S.C. § 1330(b), service of process having been properly made pursuant to 28 U.S.C. § 1608."

73. *Id*. at 68–69. This interpretation is, of course, correct; whether Congress's decision was correct is another issue.

74. *Id.* at 69. This interpretation is also correct; once again the issue is whether Congress's decision was correct.

75. The three captives were awarded $20 million, $16 million, and $9 million; the two wives each were awarded $10 million. *Id.* at 70.

76. Anderson v. Islamic Republic of Iran, 90 F. Supp. 2d 107 (D.D.C. 2000).

77. *Id.* at 108.

78. *Id.* at 109 n.1.

79. *Id.* at 112.

80. Clearly, § 1605(a)(7) provides a cause of action for the victim of "hostage taking," but the issue is whether the supporter of the hostage-taking entity is a state sponsor of terrorism, which, it would seem, requires that the hostage-taking is itself terrorism.

> The motives were, among others, to secure release of its own operatives who were being held as terrorists by other governments; to discredit American and Israeli influence in the Middle East; to dramatize to the world its willingness to take radical action in pursuit of its political objectives.[81]

Again, presumably because Iran did not appear and argue lack of jurisdiction, the case contains no analysis of subject matter jurisdiction or personal jurisdiction.[82]

A final anomaly, Iran was immune from punitive damages under the FSIA but MOIS was not. Again, this is a correct reading of the statute, but it seems to be a rather odd result.[83] Apparently, if only a state itself can be implicated in support of the terrorist actors, no punitives are available. Although Iran and MOIS were found jointly and severally liable for compensatory damages of $41.24 million, punitive damages of $300 million were assessed solely against MOIS.[84] Why does this matter? It would appear that, under *Letelier v. Republic of Chile*,[85] that a judgment could only be enforced against MOIS assets, not against the assets of any other Iranian entity.

5. *Daliberti*

In *Daliberti v. Republic of Iraq*,[86] the defendant, Iraq, responded to the complaint by way of a motion to dismiss,[87] but after losing all of its arguments, withdrew, allowing the court to enter a default judgment.[88] The case arose out of the kidnappings, false imprisonment, and torture of four Americans in Iraq.[89] The four sought $20 million each and their spouses sought $5 million each, a total of $100 million. The four men brought claims under the state sponsors of terrorism provision of the FSIA, and Hall and the four spouse plaintiffs brought claims under the commercial activities exception.[90]

Iraq raised three constitutional challenges to the amended FSIA: (1) that the delegation of the determination of state sponsor of terrorism status to the executive branch violated the doctrine of separation of powers; (2) that discrimination against state sponsors of terrorism violated Iraq's Equal Protection rights; and (3) that the statute's failure to

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81. *Anderson*, 90 F. Supp. 2d at 112.

82. The only jurisdictional issue was raised by the fact that Anderson's wife, Madeleine Bassil, was not an American citizen; she was Lebanese. Bassil was a plaintiff along with their daughter, who was born during Anderson's captivity. The court held that because § 1605(a)(7) conveyed jurisdiction if "either the plaintiff or the victim [is] a United States national at the time of the incident," the court has subject matter over Bassil's claims. *Anderson*, 90 F. Supp. 2d at 113 (citing *Flatow*, 999 F. Supp. at 16). This interpretation appears to be a correct reading of the statute, but it demonstrates how attenuated the contact can become: A Lebanese national can obtain jurisdiction in the United States over Iran for acts committed by a stateless terrorist organization situated in Lebanon because of Iran's sponsorship of that organization.

83. *See id*. at 113–14 (citing § 1606 and § 1603(b)); *Cicippio*, 18 F. Supp. 2d at 69.

84. *Anderson* 90 F. Supp. 2d at 114.

85. 748 F.2d 790 (2d Cir. 1984), *cert. denied* 471 U.S. 1125 (1985) (holding that the FSIA does not allow seizure of the assets of a foreign state's wholly owned airline to satisfy a default judgment against that state).

86. 97 F. Supp. 2d 38 (D.D.C. 2000) (*Daliberti I*).

87. *Id.* at 44 n.2.

88. Daliberti v. Republic of Iraq, 146 F. Supp. 2d 19, 20 (D.D.C. 2001) (*Daliberti II*).

89. Chad Hall was kidnapped in Kuwait and taken to Iraq for an undisclosed length of time. *Daliberti I*, 97 F. Supp. 2d at 41. He filed suit prior to the amendment to the FSIA and his claim was dismissed. Hall v. Socialist People's Republic of Iraq, Civil Action No. 92-2842, Memorandum and Order (D.D.C. 1994), *aff'd without opinion*, 80 F.3d 558 (D.C. Cir. 1996). Kenneth Beaty was arrested at the Iraq-Kuwait border and held for 205 days. *Daliberti I*, 97 F. Supp. 2d at 41. David Daliberti and William Barloon crossed into Iraq from Kuwait by mistake and were arrested when they tried to return to Kuwait. They were held for 126 days. *Id.* All four men had spouses who sued for intentional infliction of emotional distress and loss of consortium. *Id.* at 42.

90. *Id.* at 46. The court dismissed all of the commercial activity exception-based claims. *Id.* at 47–48.

require minimum contacts analysis as a predicate to personal jurisdiction violated Due Process.[91]

Turning to the separation of powers argument, the court first noted that the State Department has always played a significant role in determining whether a foreign state would be accorded immunity in U.S. courts.[92] The court then found that the Supreme Court had upheld such delegation in "scores of cases"[93] and had only rejected delegation in two 1935 cases.[94] Finally, it noted that the *Rein* court had also rejected this argument.[95] However, the court noted that, as was also the case in *Rein*, the state in question was already listed as a state sponsor of terrorism when the FSIA was amended.[96] The court, therefore, did not reach the question of whether the same result would obtain if a state were placed on the list after the state sponsors amendment in the AEDPA.

The court held that there was no Equal Protection violation because state sponsors of terrorism were not in a class subject to heightened scrutiny, and, thus, the distinction had only to survive the rational relationship test.[97] Here the distinction of certain states as sponsors of terrorism not protected by sovereign immunity was rationally related to the goal of protecting U.S. citizens by deterring terrorism and providing compensation for its victims.[98]

The court concluded that no minimum contacts analysis was required.[99] Here the court's analysis was weaker, arguing that Congress had addressed the problem within the statute and that under the FSIA there was personal jurisdiction whenever there was subject matter jurisdiction and proper service of process.[100] The court asks, "Have states that sponsor terrorism been given adequate warning that terrorist acts against United States citizens, no matter where they occur, may subject them to suit in United States court?"[101] The court answered "yes" but failed to address the fact that when the acts of kidnapping and torture in question occurred, the AEDPA did not exist, and Iraq was immune to suit.

