Compensating Victims of Terrorism or Frustrating Cultural Diplomacy? The Unintended Consequences of the Foreign Sovereign Immunities Act's Terrorism Provisions

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The law of unintended consequences, often cited but rarely defined, is that actions of people—and especially of government—always have effects that are unanticipated or 'unintended.' Economists and other social scientists have heeded its power for centuries; for just as long, politicians and popular opinion have largely ignored it.[1]

Introduction

In 2008 and 2009, the Metropolitan Museum of Art hosted *Beyond Babylon: Art, Trade, and Diplomacy in the Second Millennium B.C.*, an exhibition that brought together nearly 350 artifacts originating from the Ancient

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1. Rob Norton, *Unintended Consequences, in* The Concise Encyclopedia of Economics (David R. Henderson, ed. 2008), *available at* http://www.econlib.org/library/Enc/UnintendedConsequences.html.

Near East.[2] Celebrating the era's transformation of the visual arts through cultural exchange, the show offered viewers the opportunity to view artifacts never before displayed in the United States.[3] The exhibit traced the historic developments—including improved diplomatic relations between rulers—which led to the cross-cultural trade of resources, aesthetics, and influence.[4] Initially, Syria committed to lending fifty-five objects to *Beyond Babylon*.[5] Just prior to the opening, however, Syria broke with the exhibition's theme of cultural exchange by declining to go through with their planned contribution.[6]

Traditionally, when an American museum receives a piece of art or an artifact from a foreign state it will petition the State Department for a grant of immunity, which protects the loaned object from being subject to attachment while in the United States.[7] Despite the Metropolitan's request, Syria remained concerned that recently passed amendments to the Foreign Sovereign Immunities Act (the FSIA) rendered any grant of immunity by the State Department moot.[8] Specifically, Syria feared that victims of terrorism who had recently obtained judgments in federal court would seek to attach the objects on loan to satisfy the multi-million dollar awards they had received.[9] Despite the Syrian government's desire to participate in the exhibition, the fifty-five pieces belonging to Syria only appeared in the show's catalog.[10] Syria's decision to refrain from participating in the exhibition represented a disappointing breakdown in present-day diplomatic relations.

In 1996, Congress amended the FSIA to allow a U.S. citizen to bring a claim in federal district court for damages resulting from a state-sponsored terrorist act if the United States has designated the foreign state a "state

2. *See* Metropolitan Museum of Art, Special Exhibitions, *Beyond Babylon: Art, Trade, and Diplomacy in the Second Millennium B.C.*, http://www.metmuseum.org/special/se_pastexhib.asp (select "All" for month and "2009" for year, follow "Go", then follow "Beyond Babylon: Art, Trade, and Diplomacy in the Second Millennium B.C.") [hereinafter Metropolitan Museum of Art].

3. *See id*; Holland Cotter, Art Review, *Beyond Babylon: Global Exchange, Early Version*, N.Y. TIMES, Nov. 20, 2008, at C25.

4. *See* Metropolitan Museum of Art, *supra* note 2.

5. *See* Cotter, *supra* note 3.

6. *See* Cotter, *supra* note 3 ("The Met submitted applications for immunity from seizure for all the borrowed foreign works . . . but finally decided that the amendment jeopardized the Syrian loans, so decided not to go through with them.")

7. *See* 28 U.S.C. § 2459 (2006); *see also* Statement, Archaeological Institute of America, On the Attachment of Cultural Objects to Compensate Victims of Terrorism (Feb. 9, 2009), *available at* http://www.archaeological.org/pdfs/AIAAttachment.pdf [hereinafter AIA Statement].

8. *See* AIA Statement, *supra* note 7 ("[I]n light of the 2008 amendments [to the FSIA], even a State Department grant of immunity might not protect the objects from attachment by individuals who have claims against Syria for supporting terrorist activity.").

9. *See* Gates v. Syrian Arab Republic, 580 F. Supp. 2d 53, 75 (D.C. Cir. 2008) (awarding over $400 million in damages to surviving family members of victims of terrorism); Cotter, *supra* note 3.

10. *See* Cotter, *supra* note 3.

sponsor of terrorism."[11] In the years following the passage of the amendment, courts awarded victims of terrorism substantial monetary damages.[12] Nevertheless, successful plaintiffs were unable to collect even a fraction of their judgments.[13] In an effort to facilitate the ability of plaintiffs to recover their judgments, Congress in 2008 expanded the scope of foreign-owned assets that are attachable under the provisions of the FSIA.[14] Proponents of the amendments argue that the FSIA now provides another means for the Obama administration to fight terrorism: using the courts to penalize those states that sponsor terrorism.[15] Such arguments, however, fail to consider the cost of further alienating countries that are already antagonistic toward the United States.[16]

American political scientist Milton C. Cummings describes cultural diplomacy as the process through which two countries exchange ideas, values, systems, traditions, beliefs, and other aspects of culture with the shared goal of fostering understanding between their governments and citizens.[17] Traditional forums for such cultural exchange include the arts, sports, literature, music, science, and industry.[18] For example, countries and private organizations engage in cultural diplomacy when they organize cross-cultural museum exhibitions or sporting events.[19] In particular, the experience of art can foster and promote understanding and cooperation

11. Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221(a), 110 Stat. 1214 (1996) (codified at 28 U.S.C. § 1605(a)(7)).

12. *See* Michael T. Kotlarczyk, Note, *"The Provision of Material Support and Resources" and Lawsuits Against State Sponsors of Terrorism*, 96 GEO. L.J. 2029, 2044 (2008) (discussing the "substantial punitive damage awards" against Iran and Cuba shortly after the 1996 amendments).