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91. *Id.* at 48. Following the lead of other cases, the court worked from the assumption that Iraq was a "person" entitled to constitutional protections, but it did not decide the issue. *Id.* at 48–49.

92. *Daliberti I*, 97 F. Supp. 2d at 49–50 (citing National City Bank of New York v. Republic of China, 348 U.S. 356, 360–61 (1955) (stating that the State Department's view on sovereign immunity should be "accorded significant weight")).

93. *Id.* at 50. The court cited the list of cases provided in *Milk Industry Foundation v. Glickman*, 949 F. Supp. 882, 890 (D.D.C. 1996), and *Yakus v. United States*, 321 U.S. 414, 424–25 (1944).

94. *Id.* (citing Panama Refining Co. v. Ryan, 293 U.S. 388 (1935), and Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935)). The court also referenced *Clinton v. City of New York*, 524 U.S. 417 (1998) (Breyer, J., dissenting).

95. *Daliberti I*, 97 F. Supp. 2d at 51 (citing Rein v. Socialist People's Libyan Arab Jamahiriya, 162 F.3d 748, 762–64 (2d Cir. 1998), and two cases cited therein, Jones v. United States, 137 U.S. 202 (1890) (finding that jurisdiction over a murder case could be upheld because the island of Navassa was a U.S. territory, according to the determination made by the U.S. Secretary of State), and Matimak Trading Co. v. Khalily, 118 F.3d 76, 79–84 (2d Cir. 1997) (finding that jurisdiction could not be upheld because Hong Kong was not recognized as a foreign state by the Executive Branch)).

96. *Id.* at 51.

97. *Id.* at 52. Nor was any "fundamental right . . . implicated" that might have heightened the test beyond a mere rational basis. *Id.* (quoting Rein v. Socialist People's Libyan Arab Jamahiriya, 995 F. Supp. 325, 330–31 (E.D.N.Y. 1998)).

98. *Id.* at 52.

99. *Id.* at 53–54.

100. *Daliberti I*, 97 F. Supp. 2d at 53. I have argued extensively elsewhere that this is wrong and will not repeat those arguments here. *See* Sealing, *supra* note 4.

101. *Daliberti I*, 97 F. Supp. 2d at 53.

Finally, the court quickly dismissed Iraq's forum non conveniens and act of state doctrine arguments.[102]

Having lost on all arguments for dismissal, Iraq did not participate in the case any further. A default judgment was entered for the plaintiffs, and the court calculated damages based upon past lost wages, future lost wages, and compensation of $10,000 per day for every day imprisoned.[103] Beaty was awarded $4,235,441; Hall $1,797,004; Barloom $2,942,285; and Daliberti $3,848,559. Each spouse was awarded $1,500,000 for solatium.[104] The total award was nearly $19 million, although nothing has been collected from Iraq.

6. *Price*

In *Price v. Socialist People's Libyan Arab Jamahiriya*,[105] Libya appeared to move for dismissal on a variety of grounds. The two plaintiffs, Price and Frey, were accused of taking photographs for illegal purposes and detained for 105 days, during which time they were tortured.[106] After being acquitted of all charges, they were detained for an additional sixty days.[107] They sought in excess of $20 million each.[108]

Libya argued that Congress' grant of subject matter jurisdiction under Section 1605(a)(7) was invalid; that the court's exercise of personal jurisdiction was unconstitutional; and that plaintiffs failed to state a claim upon which relief could be granted.[109] The subject matter argument was divided into three parts: (1) the passive personality principle upon which subject matter jurisdiction is based is disfavored by the executive and judicial branches of the U.S. government as well as by international law; (2) Congress lacked the constitutional authority to grant subject matter jurisdiction; and (3) Congress' grant of subject matter jurisdiction violates the doctrine of separation of powers.[110]

The court noted that "[t]he passive personality principle forms the underpinnings of Congress' grant of subject matter jurisdiction under the FSIA: 'Under the passive personality principle, a state may punish non-nationals for crimes committed against its nationals outside of its territory, at least where the state has a particularly strong interest in the crime.'"[111] The court held that "American courts are obligated to give effect to an unambiguous exercise by Congress of its jurisdiction to prescribe even if such an exercise would exceed the limitations imposed by international law."[112]

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102. The court dismissed the forum non conveniens argument in a footnote, stating that *Congress* has already performed the balancing test used to determine the applicability of the doctrine. *Daliberti*, 97 F. Supp. 2d at 54 n.7 (emphasis added). My understanding was that this balancing was a judicial function. The court found the act of state doctrine inapplicable because its purpose was to avoid having the Judiciary "hinder" or "embarrass" the executive or legislative branches in their foreign policy roles. Here, the finding of jurisdiction was in keeping with clearly articulated wishes of both branches. *Id.* at 55.

103. *Daliberti II*, 146 F. Supp. 2d at 25.

104. *Id.* at 26.

105. 110 F. Supp. 2d 10–12 (D.D.C. 2000).

106. *Id.* at 11–12.

107. *Id.* at 12.

108. *Id.* at 11.

109. *Id.* at 12.

110. *Id.*

111. *Price*, 110 F. Supp. 2d at 12 (citing United States v. Yunis, 924 F.2d 1086, 1091 (D.C. Cir. 1991)).

112. *Id.* (quoting *Yunis*, 924 F.2d at 1091 (quoting Federal Trade Comm'n v. Compagnie de Saint-Gobain-Pont-a-Mousson, 636 F.2d 1300, 1323 (D.C. Cir. 1980))).

7. *Elahi*

In *Elahi v. Islamic Republic of Iran*,[113] Cyrus Elahi, a U.S. national, was killed in Paris, France, as a result of his former dissident stance in Iran.[114] With no appearance by Iran, the court awarded compensatory damages of $5 million to the decedent, $5 million to his brother, and punitive damages (against the MOIS only) of $300 million.[115]

8. *Sutherland*

In *Sutherland v. Islamic Republic of Iran*,[116] the Dean of the Agricultural and Food Sciences at American University of Beirut, Thomas Sutherland, was kidnapped by the Hizballah and imprisoned and tortured for approximately six-and-one-half years.[117] For most of this time he was kept with plaintiffs of other cases discussed herein, such as Friar Jenco and Terry Anderson. Here, in calculating damages, the court again concentrated on the horrifying conditions endured by the plaintiff and the sufferings of his family. The court ultimately awarded compensatory damages of $23,540,000 to Sutherland, $10 million to his wife, $6.5 million to each of three daughters, and assessed punitive damages against MOIS of $300 million.[118]

9. *Higgins*

In *Higgins v. Islamic Republic of Iran*,[119] Colonel William Higgins (a retired Marine) was kidnapped while serving in a United Nations organization on the disputed Lebanon-Israel border.[120] He was held for eighteen months, tortured, and ultimately hanged. The perpetrators were the Hizballah, funded by Iran.[121] With Iran not appearing, the court awarded more than $55 million in compensatory damages against Iran and the Islamic Revolutionary Guard Corps and $300 million in punitive damages against the Islamic Revolutionary Guard Corps.[122]

10. *Eisenfeld*

Eisenfeld v. Islamic Republic of Iran[123] consolidated the cases of Sara Rachel Duker and Matthew Eisenfeld, two American students who were killed in the same terrorist bombing. On February 25, 1996, Hamas member Magid Wardah exploded a bomb he was carrying on a bus traveling from Jerusalem to an archeological site in Petra, Jordan.[124]

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113. 124 F. Supp. 2d 97 (D.D.C. 2000).
114. *Id.* at 99.
115. *Id.* at 115.
116. 151 F. Supp. 2d 27 (Ct. Int'l Trade 2001).
117. *Id.* at 30.
118. *Id.* at 53.
119. No. 99-377, 2000 WL 33674311 (D.D.C. 2000).
120. *Id.* at *1.
121. *Id.* at *3.
122. *Id.* at *8–9.
123. 172 F. Supp. 2d 1 (D.D.C. 2000).
124. *Id.* at 4.

Relying heavily on *Flatow*, the court concluded that it had personal jurisdiction based upon the existence of an exception to sovereign immunity under the FSIA and proper service of process.[125] But the court then stated, "[a] court must also determine whether the notice provided by service under Section 1608 passes constitutional muster."[126] The court concluded that it did because "a foreign state that causes the death of a United States national through an act of state-sponsored terrorism has the requisite 'minimum contacts' with the United States."[127]

The court awarded $1 million to each of the decedents for compensation and made solatium awards of $5 million to Duker's mother, $2.5 million each to her two sisters, $5 million each to Eisenfeld's father and mother, and $2.5 million to his sister.[128] The court declined the plaintiffs' request for $500 million each in punitive damages and awarded the relatively "low" amount of $150 million each.[129]

11. *Jenco*

The case of *Jenco v. Islamic Republic of Iran*[130] arose out of the same facts as *Anderson* and *Sutherland*. Jenco, an ordained Catholic priest working in Lebanon, was kidnapped, held captive, and tortured for 564 days.[131] His captors were members of the Hizballah, funded and controlled by Iran and the MOIS.[132] The court devoted little consideration to the issues discussed herein, instead concentrating on the determination of damages. The court awarded Friar Jenco's estate $5,640,000 in compensatory damages, based on the formula of approximately $10,000 per day of captivity that had been applied in *Anderson*,[133] $1.5 million each to six siblings,[134] and after concluding that punitive damages were appropriate, assessed $300 million in punitive damages.[135] Thus, the total award was $314,640,000.

12. *Simpson*

Libya was once again the defendant in *Simpson v. Socialist People's Libyan Arab Jamahiriya*.[136] This case arose when Simpson and her late husband were forced to dock in the Libyan harbor of Benghazi when a storm interrupted their pleasure cruise and damaged their ship. Although Libya first offered refuge and a "safe harbor," they were later arrested, threatened with death, and detained—in Simpson's case for about three months and in her husband's case for about seven months.[137]

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125. *Id.* at 7 (noting that the exceptions are contained at 28 U.S.C. §§ 1604, 1605 or 1607 and that service must be effectuated pursuant to § 1608).

126. *Id.*

127. *Id.* (citing International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945), and Flatow v. Islamic Republic of Iran, 999 F. Supp. 1, 23 (D.D.C. 1998)).

128. *Id.* at 9.

129. *Eisenfeld*, 172 F. Supp. 2d at 9.

130. 154 F. Supp. 2d 27 (D.D.C. 2001).

131. *Id.* at 29.

132. *Id.* at 30.

133. *Id.* at 37.

134. *Id.* at 37–38.

135. *Id.* at 38 (examining Sutherland v. Islamic Republic of Iran, 151 F. Supp. 2d 27 (Ct. Int'l. Trade 2001); Flatow v. Islamic Republic of Iran, 999 F. Supp. 1 (D.D.C. 1998); and Anderson v. Islamic Republic of Iran, 90 F. Supp. 2d 107 (D.D.C. 2000)).

136. 180 F. Supp. 2d 78 (D.D.C. 2001).

137. *Id.* at 81.

The case does not add much in the way of analysis, instead citing to prior cases already discussed, although, because the incident did take place in the territory of the state sponsor of terrorism, the court explored the parameters of the requirement that the plaintiff first offer to arbitrate the claim.[138] Libya raised the arguments that the AEDPA's jurisdiction theory violated international law; that Congress lacked the authority to enact the AEDPA; that it violated the separation of powers doctrine; and that it violated equal protection.[139] Noting that these arguments had been rejected in *Prince*, *Daliberti*, *Flatow*, and *Rein*, the court rejected them as well.[140] To date, no further action has been taken in the case.

13. *Wagner*

Wagner v. Islamic Republic of Iran[141] arose out of the 1984 suicide bombing of the U.S. Embassy in Beirut, Lebanon, by a member of the Hizballah, funded and directed by Iran and the MOIS. Navy Petty Officer First Class Michael Wagner was killed at his duty station in the blast.[142] Once again the court took as settled points the issues discussed in this paper and concentrated on the award of damages.[143] Wagner's estate was awarded $3,281,245, his father $5 million, his mother's estate $3 million, and his two siblings $2.5 million each.[144] The court noted that the FSIA authorized punitive damages against a foreign "agency or instrumentality" but not against a state[145] and that punitive damages had been calculated in prior cases at an amount equal to three times the amount Iran annually budgeted for MOIS to spend on terrorism. The court went on to award $300 million in punitive damages.[146]

14. *Weinstein*

Finally, on October 31, 2001, in *Weinstein v. Islamic Republic of Iran*,[147] a case that arose out of the same Hamas terrorist bombing as *Eisenfeld*, *supra*, the court held that, when a foreign state does not appear, the court will not take judicial notice of prior testimony in a case arising out of the same incident. Nor will it apply collateral estoppel to allow the plaintiff to rely on the prior case's findings of fact and conclusions of law.[148] However, the court said that it could base its decision on affidavits by witnesses in the prior case or transcripts from the case.[149] It is assumed that this case will now go forward to an award of damages, but, to date, there have been no additional reported developments.

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138. *Id.* at 82–83. The court found that Simpson had met the requirement.
139. *Id.* at 80.
140. *Id.* at 84–85.
141. 172 F. Supp. 2d 128 (D.D.C. 2001).
142. *Id.* at 130.
143. *Id.* at 134.
144. *Id.* at 136–37.
145. *Id.* at 137 (citing 28 U.S.C. § 1603, 1603(b)).
146. *Id*. at 137.
147. 175 F. Supp. 2d 13 (D.D.C. 2001). The case was heard as a bench trial as required by the FSIA. 28 U.S.C. § 1608, 1608(e) (2000).
148. *Weinstein*, 175 F. Supp. 2d at 16–21.
149. *Id.* at 21–22.