13. *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, 499 (2002); Alicia M. Hilton, *Terror Victims at the Museum Gates: Testing the Commercial Activity Exception Under the Foreign Sovereign Immunities Act*, 53 VILL. L. REV. 479, 480 (2008) (noting that "more than ten years after the attacks, the plaintiffs in [*Rubin*] have yet to realize any meaningful recovery.").

14. 28 U.S.C.A. § 1605A(g), National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-81, § 1083, 122 Stat. 338 [hereinafter NDAA].

15. *See* Steven R. Perles & Maj. Gabriel Lajeunesse, *Policy Options for the Obama Administration: The Foreign Sovereign Immunities Act as a Tool Against State Sponsors of Terrorism*, 22nd Gustov Sokol Program on Private International Law : Human Rights Litigation on US Courts; University of Virginia Law School (2009), *available at* http://works.bepress.com/cgi/viewcontent.cgi?article=1013&context=gabriel_lajeunesse.

16. *See* Gartenstein-Ross, *supra* note 13.

17. *See* Milton C. Cummings, Jr., Washington, D.C: Center for Arts and Culture, *Cultural Diplomacy and the United States Government: A Survey* 1)(2003), *available at* http://www.culturalpolicy.org/pdf/MCCpaper.pdf.

18. *See* Institute for Cultural Diplomacy, What is Cultural Diplomacy? http://www.culturaldiplomacy.org/index.php?en_culturaldiplomacy.

19. *See e.g.*, Cummings, *supra* note 17, at 6 (discussing the first cultural art exhibit exchange); David A. DeVoss, *Ping-Pong Diplomacy*, SMITHSONIAN, Apr. 2002, *available at* http://www.smithsonianmag.com/history-archaeology/pingpong.html (chronicling President Nixon's ability to achieve a diplomatic breakthrough with the People's Republic of China through a series of table tennis matches between American and Chinese athletes and quoting Chinese Premier Chou En-lai as stating that "[n]ever before in history has a sport been used so effectively as a tool of international diplomacy.").

among the diverse people and cultures of the globe.[20] Even the U.S. government believes "that citizens of other countries benefit from exposure to American works of art just as Americans benefit from exposure to the arts of other cultures."[21] Indeed, scholars argue that the United States' soft power—its ability to "attract others by the legitimacy of [its] policies and the values which underlie them"—depends on the effectiveness of cultural diplomatic efforts.[22]

Syria's decision to opt out of the Metropolitan's *Beyond Babylon* exhibit is just one example of the 2008 FSIA amendments' unforeseen and unintended consequences. Rather than providing a new weapon against terrorism or a means to compensate victims of terrorist acts, the FSIA's terrorism exception aggravates already strained relations between the United States and foreign nations that have historically sponsored terrorism directly or indirectly.[23] Therefore, to meet its goal of furthering diplomatic relations through cross-cultural exchange, the U.S. government must take strides toward unifying American foreign policy.

Currently, the courts play a prominent role under the FSIA's terrorism provisions, arguably usurping the executive's constitutional power to effectively conduct foreign affairs.[24] The Constitution does not grant the executive branch exclusive control over foreign policy or national security; however, many commentators argue that the president should exercise primary authority in this volatile field.[25] At a minimum, the Supreme Court has consistently held that the authority to shape foreign policy rests with the legislature and executive.[26] Although the political branches may in some sense share control over foreign affairs, it is the executive that is responsible for maintaining diplomatic relations and plays the principal role in forming and executing foreign policy.[27] The view that, when the two branches conflict, executive considerations should generally trump congressional considerations originated in the Founding Era.[28] Given that the Obama administration is focused on re-energizing American alli-

20. Position Paper, Ass'n of Art Museum Directors, Art Museums and the International Exchange of Cultural Artifacts (Oct. 2001), *available at* http://www.aamd.org/papers/documents/CulturalProperty_000.pdf.

21. *See id.*

22. *See* Joseph S. Nye, Jr., *The Decline of America's Soft Power: Why Washington Should Worry*, 83 FOREIGN AFF. 16, 19 (May-June 2004) [hereinafter Nye, *The Decline of America's Soft Power*].

23. *See* Kotlarczyk, *supra* note 12, at 2049 (characterizing citizens suits as "a clumsy way to pursue what should be delicate diplomacy); Anne-Marie Slaughter & David Bosco, *Plaintiff's Diplomacy*, 79 FOREIGN AFF. 102, 113 (Sept.-Oct. 2000) ("The looming presence of such judgments may actually make rogue governments defensive, discouraging dialogue, engagement, political reform, and integration by these states into international legal and financial regimes.").

24. *See* Kotlarczyk, *supra* note 12, at 2050-51.

25. *See id*; H. Jefferson Powell, *The President's Authority Over Foreign Affairs: An Executive Branch Perspective*, 67 GEO. WASH. L. REV. 527, 545-46 (1999).

26. *See* Powell, *supra* note 25, at 545 n.83.

27. *See id.* at 546.

28. *See id.* at 548.

ances[29]—indeed, President Obama has already made strides toward rebuilding ties with Syria[30]—the continued operation of the FSIA's terrorism provisions should be critically reassessed.