IV. THE UNANSWERED QUESTIONS

A. What is a "State"?

By definition, the State Sponsors of Terrorism exception applies only to states. As noted in the context of the discussion of *Ungar v. Palestinian Authority*,[150] the Palestinian Authority is not a state and so must be sued under the Antiterrorism Act of 1991 (ATA). More troubling, Afghanistan's Taliban government was not recognized as a state by the United States on September 11.[151] Now it has effectively ceased to exist and a new "state" supported by the United States is taking its place. Could the Taliban ever be sued under the FSIA?[152]

B. Who is a "Sponsor"?

A state may actively support terrorists with money, arms, or shelter. A state may passively support terrorists by allowing them to establish a secure haven as a base of operations. A state may do so willingly or unwillingly.[153]

What if one lacks the ability to reign in a terrorist group that is within one's own territory? Assuming, *arguendo*, that the Palestinian Authority is a state, is Yassar Arafat sponsoring the Hamas terrorist group, which is based in Palestine, when, as some U.S. officials concede, he may be unable to stop them?[154]

C. What is "Terrorism"?

As the *Flatow* court stated, "[a]ttempts to reach a fixed, universally accepted definition of international terrorism have been frustrated both by changes in terrorist methodology and the lack of any precise definition of the term 'terrorism.'"[155] Or, as one Texas-based columnist succinctly put it, "one man's terrorist is another man's freedom fighter."[156] Can any attack on a military target be considered terrorism? Depending on the answer, arguably the attack on the U.S.S. Cole was not a terrorist act.[157]

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150. 153 F. Supp. 2d 76 (D.R.I. 2001).

151. Peter Slevin & Vernon Loeb, *Issues of Proof Emerge as U.S. Seeks Coalition Against Terror; Evidence Difficult to Find in Identifying State Sponsors*, WASH. POST, Sept. 20, 2001, at A10.

152. Perhaps anticipating this problem, speaking at the *Texas International Law Journal* Symposium on International Litigation, leading plaintiffs' attorney Lee Kreindler suggested that there may have been Iraqi support for the September 11 terrorists. Of course, Iraq is amenable to suit under the FSIA, although collection of judgments remains an issue.

153. These questions were also posed by Professor Ved Nanda in a lecture, "Combating International Terrorism: The Role of International Law and Policy," presented November 14, 2001 at Syracuse University College of Law (notes on file with the author; videotape available through the Syracuse University H. Douglas Barclay Law Library).

154. Kathy Kiely, *Extremist Voices Drown Out All Others in Mideast; Moderates 'Disappear' as Violence Hardens the Positions of Both Israelis and Palestinians*, USA TODAY, Apr. 5, 2002, at A1, *available at* 2002 WL 4723400.

155. Flatow v. Islamic Republic of Iran, 999 F. Supp. 1, 17 (D.D.C. 1998) (citing U.S. DEPT. OF STATE, PATTERNS OF GLOBAL TERRORISM at vi, 1, 17); Louis Rene Beres, *The Meaning of Terrorism—Jurisprudential and Definitional Clarifications*, 28 VAND. J. TRANSNAT'L L. 239 (1995).

156. Molly Ivins, *Time to Force Mideast Deal*, SYRACUSE POST-STANDARD, Dec. 19, 2001, at A14.

157. The ATA defines "international terrorism" as activities that:

D. How Does a State Cease to be a State Sponsor of Terrorism?

No state has ever been taken off the list, although the State Department has indicated that it would like to do so, or at least feels it has the power to do so.[158] It would seem that holding out the possibility of being removed from the list might be a useful diplomatic tool, for example in dealings with Iran.

On the other hand, families of those who were killed on the Pan Am Flight 103 bombing recently expressed the fear that Libyan leader Moammar Gadhafi was attempting to join the international war on terrorism and thereby secure reduced sanctions against Libya.[159] Remember, too, that Libya has substantial oil reserves.[160]

E. Must the Terrorism Supported by the State Sponsors be Directed Against the United States?

The original motivation for the FSIA amendment regarding state sponsors of terrorism was an act that blew up an American plane bound for America and killed 270 people, most of them American.[161] But we have seen a number of examples where the terrorism was aimed exclusively or at least primarily at Israel. There, U.S. victims have been "collateral damage," and the terrorists' target was Israel, not any U.S. policy toward Israel. If you feel, as I do, that the FSIA cannot by itself create constitutional personal jurisdiction, but that minimum contacts must be found, a terrorist bombing such as that in *Flatow* provides far fewer contacts than the Pan Am 103 bombing in *Rein*.

F. Who Belongs on the List of State Sponsors Today?

The United States initiated the list of state sponsors of terrorism in 1979 after the passage of the Export Administration Act of 1979,[162] and, as noted above, the same seven countries have remained on the list since the Act was implemented: Iran, Syria, Sudan,

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

18 U.S.C.A. § 2331 (Supp. 2002).

158. Barbara Slavin, *Terrorist states' list should be flexible, State official says targeting the real 'troublemakers*,*'* USA TODAY, Apr. 13, 2000, at A14.

159. Mark Libbon, *Don't trust Libya, Flight 103 kin say*, SYRACUSE POST-STANDARD, Nov. 16, 2001, at A14. At the time of publication of this article, Libya was expected to accept responsibility for the Lockerbie bombing as well as pay out millions in compensation to the families of those killed in the explosion. Lorna Hughes, *Libya: We're Guilty: Gaddafi to Admit Lockerbie Bombing; He'll Claim He Didn't Issue Order*, SCOTTISH DAILY REC. & SUNDAY MAIL LTD., Sep. 22, 2002, at 8.

160. *Id.*

161. *See* McKay, *supra* note 22, at 440 n.5.

162. 50 U.S.C., app. §§ 2401–20 (1994 & Supp. V 1998).

North Korea, Cuba, Libya, and Iraq.[163] Arguments can be made that some countries on the list no longer deserve that status, and arguments can likewise be made that, for political reasons, countries not on the list do belong there.

1. Countries on the List[164]

a. Iran

At one time, Iran was estimated to be spending $100 to $150 million a year in support of terrorist activities[165] and is one of six countries feared by the United States to be building biological weapons.[166] Since Mohammad Khatami was elected President in 1997, he has condemned past actions and given indications that Iran is ready to move forward into new relations with the world community of nations. Opposition in Iran, however, continues to express hatred for the West and the United States in particular.[167] The history of U.S. relations with Iran; the CIA's propping up of the Shah of Iran's corrupt regime; the Shah's fall and the rise of the Ayatollah Khomeni are all events that led to the cases discussed up to this point and need not be discussed in detail here. When should Khatami be rewarded and supported by having his nation removed from the list of state sponsors of terrorism? Apparently not in the near future, as his nation has been included in the "axis of evil."[168]

b. Iraq

Saddam Hussein's regime must sit "at the very top of the list"[169] of state sponsors of terrorism. As a member of the "axis of evil" it also tops the list of the nations that President Bush and his advisors are considering for phase two of the war against state sponsors of terrorism when the war in Afghanistan winds down.[170] Iraq is one of six countries feared by the United States to be building biological weapons.[171]

c. Syria

Syria is also one of six countries feared by the United States to be building biological weapons.[172] One case is pending against Syria under the FSIA, but it has not proceeded beyond a Surrogate's Court decision and provides little instruction. In *In the Matter of the*

163. 22 C.F.R. § 126.1(d).

164. *See id.*

165. Cicippio v. Iran, 18 F. Supp. 2d 62, 68 (D.D.C. 1998).

166. Andrew Milga & Joe Battenfeld, *No Escape; Noose Tightens around Osama*, BOSTON HERALD, Nov. 20, 2001, *available at* 2001 WL 3817159.

167. *See* MEHDI MOSLEM, FACTIONAL POLITICS IN POST-KHOMENI IRAN (2002).

168. President George W. Bush, Message from the President of the United States transmitting a Report on the State of the Union (Jan. 29, 2002), *in* H.R. DOC. NO. 107-157, Feb. 4, 2002, at 3 [hereinafter State of the Union Address].

169. David Sanger, *After the Taliban, Who? Don't Forget North Korea*, N.Y. TIMES, Nov. 25, 2001, sec. 4, at 5.

170. *Id.*

171. Milga & Battenfeld, *supra* note 166.

172. *Id.*

Estate of Ira Weinstein,[173] the Surrogate's Court granted letters of administration to the petitioners so that they could pursue an action against Syria under the FSIA.[174]

Yet, while the United States and Israel may consider Syria a state sponsor of terrorism, Syria was recently elected unopposed to the United Nations Security Council with the sole exception of Israel. Of 177 eligible voting nations, 160 voted in favor of Syria, and the United States did not offer any opposition.[175]

d. Sudan

Sudan is also one of six countries feared by the United States to be building biological weapons.[176] The country has been locked in a civil war that has cost two million lives; the rebel-held territories of the south are predominantly Christian, while the north is held by Moslems who repress Christians.[177] Perhaps Sudan should be used as an example of a nation lacking the ability to cleanse itself of terrorists.

e. North Korea

In an interview conducted with Michael Sheehan, the State Department's "chief terrorism fighter," which took place before September 11, it was suggested that North Korea was the most likely candidate for removal from the list.[178] However, John Bolton, under secretary of state for arms control and international security, believes that North Korea has an "extremely disturbing" biological weapons program and might be helping Osama bin Laden.[179] It may be true that "President Kim Jong Il abandoned his father's habit of sponsoring terrorism,"[180] but if that is not the case, it bears noting that North Korea has both nuclear weapons and the medium range missiles to put them at least in South Korea and Japan. Denomination as a member of the "axis of evil" may have hurt fledgling efforts at rapprochement with South Korea.

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173. 712 N.Y.S.2d 300 (N.Y. Sur. Ct. 2000).

174. *Id.* at 303. The facts present a valid cause of action under the FSIA as interpreted. The decedent, Ira Weinstein, a U.S. citizen resident in Israel, was killed in Israel in 1996 as a result of a terrorist suicide bombing allegedly sponsored by Syria. *Id.* at 301. However, the case does raise the question that I asked earlier regarding the significance of the fact that the terrorism in question was apparently aimed at Israel, not the United States. The Surrogate's Court devoted no analysis to the issues raised herein and in the context of the issue presented, there were no opposing parties. The Weinstein family has filed suit against Syria, the Syrian Defense Minister, and the commander of Syrian Intelligence, asking for $300 million—a figure in keeping with the *Flatow* award of $247.5 million. *See* Judith Miller, *Syria Is Sued by Family of Man Killed by '96 Bomb in Jerusalem*, N.Y. TIMES, Aug. 2, 2000, *available at* 2000 WL 25028230; Dan Izenberg, *Family of terror victim suing Syria for damages*, JERUSALEM POST, Aug. 3, 2000, at 4.

175. *See* Melissa Radler et al., *Syria elected to Security Council*, JERUSALEM POST, Oct. 10, 2001, *available at* 2001 WL 6614762.

176. Milga & Battenfeld, *supra* note 166.

177. Jon Sawyer, *Days in Midwest Helped Shape Rebel Chief; Sudan's John Garang Seeks Self-Determination in South*, ST. LOUIS POST-DISPATCH, Jan. 22, 2002, *available at* 2002 WL 2541827.

178. Slavin, *supra* note 158.

179. The Honorable John R. Bolton, Under Secretary of State for Arms Control and International Security, Statement at the Fifth Review Conference of the Biological Weapons Convention (Nov. 19, 2001), *available at* http://usinfo.state.gov/topical/pol/terror/01111905.htm (last visited Oct. 24, 2002).

180. Sanger, *supra* note 169.

f. Cuba

When is the last time Cuba has had enough money to sponsor a terrorist? Sheehan has indicated that Cuba does not really belong on the list anymore, stating, "I have told people on Capitol Hill, 'If you have a problem with Cuba on human rights, get your own sanctions, don't use mine.'"[181]

g. Libya

Even if not the host to the terrorists that committed the Pan Am flight 103 bombing,[182] Libya is certainly a state sponsor of terrorism. But when can it be considered reformed?

2. Countries Not on the List

a. Yemen

Yemen began as South Yemen, but it merged with northern Yemen in 1990.[183] Historically, Yemen should be on the list: seven Yemeni are among the al Qaeda prisoners in Guantanamo Bay, Cuba; the country has hidden al Qaeda members since 1990; John Walker Lindh, "the American Taliban," is a graduate of its religious schools; and the U.S.S. Cole was stationed in Yemen's port of Aden when it was bombed, presumably by al Qaeda forces living in Yemen.[184] However, Yemen has recently signaled a shift in policy following a visit to Washington by President Ali Abdallah Salih, evidenced by attacks by Yemeni forces on suspected al Qaeda strongholds and other efforts to eradicate terrorism.[185] Most recently, the United States has been supplying anti-terrorism training to Yemen.[186]

b. Afghanistan

Ironically, Afghanistan is not now nor has it ever been on the list. However, its absence may not be a problem. Libya was a state sponsor of terrorism in American eyes at the time of the Pan Am Flight 103 bombing, but at that time, the list had no jurisdictional effect. Congress, therefore, simply amended the FSIA to create jurisdiction over state sponsors of terrorism, thus creating, in the eyes of the federal courts thus far, subject matter and personal jurisdiction over the state of Libya for the act. (Although the *Rein* defendants have reserved the argument, no court has addressed the question of whether such actions

181. Slavin, *supra* note 158.

182. Alan M. Dershowitz, *I seek what Pan Am 103 families also seek: the truth*, SYRACUSE POST-STANDARD, Aug. 15, 2001, at A11, *available at* WL 5558585 (noting that a number of people were critical of the accuracy of the guilty verdict in the criminal trial of the suspects of the Pan Am 103 bombing).