This Note examines the implications of the FSIA's terrorism exception by focusing on how the 2008 amendments have interfered with American museums' efforts at fostering international cultural exchange. Furthermore, this Note argues that it is not sound policy to allow victims of terrorism to sue foreign sovereigns at a time when the executive's foreign policy goals include the use of cultural diplomacy as a bridge to connect with countries that may be subject to the exception's waiver of immunity. Finally, this Note suggests that Congress should repeal the FSIA's terrorism provisions entirely, especially in light of the exception's limited compensatory and deterrence effects. Alternatively, Congress should delegate authority to the President to waive the terrorism provision's applicability to a designated state sponsor of terrorism in cases where the President determines that waiver will promote the security and diplomatic interests of the United States.[31]

Part I of this Note traces the development of the American doctrine of foreign sovereign immunity and presents the relevant congressional history of the FSIA. Part II explores the role of the executive in shaping foreign policy. Part III examines litigation involving the FSIA's terrorism provisions, highlighting the shortcomings and implications of the current terrorism exception. Part IV discusses the foreign policy of the Obama administration and draws inferences about the executive's view of the FSIA's terrorism provisions. This Note concludes that Congress needs to reexamine the validity of the terrorism exception to the FSIA and, in the alternative, suggests avenues by which Congress could amend the FSIA to avoid the unintended consequences of the present statutory framework.

I. Tracing the History of Foreign Sovereign Immunity Determinations

A. The Doctrine of Foreign Sovereign Immunity

It is an undisputed principle of domestic and international law that a state should be free from the jurisdiction of the courts of another state.[32] The United States follows a restrictive view of sovereign immunity under

29. *See* White House, Foreign Policy, http://www.whitehouse.gov/issues/foreign-policy (last visited May 24, 2010) ("The United States seeks to engage in dialogue that is honest and grounded in mutual respect, as the best way to resolve disagreements and work towards shared interests. We are committed to . . . building new [partnerships] to confront the challenges of the 21st century.").

30. *See* Mark Landler, *Obama Will Send Envoy to Syria, Officials Say*, N.Y. TIMES, June 24, 2009, at A10 ("President Obama has decided to send an ambassador to Syria after a four-year hiatus . . . in a sign of the deepening engagement between the Obama administration and the Syrian government.").

31. *See infra* notes 106–16.

32. *See* Elizabeth L. Bahr, Comment, *Is the Gavel Mightier than the Sword? Fighting Terrorism in American Courts: The Problematic Implications of Using the Foreign Sovereign Immunities Act to Compensate Military Victims of America's War on Terror*, 15 GEO. MASON L. REV. 1115, 1121 (2008).

which sovereigns enjoy immunity for sovereign or public acts but not for private acts.[33] Although various justifications for the doctrine of sovereign immunity have surfaced over time, the generally accepted explanation provides that "the subjection of . . . governments to private litigation might constitute a serious interference with the performance of their functions and with their control over their respective instrumentalities, funds, and property."[34]

Because U.S. jurisdiction over persons and property within its territory is not subject to external limitations, foreign states do not enjoy a constitutional right to immunity in U.S. courts.[35] Rather, the Supreme Court considers foreign state immunity to be a matter of grace and comity.[36] Accordingly, for the better part of American history the courts looked to the political branches for guidance in determining whether to exercise jurisdiction over a foreign sovereign;[37] in particular, the judiciary often deferred to the executive branch, which frequently recommended immunity for friendly sovereigns.[38]

In 1952, Jack B. Tate, the acting legal adviser to the Secretary of State at the time, promulgated the Tate Letter.[39] The Tate Letter supplanted the doctrine of near absolute foreign sovereign immunity that had dominated American courts for nearly two centuries with a "restrictive theory" of sovereign immunity.[40] The "restrictive theory" allows foreign sovereigns to raise an immunity defense in cases involving public acts, but not private acts, thereby narrowing the applicability of the defense.[41] Pursuant to the Tate Letter, the State Department initiated a process to determine whether a claim brought by a U.S. citizen against a foreign sovereign involved a sovereign public or private act, either triggering or barring the defense of sovereign immunity.[42] Although the State Department did not consistently distinguish between public and private acts, the courts continued to accept the State Department's recommendations.[43] Indeed, the courts continued

33. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 451 cmt. a (1987).

34. *See* Joseph D. Block, *Suits Against Government Officers and the Sovereign Immunity Doctrine*, 59 HARV. L. REV. 1060, 1061 (1946).

35. Schooner Exchange v. McFaddon, 11 U.S. 116, 136 (1812). Chief Justice Marshall's opinion in *Schooner Exchange* is generally viewed as the source of U.S. foreign sovereign immunity jurisprudence. *See, e.g.*, Republic of Austria v. Altmann, 541 U.S. 677, 689 (2004).

36. *See Republic of Austria*, 541 U.S. at 689; Katherine Florey, *Sovereign Immunity's Penumbras: Common Law, "Accident," and Policy in the Development of Sovereign Immunity Doctrine*, 43 WAKE FOREST L. REV. 765, 780 (2008).

37. *See Republic of Austria*, 541 U.S. at 689.

38. *See* Florey, *supra* note 36, at 780–81.

39. *See id.* at 781.

40. *See id.*

41. *See* Bahr, *supra* note 32, at 1123.