183. Yemen and South Yemen merged in the early 1990s into Yemen. Salem Baalawi, *Two Yemens Merge, Citing Security Goal: Leader Says Move Benefits Gulf Region*, WASH. POST, May 23, 1990, at A33.

184. Walter Pincus, *Al Qaeda Leader Talked of Plot Against U.S. Embassy; Interrogation Led to Closing of Facility in Yemen*, WASH. POST, January 23, 2001, section A.

185. *Id.*

186. Michael R. Gordon, *A Nation Challenged: The Vice President; Cheney Asks Yemen to Join the Pursuit of Al Qaeda's Remnants*, N.Y. TIMES, Mar. 15, 2002, at A10.

are—or are analogous to—ex post facto laws or bills of attainder.[187]) At least one suit that would require that action to succeed has already been filed in the District Court for the Southern District of New York, the court that heard *Rein*, by a New Jersey woman whose husband was killed in the World Trade Center on September 11.[188]

The suit against Afghanistan raises at least two additional questions. First, and there are newspaper accounts to support this argument, could the Afghanistan government argue that it was powerless to expel Osama bin Laden and al Qaeda? Second, if that government has already been deposed by a coalition government that supposedly now opposes terrorism, who is actually paying the judgment, assuming that it can be collected? The answer is obvious: the Afghani people, who were also victims of the last regime and are in need not of adverse judgments, but of food, shelter, and humanitarian aid simply to survive.[189]

c. Israel

Of course, any Arab list of state sponsors of terrorism would start with Israel. Israel, of course, used terrorism in its efforts to end the British Mandate,[190] but that was a long time ago in the immediate post-World War II era. Also, those events took place before Israel became a state. In addition, Israel, probably the most frequent victim of terrorism in the world today, uses what could arguably be defined as "counter-terrorism" in self-defense. Is "counter-terrorism" the same as "terrorism," or is it some lesser evil? Is it the United States' right to answer that question for Israel? Obviously, Israel's situation raises many questions relevant to this article's inquiry, but a full treatment of the issues it presents is outside its scope.[191]

d. Pakistan

In a country where government services are becoming non-existent and private religious schools, *madrasas*, "have emerged as incubators of the jihad,"[192] let us not forget two key facts: (1) Pakistan was our sanctioned enemy, and deservedly so, before we decided it was our friend in the battle against Afghanistan,[193] and (2) Pakistan has thirty to forty nuclear weapons.[194] Simultaneous with the war on Afghanistan, terrorists struck in

187. U.S. Const. art. I, § 3. These arguments were developed by Professor David Meltz, John Marshall Law School, Atlanta.

188. Richard Milin, *Suing Terrorists and their Private and State Supporters*, N.Y.L.J., Oct. 29, 2001; Mark Hablett, *World Trade Center Victim's Wife Sues Taliban bin Laden; Lawyer Files Claims Including Wrongful Death and Racketeering*, N.Y.L.J., Oct. 12, 2001.

189. Given little attention in the surprisingly rapid destruction of the Taliban with a relatively low American casualty rate is the quality of the factions that look to be coming to power. For example, General Abdul Rashid Dostum, who is currently on our side, helped the Soviet Union kill a million Afghans; was a member of the Soviet puppet government; switched sides and helped overthrow them; ruled as part of the Taliban; and finally switched sides, and is—as of this writing—on the winning, Northern Alliance side. Molly Ivins, *The Good, the Bad and Jesse*, SYRACUSE POST-STANDARD, Nov. 19, 2001, at A8.

190. *See generally* TOM SEGEV, ONE PALESTINE, COMPLETE JEWS AND ARABS UNDER THE BRITISH MANDATE (Haim Watzman trans., 2000) (detailing Arab terrorism against Zionists, Zionist terrorism against the British in context of the history of the British Mandate in Palestine, 1917–1948).

191. For a detailed treament of these issues, see *id.*

192. Ivins, *supra* note 189, at A8.

193. *Id.*

194. *Id.*

India and it was at least suggested that they were sponsored by Pakistan,[195] which disputes ownership of Kashmir with India. Whether related or not, India had just tested its latest missile, which is capable of carrying a nuclear weapon—which India has.

e. Saudi Arabia

Saudi Arabia is, of course, an ally, not a state sponsor of terrorism, but this designation has more to do with keeping America's SUVs on the road than with reality or justice. Fifteen of the nineteen 9/11 hijackers were born in Saudi Arabia as was bin Laden, and the bin Laden family fortune was made in Saudi Arabia, much of it from Western oil interests.[196] Saudi Arabia has allegedly been dragging its feet in response to U.S. requests to eliminate terrorist money laundering as well.[197]

The events that led to *Saudi Arabia v. Nelson*[198] occurred prior to the 1996 amendments to the FSIA. In that case, an American was shackled, tortured and beaten, denied food for four days, and kept in a Saudi prison for thirty-nine days because he blew the whistle on a Saudi hospital's safety violations.[199] He then failed in his efforts to bring suit in the United States because the Supreme Court ultimately, and correctly, concluded that the United States did not have jurisdiction over Saudi Arabia under the commercial activity exception, Section 1605(a)(2).[200] His case would have benefited from the enactment of the state sponsors exception. Indeed, Nelson's attorney was disappointed that the FSIA amendment was fashioned in such a way that Nelson could not benefit from the change.[201]

f. Somalia

Somalia, which has been in turmoil at least since 1992 when U.S. troops were brought in to protect humanitarian food deliveries, is alleged to have ties with Al-Itihaad Al-Islamya, which made President Bush's list of twenty-two international terrorist organizations.[202] There has been from time to time suspicion that bin Laden may have escaped to Somalia.[203] There is also talk of an invasion of Somalia.[204]

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195. Rama Lakshmi, *India Wages a War of Words; Pakistan Again Assailed for Attack, U.S. for Its Response*, WASH. POST, Dec. 19, 2001, at A32.

196. Samson Mulugeta, *America's Ordeal/He's One of Their Own/Bin Laden seen as hero in Yemen*, NEWSDAY, Sept. 30, 2001, at A7.

197. Karen DeYoung, *Saudis Seethe Over Media Reports on Anti-Terror Effort*, WASH. POST, Nov. 6, 2001, at A1.

198. 507 U.S. 349 (1993).