42. *See id.*

43. *See* Florey, *supra* note 36, at 781; *see also Republic of Austria*, 514 U.S. at 690 ("The change in State Department policy wrought by the 'Tate Letter' had little, if any impact on federal courts' approach to the immunity analyses . . . courts continued to abide by [the State] Department's suggestions of immunity.").

to embrace the view once extolled by Justice Stone, namely that courts must refuse to exercise jurisdiction over foreign sovereigns when to do so would "embarrass the executive arm of the government in conducting foreign relations."[44] In practice, therefore, the policy announced in the Tate Letter led to unclear and inconsistent standards, often resulting in superfluous review.[45] Given the shortcomings of the Tate Letter and the perceived need to intelligibly inform parties when the defense of immunity would not bar suit against a foreign sovereign, Congress passed the FSIA in 1976.[46]

B. The Foreign Sovereign Immunities Act

The FSIA provides the comprehensive and exclusive statutory framework that governs whether a foreign sovereign may raise the defense of sovereign immunity.[47] The Act, like the Tate Doctrine, codifies a restrictive theory of sovereign immunity by generally granting a foreign sovereign immunity to suit in the United States and enumerating instances under which the defense will not bar an action.[48] Therefore, a plaintiff may only obtain jurisdiction over a foreign state defendant if the plaintiff's claim falls under one of the Act's exceptions.[49] For example, the Act strips a foreign state defendant of sovereign immunity in cases where the foreign state waives immunity;[50] where the plaintiff's claim is based upon the foreign state's commercial activity in the United States;[51] or where rights in property taken in violation of international law are at issue and the property is present in the United States.[52] Furthermore, the Act governs the extent to which a foreign state's property may be subject to attachment or execution.[53] Notably, the Act firmly places sovereign immunity determinations within the judgment of the courts—a sharp departure from nearly two hundred years of judicial deference to the executive branch's recommenda-

44. *See* Ex parte Republic of Peru, 318 U.S. 578, 588 (1943).

45. *See Republic of Austria*, 541 U.S. at 690–91 (quoting Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 488 (1983)) ("Thus, [because responsibility fell to the courts to determine whether sovereign immunity existed,] sovereign immunity determinations were made in two different branches, subject to a variety of factors, sometimes including diplomatic considerations. Not surprisingly, the government standards were neither clear nor uniformly applied.").

46. *See* Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891; Bahr, *supra* note 32, at 1125.

47. *See Republic of Austria*, 541 U.S. at 691 ("The FSIA [contains] a set of legal standards governing claims of immunity in every civil action against a foreign state. . .") (internal quotations omitted); H.R. REP. NO. 94-1487, at 12, *reprinted in* 1976 U.S.C.C.A.N. 6604, 6610 [hereinafter HOUSE REPORT]. The House Report states that the FSIA "sets forth the sole and exclusive standards to be used in resolving questions of sovereign immunity."

48. *See* 28 U.S.C. §1605; Bahr, *supra* note 32, at 1125.

49. *See* Hilton, *supra* note 13, at 504–05.

50. 28 U.S.C. § 1605(a)(1).

51. *Id.* § 1605(a)(2).

52. *Id.* § 1605(a)(3).

53. *Id.* §§ 1609–11.

tions.[54] By shifting such decision-making from the executive to the judiciary, Congress hoped that the courts, free from political considerations, would make impartial determinations.[55]

Since 1976, Congress has continually expanded the scope of the FSIA, creating new exceptions that prevent a foreign government from claiming a defense of sovereign immunity and broadening the availability of foreign-owned property and assets for attachment within the United States.[56] Most notably, in 1996, Congress amended the FSIA to allow suits by U.S. victims of terrorism against foreign states that the State Department designates as state sponsors of terrorism.[57] As of April 2010, the State Department listed four countries as state sponsors of terrorism: Cuba, Iran, Sudan, and Syria.[58] The State Department designates a country as a state sponsor of terrorism if a country's government provides material support to terrorist groups, by means of funds, weapons, materials, or by providing a safe haven.[59] The State Department may add or remove a country from the list of state sponsors of terrorism at any time.[60]

Under the terrorism exception plaintiffs must satisfy five requirements to obtain jurisdiction:

> First, the claim must involve torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support of resources for such acts. Second, 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

54. *See* Bahr, *supra* note 32, at 1125.

55. *See* Allison Taylor, Note, *Another Front in the War on Terrorism? Problems with Recent Changes to the Foreign Sovereign Immunities Act*, 45 ARIZ. L. REV. 533, 535 (2003).

56. *See* Bahr, *supra* note 32, at 1126.

57. Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221, 110 Stat. 1214, 1241 (1996) (codified as 28 U.S.C. § 1605(a)(7)); *see also* Taylor, *supra* note 55, at 536 (noting that Congress added this amendment to the FSIA in part because of lobbying by victims of terrorism and their families whose claims against state sponsors of terrorism were unsuccessful).

58. OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, STATE DEP'T, COUNTRY REPORTS ON TERRORISM 181 (2009), *available at* http://terrorisminfo.mipt.org/pdf/Country-Reports-Terrorism-2008.pdf [hereinafter COUNTRY REPORTS ON TERRORISM].

59. *See id.* The State Department designates state sponsors of terrorism under section 6(j) of the Export Administration Act of 1979, 50 U.S.C. App. § 2405 (2004), or § 620A of the Foreign Assistance Act of 1961, 22 U.S.C. § 2371. Consequences of receiving the designation include: a ban on arms-related exports and sales, prohibitions on economic assistance, imposition of financial restrictions, and exception from the jurisdictional immunity in U.S. courts. Furthermore, current and former state sponsors of terrorism, with the exception of Iraq, are unable to claim sovereign immunity as a defense against a suit brought by a U.S. citizen for personal injury or death caused by acts of terrorism that occurred within its territory. *See id.* Legislation requires the State Department to publish annual reports that include assessments of the countries it designates as state sponsors of terrorism. *See* 22 U.S.C. § 2656f(a)(1)(A)(ii).

60. *See, e.g.*, COUNTRY REPORTS ON TERRORISM, *supra* note 58, at 181 ("On October 11, the United States rescinded the designation of the Democratic People's Republic of Korea (DPRK) as a state sponsor of terrorism in accordance with criteria set forth in U.S. law, including a certification that the Government of North Korea had not provided any support for international terrorism during the preceding six-month period and the provision by the government of assurances that it will not support acts of international terrorism in the future.").

> his or her duty. Third, the U.S. Secretary of State must have designated the defendant state as a state sponsor of terrorism. Fourth, either the claimant or victim must have been a U.S. national at the time of the act. Finally, if the act occurred in the foreign state against which the claim is brought the claimant must have afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration.[61]

Upon meeting these requirements, a plaintiff-victim of a terrorist act may bring the responsible foreign sovereign before a federal district court.[62] Under the FSIA, successful plaintiffs may receive damages covering noneconomic harms and punitive damages, allowing for the possibility of substantial judgments.[63]

Congress passed the terrorism provisions in hope that the exception would provide victims of terrorism monetary compensation for their suffering and with the loftier goal of deterring hostile states from continuing to engage in terrorist activity, whether directly or indirectly, by awarding considerable damages to successful plaintiffs.[64] However, in practice, although plaintiffs were able to overcome the daunting defense of sovereign immunity and secure victory by default, they remained unable to successfully collect on their judgments.[65] In 2008, Congress responded by amending the FSIA in an attempt to facilitate plaintiffs' efforts to satisfy the large judgments granted in their favor.[66] The amendments garnered widespread support across political lines and academia.[67] Indeed, commentators have hailed the amendments as a "novel approach to the problem of terrorism," calling upon other countries to adopt legislation similar to the FSIA's terrorism provisions.[68]

Specifically, the 2008 amendments sought to clarify the 1996 amendments and to overrule court decisions that had limited plaintiffs' abilities to collect against foreign states.[69] Significantly, the amendments codified the terrorism exception as its own set of provisions within the FSIA, allowing plaintiffs to bring claims seeking money damages against a foreign state sponsor of terrorism directly and any agent of that foreign state acting within the scope of employment, in a federal district court of the United

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61. 28 U.S.C. § 1605(a)(7) (2008); *see also* Gartenstein-Ross, *supra* note 13, at 504.

62. *See* 28 U.S.C. § 1605(a)(7) (2008); *see also* Gartenstein-Ross, *supra* note 13, at 504.

63. 28 U.S.C. § 1606 (2008); *see also* Gartnstein-Ross, *supra* note 13, at 504.

64. *See* Taylor, *supra* note 55, at 534.

65. *See id.* at 530.

66. *See* NDAA, *supra* note 14; *see also* Debra M. Strauss, *Reaching Out to the International Community: Civil Lawsuits as the Common Ground in the Battle Against Terrorism*, 19 DUKE J. COMP. & INT'L L. 307, 327–28 (2009).

67. *See, e.g.*, David M. Herszenhorn, *After Veto, House Passes a Revised Military Policy Measure*, N.Y. TIMES, Jan. 17, 2008, at A28 (noting that the bill passed by wide margins in both houses).

68. Strauss, *supra* note 66, at 307–08 ("[T]his article emphasizes using a *civil*—not military or retaliatory—approach to respond to matters of international terrorism.") (emphasis in original).

69. *See id.* at 329.

States.[70] To ensure that plaintiffs have the possibility to collect on their judgments, the Act now includes a measure that preserves assets of the foreign state upon the filing of a lawsuit.[71] Thus, section 1605A(g)(1) creates an "automatic lien on all real or tangible personal property in the name or control of the defendant state sponsor of terrorism without the usual requirements of specificity and notice."[72] Plaintiffs no longer must show that the foreign state exercises economic control over the targeted property or that the foreign state receives profits from the property.[73] Moreover, the FSIA now provides that "any property [located within the United States] of a foreign state, or agency, or instrumentality of a foreign state . . . shall not be immune from attachment in aid of execution, or execution upon a judgment entered under section 1605A."[74] This last measure is especially significant because it essentially renders any grant of immunity by the State Department to loans of cultural objects from a foreign state sponsor of terrorism ineffectual.[75]

The U.S. doctrine of foreign sovereign immunity has evolved from a rigid bar to suit by U.S. individuals against almost all foreign nations, to a system of case-by-case application based on executive determinations, to a complicated statutory scheme of immunity stripping provisions created by Congress and administered by the courts. Lurking behind the development of a consistent doctrine of foreign sovereign immunity rests separation of powers issues.[76] Although the Constitution delegates authority to both the executive and legislative branches in the arena of foreign affairs,[77] confusion remains as to which body should trump the other when either pursues a course of action that conflicts with the aims or foreign policy goals of the other.[78]

II. Separation of Powers and Foreign Policy

Traditionally, scholars and politicians have viewed the executive branch as the organ of government responsible for protecting national

70. 28 U.S.C. § 1605A (2008); *see also* Strauss, *supra* note 66, at 329 ("This development effectively overrules . . .*Cicippio-Puelo v. Islamic Republic of Iran*, which interpreted section 1605 of the FSIA as a merely jurisdictional vehicle that does not confer a private right of action against a foreign state and limited the Flatow Amendment to providing a cause of action against officials, employees, and agents of the foreign state in their individual capacity.").

71. 28 U.S.C. § 1605A(g)(1) (2008).

72. *See* Strauss, *supra* note 66, at 331–32.

73. 28 U.S.C. § 1610(g)(1) (2008); *see also* Strauss, *supra* note 66, at 332.

74. 28 U.S.C. § 1610(g)(2).

75. *See* AIA Statement, *supra* note 7.

76. *See* Jeewon Kim, Note and 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, 538–39 (2004).