199. *Id.* at 352–53.

200. *Id.* at 356.

201. GERSON & ADLER, *supra* note 40, at 228. *See also* Alexander J. Mueller, Nelson v. Saudi Arabia *and the Need for a Human Rights Exception to the Foreign Sovereign Immunities Act*, 13 N.Y. INT'L L. REV. 87 (2000).

202. *See* Davan Maharaj, *Response to Terror U.S. is Urged Not to Attack Somalia Africa: Nation may be target in terror war. U.N. official says strike would disrupt a fragile security and worsen the poverty,* LOS ANGELES TIMES, Jan. 10, 2002, *available at* 2002 WL 2445270.

203. *See generally* Barbara Slavin, *Arab TV broadcasts new bin Laden clip; Al-Qaeda chief lauds attacks of Sept. 11, condemns U.S. strikes*, USA Today, Dec. 27, 2001, at A3, *available at* 2001 WL 5479413.

204. *Id.*

g. The Palestinian Authority

The Palestinian Authority cannot be a state sponsor of terrorism under the FSIA because it is not a state. Thus, in *Ungar v. Palestinian Authority*[205] when five members of Hamas opened fire on a vehicle driven in Israel by U.S. citizen Yaron Ungar, killing him and his wife, the Ungars' estate filed suit under the ATA[206] but could not go after the Palestinian Authority under the FSIA.

h. The United States

Consider Oliver North and the sales of arms to terrorist state Iran and the use of the funds received from that sale to fund the terrorist government of Nicaragua, both of which governments are now defunct. Was this state sponsorship of terrorism? Does the training that the United States provided at the School for the Americas make it a state sponsor of terrorism?[207]

V. ARE STATE SPONSORS OF TERRORISM "PERSONS" ENTITLED TO CONSTITUTIONAL PROTECTIONS SUCH AS DUE PROCESS?

I have argued previously in another article that foreign states are "persons" entitled to Due Process protection,[208] and will talk about it only very briefly here. The Supreme Court has not directly answered the question. However, in *Republic of Argentina v. Weltover*,[209] the Court "assumed" without "deciding" that a foreign state is a person for Due Process purposes.[210]

However, the Second Circuit, where much of the FSIA litigation has taken and will take place, held in a commercial-exception FSIA case that a state *was* a person.[211] In *Eisenfeld*, a District of Columbia District Court case, the court impliedly held that a state was a person but held that Iran needed minimum contacts with the United States in order for there to be personal jurisdiction.[212] By contrast, the *Flatow* court reached the opposite conclusion based upon the following analysis of *Weltover*:

> The Court in *Weltover* did not find it necessary to decide this issue, given the presence of "minimum contacts" sufficient to satisfy the Due Process Clause under the facts of that case, [sic] During its discussion of direct effects and minimum contacts in *Weltover*, however, the Court referred to *South Carolina v.*

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205. 153 F. Supp. 2d 76 (D.R.I. 2001).

206. *Id*. at 82–83. 18 U.S.C. § 2333, enacted as part of the Antiterrorism Act of 1991, provides a cause of action for Americans injured in their person, property or business by an act of international terrorism.

207. *See generally* Timothy Kepner, Comment, *Torture 101: The Case Against the United States for Atrocities Committed by School of the Americas Alumni*, 19 DICK. J. INT'L L. 475 (2001).

208. *See* Sealing, *supra* note 4, at 438. I am in the process of writing a separate article on that point, and in the interest of brevity, I only summarize the pertinent points here.

209. 504 U.S. 607 (1992).

210. *Id.* at 619.

211. *See* Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 313–15 (1981), *cert. denied*, 454 U.S. 1148 (1982), *discussed in* Sealing, *supra* note 4, at 429-32 nn.250–64.

212. *See supra* notes 123–129.

> *Katzenbach*, in which it had stated that the States of the Union are not persons for the purpose of the Due Process Clause, [sic][213]

The Court interpreted this analysis as suggesting that, if faced with the issue, it would find that a state was *not* a person, and a number of lower courts have agreed in the cases discussed above. Commentators have come out on both sides of the issue.[214]

If the correct answer is "no," foreign states are not persons for Due Process purposes, then the following anomalous result occurs: A state that sponsors terrorism is subject to personal jurisdiction without the protection of Due Process under the FSIA, but a lesser, non-state entity such as The Palestinian Authority or even the PLO is accorded all the protection of Due Process under the ATA.[215]

VI. SHOW ME THE MONEY

To date, the dollar amounts awarded (but, as already discussed, not collected) are astronomical and have grown steadily. It is now fairly well settled that kidnapping and torture victims receive $10,000 per day of confinement; that deceased victims' estates receive very ample compensatory damages; that surviving close relatives receive up to $5 million in solatium; and, finally, that the punitive damage award (at least against Iraq) is set at $300 million.[216] To put this in perspective, assuming 3,000 victims of 9/11 and a punitive damage award of $300 million per wrongful death, the amount of the judgment against Afghanistan would be $900 billion, without even factoring in solatium and actual damages such as lost wages. Contrast that figure with the aid said to be needed by that nation. The United Nations estimates Afghanistan will need $1.7 billion in aid over the next year and set a goal of $10.2 billion over five years. Worldwide, a number of nations have pledged a total of $4.9 billion to be distributed over several years.[217]

It is one thing to win a massive judgment; it is quite another thing to collect it. Assume that it can be collected based on the United States' freezing of assets of the state sponsor of terrorism in the United States. (Since September 11, the United States and other countries have frozen more than $80 million in terrorist-related accounts.[218]) Is it in the nation's best interests for the plaintiffs and their lawyers to be given these frozen assets,

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213. Flatow v. Islamic Republic of Iran, 999 F. Supp. 1, 19 (D.D.C. 1998) (emphasis added) (citations omitted).

214. *Compare* Lee Caplan, *The Constitution and Jurisdiction Over Foreign States: The 1996 Amendment to the Foreign Sovereign Immunities Act in Perspective*, 41 VA. J. INT'L L. 369 (2001) (arguing that foreign states are not "persons" entitled to Due Process protections) *and* Glannon & Atik, *supra* note 4 (concluding that state sponsors of terrorism are *not* entitled to Due Process) *with* Susan Ross, *In the Shadow of Terror: The Illusive First Amendment Rights of Aliens*, 6 COMM. L. & POL'Y 75 (2001) (arguing that courts should look beyond deferential statutory interpretation to judge the constitutionality of antiterrorist laws that directly reduce the freedoms of non-citizens) *and* Molora Vadnais, Comment, *The Terrorism Exception to the Foreign Immunities Act: Forward Leaning Legislation or Just Bad Law?*, 5 UCLA J. INT'L L. & FOREIGN AFF. 199 (2000) (arguing that jurisdiction over foreign states should be limited by the effects doctrine).