77. *See, e.g.*, Powell, *supra* note 25, at 527 (discussing the Constitution's allocation of foreign affairs powers between the President and Congress).

78. *See, e.g.*, Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 233 (2001) ("[M]odern scholarship remains without a coherent and complete theory of the constitutional division of foreign affairs powers.").

security through the maintenance of diplomatic relations and, when necessary, military force.[79] Recently, however, debate has increased over which political branch—the executive or the legislative—retains primary control over shaping foreign policy.[80] The Constitution assigns responsibility for the conduct of foreign policy to both political branches in a complicated and indirect manner.[81]

Article II of the Constitution makes the President, "Commander in Chief of the Army and Navy of the United States;"[82] it delegates to the President the power to "make Treaties," to "appoint Ambassadors,"[83] and to "receive Ambassadors and other public ministers."[84] Moreover, the Constitution provides that the President "take care that the Laws be faithfully executed."[85] This amalgam of powers provides strong support for the view of the President as the "constitutional representative" of the United States in the foreign relations arena.[86] Indeed, many of the Founding Fathers expressed their belief that the Constitution granted the President "plenary and exclusive authority over the conduct of foreign affairs."[87] Since the founding, Presidents have claimed, as a matter of constitutional right, responsibility for shaping the U.S. foreign policy.[88]

The executive branch's belief in its control over foreign affairs does not stem from a belief in its omnipotence, but rather from centuries of judicial and, at times, legislative deference.[89] Although congressional deference to the executive branch may rarely occur, there have been instances where Congress has delegated its foreign affairs powers to the discretion of the President.[90] Moreover, even Chief Justice Marshall, who famously

79. *See* Kim, *supra* note 76, at 525.
80. *See* Powell, *supra* note 25, at 527–28.
81. *See id.* at 545.
82. U.S. CONST. art. II, § 2, cl. 1.
83. *Id.* art. II, § 2, cl. 2.
84. *Id.* art. II, § 3.
85. *Id.*
86. *See* Powell, *supra* note 25, at 547.
87. See *id.* at n.86 (citing Thomas Jefferson, Opinion on the Question of Whether the Senate Has the Right to Negative the Grade of Persons Appointed by the Executive to Fill Foreign Missions (Apr. 24, 1790), in 5 THE WRITINGS OF THOMAS JEFFERSON 161, 161 (Paul L. Ford ed., New York, G.P. Putnam's Sons 1895)) ("The transaction of business with foreign nations is executive altogether; it belongs, then, to the head of that department. . .").
88. *See id.* at 548.
89. *See id.* at 555 ("[E]xecutive primacy in foreign affairs and national security is a faithful exposition not only of judicial precedent and historical practice, but also of the fundamental notion that the Constitution is meant to provide checks on the tendency of power, including executive power, to become arbitrary.").
90. *See, e.g.*, Authorization for Use of Military Force against Iraq Resolution of 2002, H.J. Res. 114, 107th Cong., 116 Sat. 1498, 1501 (2002) (authorizing the President to initiate hostilities with Iraq "as he determines to be necessary and appropriate in order . . . to defend the national security of the United States."); Doe v. Bush, 323 F. 3d 133 (1st Cir. 2003) (affirming dismissal of plaintiffs' claim that Congress' delegation of its power to declare war to Iraq to the President violated the Constitution); U.S. v. Curtiss-Wright Exp. Co., 299 U.S. 304, 324 n.2 (1936) (listing examples where Congress has delegated to the President to use his unrestricted judgment when acting with respect to subjects involving foreign relations).

entrenched the independence of the Court to the chagrin of the Executive,[91] acknowledged the primacy of the executive in international affairs.[92] Indeed, the Court has consistently echoed "the generally accepted view that foreign policy [is] the province and responsibility of the Executive."[93] Absent direct and contrary congressional action, the Court has remained unwilling to question the authority of the executive with respect to national security affairs, which must inevitably include general foreign policy objectives.[94]

In *U.S. v. Curtiss-Wright Export Co.*, the Court distinguished the application of the maxim "the federal government can exercise no powers except those specifically enumerated in the Constitution" as between internal and external affairs.[95] In that case, the Court suggested that the Framers were not as explicit when assigning foreign policy powers because they did not fear infringing upon the rights and powers of the individual states.[96] Indeed, the Court contended that although the Constitution enumerates some foreign affairs' powers, even if it had remained completely silent on the subject, the federal government would still have inherited the power to shape foreign policy as a consequence of nationality.[97] The Court continued:

> It is quite apparent that if, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.[98]

Moreover, the Court highlighted the executive's superior position with respect to fact gathering as a compelling reason for granting the President sole authority in the arena of international relations.[99] Therefore, in addition to constitutional arguments, there are pragmatic factors which tip the

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91. *See generally* Marbury v. Madison, 5 U.S. 137 (1803) (establishing the doctrine of judicial review).

92. See *Curtiss-Wright Exp. Co.*, 299 U.S. at 319 ("The President is the sole organ of the nation in its external, and its sole representative with foreign nations.") (quoting Justice John Marshall).

93. Department of the Navy v. Egan, 484 U.S. 518, 529 (1988) (quoting Haig v. Agee, 453 U.S. 280, 293-94 (1981)).

94. *Id.*

95. *See Curtiss-Wright Exp. Co.*, 299 U.S. at 315-16 ("The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution . . . is categorically true only in respect of our internal affairs.").

96. *See id.* at 316.

97. *See id.* at 316, 318 ("As a result of the separation from Great Britain by the colonies . . . the powers of external sovereignty passed from the Crown . . . to the colonies in their collective and corporate capacity as the United States of America.").

98. *See id.* at 320.

99. *See id.* ("[The President], not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries . . . .")

balance of foreign-relations control in the executive's favor.[100]

A combination of these observations supports the argument that, because the Constitution does not articulate which political branch is directly responsible for shaping and executing U.S. foreign policy, the executive branch should be allowed to exercise *de facto* primary control in the arena of foreign affairs.[101] This comports with historical precedent: when determining whether a foreign state could assert the defense of sovereign immunity in a U.S. court, the historic judicial practice had been to defer to the executive branch's recommendations.[102]

Although many commentators are unwilling to view foreign affairs as the exclusive province of the executive, the proposition that the President has the power to devise and declare foreign policy seems an acceptable concession to those who argue for more congressional control.[103] Indeed it is a well-established belief, even if not explicitly constitutionally based, that the President, not Congress, has the authority to declare the United States' views on international matters.[104] Nevertheless, Congress often indirectly shapes U.S. foreign policy in the course of developing and passing legislation.[105] For example, the adoption of the FSIA symbolizes legislative intervention in a domain traditionally controlled by the executive. Congress's decision to take action with regard to foreign sovereign immunity determinations does not need to be rebuffed—certainly, as the legislative body of the federal government, Congress should improve upon inefficient processes, even in an area that affects foreign policy.[106] Participation by Congress within the arena of foreign affairs, however, demands cooperation, not contradiction, with the executive branch. Indeed, if the President's foreign policy is to move from rhetoric to action, he will need the lawmaking powers of the legislature.[107] Congressional support in the field of international relations, however, requires that Congress "accord to

100. *See, e.g.*, LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 32 (2d ed. 1996) (listing factors including the President's control of information and ability to act quickly as advantages with respect to foreign relations).

101. *See* Powell, *supra* note 25, at 529 (supporting "executive primacy"—the belief that the President is vested with the primary authority to control foreign affairs and national security).

102. Bahr, *supra* note 32, at 1125 (describing the history of sovereign immunity determinations).

103. *See* Prakash & Ramsey, *supra* note 78, at 262–63.

104. *See id.* ("Thus, the basic outlines of foreign affairs authority have generally been correctly understood, although their constitutional basis has become obscured."); *see also* HENKIN, supra note 100, at 44-45 (listing examples of President's actions that express the U.S. foreign policy without any consideration toward the approval or opinion of Congress).

105. *See* Prakash & Ramsey, *supra* note 78, at 262-63.

106. *See generally* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1935) (Jackson, J., concurring) ("The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government.").

107. *See* Prakash & Ramsey, *supra* note 78, at 263 ("[T]he President must often look to Congress as a partner in foreign affairs endeavors.").

the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved."[108]

In *Republic of Iraq v. Beaty*, a recent Supreme Court case involving the FSIA's terrorism provisions, the Court inadvertently highlighted the favorability of congressional and executive compromise.[109] Congress's initial attempt to amend the FSIA's terrorism exception directly conflicted with President Bush's foreign policy goals with respect to Iraq.[110] Indeed, because the provisions applied to past and current designated state sponsors of terrorism, President Bush feared that potential liability to victims of terrorism under the FSIA could threaten Iraq at a "crucial juncture" in its history.[111] Therefore, when Congress failed to include a provision that waived the terrorism exception's applicability to Iraq, President Bush vetoed the bill.[112] In the end, the National Defense Authorization Act for Fiscal Year 2008 included the FSIA's current terrorism exception and a provision satisfying President Bush's demands.[113] On the same day that the Act passed, President Bush exercised his authority and effectively deemed Iraq immune to suit under the FSIA's terrorism exception.[114] In *Beaty*, the Court upheld the waiver provision because of the well-established practice of granting the President the power to suspend the operation of a valid law in the sphere of foreign affairs.[115] The Court found "the granting of Presidential waiver authority . . . particularly apt with respect to congressional elimination of foreign sovereign immunity, since the granting or denial of that immunity was historically the case-by-case prerogative of the Executive Branch."[116] Therefore, the plaintiffs who had suffered under the regime of Saddam Hussein were unable to proceed with their suit against Iraq because the FSIA no longer provided an exception to Iraq's immunity defense, although Iraq had, at the time of the terrorist act, been a designated sponsor of terrorism.[117]

Historically, the executive branch exercised nearly exclusive control

108. *Curtiss-Wright Exp. Co.*, 299 U.S. at 320; *see also* Zemel v. Rusk, 381 U.S. 1, 17 (1965) ("[B]ecause of the changeable and explosive nature of contemporary international relations, and the fact that the Executive is immediately privy to information . . ., Congress—in giving the Executive authority over matters of foreign affairs—must of necessity paint with a brush broader than that it customarily wields in domestic areas.")

109. *See* Republic of Iraq v. Beaty, 129 S. Ct. 2183 (2009)

110. *See, e.g.*, *id.* at 2188; Herszenhorn, *supra* note 67, at A28.

111. *See, e.g.*, *Beaty*.

112. *See* Herszenhorn, *supra* note 67, at A28.

113. NDAA, *supra* note 14, at 122 Stat. 343 ("The President may waive any provision of this exception with respect to Iraq . . . if the President determines that the waiver is in the national security interest of the United States.").

114. *See* 73 Fed. Reg. 6571, No. 2008-9 (2008) ("The economic security and successful reconstruction of Iraq continue to be top national security priorities of the United States. [The terrorism exception of the FSIA] threatens those key priorities.").

115. *See Beaty*, 129 S.Ct. at 2189.