215. *See* Ungar v. Palestinian Authority, 153 F. Supp. 2d 76 (D.R.I. 2001).

216. Hill v. Republic of Iraq, 175 F. Supp. 2d 36, 48–49 (D.D.C. 2001).

217. *See* Alan Sipress & Clay Chandler, *U.S. Sets Pledges on Afghan Renewal: First-Year Donation To Be $297 Million*, WASH. POST, Jan. 21, 2002, at A1.

218. Adam Clymes, *A Nation Challenged: Money Trail; Mixed Praise for Efforts to Stanch Terror Funds*, N.Y. TIMES, Jan. 30, 2002, at A9.

thereby eliminating the government's ability to use the funds as a possible carrot that can be offered up in exchange for the state's renunciation of support for terrorism?[219]

Further, the most recent litigation following *Flatow* makes collection even more difficult. Recall that in *Flatow* a default judgment of more than $247.5 million was assessed against Iran, the MOIS and named individuals, including the Ayatollah Khomeni in 1998.[220] To date, nothing has been collected. In *Flatow v. Alvi Foundation*,[221] an unpublished opinion by the Fourth Circuit, the court rejected Flatow's attempt to levy against the Alavi Foundation because the U.S.-based organization was not connected with the named defendants.

Since 2000, successful FSIA plaintiffs can be paid their compensatory damages from the U.S. Treasury.[222] However, this remedy has tremendous problems. First, the claimants must give up all claim to punitive damages, which are, by far, the largest portions of the claims. For example, the estate of Friar Jenco and his six siblings could demand $14,640,000 from the U.S. Treasury but would thereby forego $300 million in punitive damages.[223] Second, any sort of moral victory by victims or their decedents is eliminated, since the torturers, kidnappers, and murderers pay nothing and the punitives are eliminated.[224]

VII. CONCLUSION

The solutions to the problems posed by international terrorism lie in federal funds for the victims and their families and in multilateral global diplomacy. Putting the matter in the hands of litigators and haling foreign sovereigns into U.S. courts based on an expansive notion of the passive personality principle and politically motivated notions of whether a given nation is a "State Sponsor of Terrorism" or an "ally" is not the solution.

But we seem bent on moving backward into unilateralism. Are we entering the age of the Pax Americana, or, alternatively, Imperial America? "America will lead the world to peace," according to President Bush.[225] But can it do so unilaterally? Look at the state sponsors of terrorism exception to sovereign immunity in the context of other recent events. The United States has refused to sign the Kyoto Protocols on global warming, already signed by some 150 countries;[226] unilaterally withdrawn from the 1972 Anti-Ballistic Missile Treaty;[227] made a blockbuster eleventh hour announcement that scuttled the anti-

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219. *See* Parloff, *supra* note 5. "If the government has frozen a rogue nation's assets, for instance, [the State Department] may want to use that property as leverage to achieve a foreign policy objective rather than handing hundreds of millions of dollars of it over to a single plaintiff and his lawyers."

220. *Flatow* is discussed *supra* notes 55–66 and accompanying text.

221. 225 F.3d 653 (4th Cir. 2000).

222. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 2002, 114 Stat. 1464 (2000).

223. Jenco v. Islamic Republic of Iran, 154 F. Supp. 2d 27, 40 (D.D.C. 2001).

224. Victims of Trafficking and Violence Protection Act, § 2002.

225. Mike Allen, *Bush Cites Need to Overhaul Military Threat Spurring Dramatic Changes, President Says*, WASH. POST, Dec. 12, 2001, at A3.

226. Ilene Prusher, *Tokyo irked by US stance of Kyoto*, CHRISTIAN SCIENCE MONITOR, Mar. 12, 2002, at 7 ("In the eyes of Japan and many U.S. allies, the Bush administration's decision not to ratify the Kyoto Protocol is one of the many signals that Washington is growing increasingly unilateralist in the six months since the Sept. 11 attacks on America.").

227. Treaty on the Limitation of Anti-Ballistic Missile Systems, May 26, 1972, U.S.-U.S.S.R., 23 U.S.T. 3435. Pursuant to Article XV of the treaty with the Soviet Union, either party can withdraw with six months' notice. President Bush, after failing to negotiate a mutual revision of the treaty, announced the withdrawal so that he can begin development of air- and sea-based ABMs. (Fixed, land-based ABMs, such as the ones the U.S. has

bioterrorism meeting;[228] delivered an ill-conceived "axis of evil" speech[229] that has disturbed allies;[230] opened up a discussion of developing nuclear weapons for use against sponsors of terrorism;[231] refused to participate in the creation of a permanent war crimes tribunal;[232] and planned military tribunals that have troubled Spain and other European allies.[233] The victims of prior terror and those at risk in the future will both be better served by a little more diplomacy and a little less unilateralism.

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already fired, may be tested under the treaty.) *See* J. Peter Scoblic, *President sending wrong message at wrong time*, SYRACUSE POST-STANDARD, Dec. 16, 2001, at D4 ("Exiting the treaty just as we have asked for international help in rooting out al-Qaida and combating global terrorism would be nothing less than a slap in the face of the world community."). Professor Kunich holds the opposite view. *See* John C. Kunich, *Withdrawal from pact vital to U.S. security*, SYRACUSE POST-STANDARD, Dec. 16, 2001, at D4 (arguing that a missile defense system would reduce the risk of a missile attack on America by a terrorist group or a state sponsor of terrorism).

228. For a discussion of the United States' rejection of a protocol to strengthen and implement the Biological and Toxin Weapons Convention, see Graham S. Pearson, *The US Rejection of the Protocol at the Eleventh Hour Damages International Security Against Biological Weapons*, THE CHEMCIAL AND BIOLOGICAL WEAPONS CONVENTIONS BULLETIN, Issue No. 53, Sept. 2001, at 8, 18, 23, *available at* http://www.fas.harvard.edu/~hsp/bulletin/cbwcb53.pdf (last visited Oct. 23, 2002).

229. State of the Union Address, *supra* note 168, at 1.

230. David Sanger, *Allies Hear Sour Notes in "Axis of Evil" Chorus*, N.Y. TIMES, Feb. 17, 2002, at A18.

231. Sam Nunn, et al., *Still Missing: A Nuclear Strategy*, WASH. POST, May 21, 2002, at A17.

232. *An International Court Press; Talks: The effort to set up a permanent war crimes tribunal proceeds without U.S. backing*, LOS ANGELES TIMES, Dec. 20, 2001, at A28.

233. Sam Dillon & Donald G. McNeil, Jr., *Spain insisting 8 men be tried in civilian court; Officials frown on U.S. plans for military tribunals*, CHI. TRIB., Nov. 25, 2001, at C12.