116. *Id.*

117. *See id.* at 2195.

over foreign affairs.[118] However, notwithstanding judicial and legislative deference toward executive foreign sovereign immunity determinations for nearly two centuries, Congress enacted the FSIA, ushering a new era in the U.S. doctrine of foreign sovereign immunity.[119] Regardless of which, or if either, branch exercises exclusive or superior control over foreign affairs, it is clear that foreign policy, diplomatic relations, and international comity would benefit from a critical reexamination of the FSIA's terrorism exception.

III. Playing Tug-of-War with Ancient Cultural Objects

In practice, the FSIA's terrorism provision fails to compensate the overwhelming majority of terrorist victims who use the FSIA to bring claims before federal district courts.[120] Furthermore, there is no empirical evidence that supports the argument that the provision deters state sponsors of terrorism.[121] Indeed, rather than providing the United States with a tool to combat global terrorism, the provisions have frustrated legitimate, non-governmental attempts to open and foster diplomatic relations with foreign states that have traditionally been antagonistic toward the United States.[122]

A. Case-Study: Rubin v. The Islamic Republic of Iran[123]

The story of the nine individual plaintiffs in *Rubin*[124] serves as a typical example of the obstacles and failures that the majority of terrorist victims encounter when seeking redress under the FSIA. In 1997, five of the nine plaintiffs suffered horrific and life-altering injuries stemming from a suicide bombing in Jerusalem; the other four plaintiffs suffered emotional harm as a result of injured family members.[125] Hamas, an Islamic militant terrorist organization, claimed responsibility for the terrorist attack; Israeli officials arrested and convicted members of the organization for orchestrating the bombing.[126] Soon after, the *Rubin* plaintiffs brought actions against Hamas and the Islamic Republic of Iran for providing material support for the attack.[127]

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118. *See, e.g.*, Ex parte Republic of Peru, 318 U.S. 578, 588–89 (1943) (following judicial policy of deferring to State Department recommendations when determining whether sovereign immunity will bar suit).

119. *See* Bahr, *supra* note 32, at 1125.

120. *See* Taylor, *supra* note 55, at 537.

121. *See id.* at 534.

122. *See, e.g.*, Cotter, *supra* note 3, at 1 (detailing how a private action under the FSIA's terrorism provisions derailed the Metropolitan Museum of Art's attempt to engage in cultural exchange with the Syrian government).

123. *See* Rubin v. Islamic Republic of Iran, 2007 WL 2219105, at *1 (N.D. Ill., July 26, 2007).

124. *See* Campuzano v. Islamic Republic of Iran, 281 F. Supp. 2d 258, 261–62 (D.D.C. 2003).

125. *See id.* at 261.

126. *See id.* at 261–62.

127. *See id.*

The district court found that the FSIA provided a jurisdictional basis for the suit against Iran.[128] However, none of the named defendants, including high-ranking members of the Iranian government that held office at the time of the bombing, appeared.[129] The court then held a hearing to obtain the relevant evidence necessary to enter a default judgment.[130] Plaintiffs proved that the bomb-maker in the attack received training from Iranian agents; accordingly, the court awarded plaintiffs damages totaling nearly $400 million.[131]

Ever since the district court handed down this considerable judgment, the plaintiffs have been on a wild goose chase to collect damages. To date, the *Rubin* plaintiffs have been unable to collect even a meaningful portion of the sum the district court awarded to them.[132] Initially, the plaintiffs attempted to attach several bank accounts associated with the Consulate General of Iran.[133] The court ruled that the funds were not being used for diplomatic purposes and that they were subject to attachment by the *Rubin* plaintiffs.[134] But the plaintiffs could not collect because a prior judgment creditor held a lien on the funds.[135] Next, the plaintiffs attempted to attach assets held by the Iranian government at the Bank of New York, only to face similar defeat.[136] Finally, in 2005, the *Rubin* plaintiffs enjoyed a minimal court victory when U.S. Marshals sold a residence owned by an Iranian prince in Lubbock, Texas for approximately $390,000—a fraction of their total judgment.[137]

Frustrated by the minimal gains made by their lengthy and expensive efforts to execute upon traditional assets, the *Rubin* plaintiffs focused their attention on Persian antiquities held by the Field Museum and the University of Chicago's Oriental Institute.[138] Initially, the plaintiffs asserted that

128. *See id.* at 269–71 (discussing the satisfaction of the FSIA element by element).
129. *See id.* at 261.
130. *See id.*
131. *See id.* at 270–71 (awarding the plaintiffs $71.5 million in compensatory damages and $300 million in punitive damages).
132. *See* Hilton, *supra* note 13, at 494–95 (describing the plaintiffs several failed attempts at attaching assets to pay the judgment).
133. *See* Rubin v. Islamic Republic of Iran, 2005 WL 670770, at *1 (D.D.C. 2005), *vacated* by Rubin v. Islamic Republic of Iran, 563 F. Supp. 2d 38 (D.D.C. 2008); *id.*at 494.
134. *See id.* at *4.
135. *See* Hilton, *supra* note 13, at 494.
136. *See id.* at 495–96.
137. *See id.* at 495.
138. *See* Rubin v. Islamic Republic of Iran, 349 F. Supp. 2d 1108, 1109–11 (N.D. Ill. 2004); *see also* Hilton, *supra* note 13, at 480 ("[T]he [*Rubin*] plaintiffs seek to attach the Persepolis Tablets, the Chogha Mish Collection, the Herzfeld Collection at the Field Museum of Natural History and other Persian artifacts owned by Iran that are held at the University of Chicago's famed Oriental Institute."). The plaintiffs also brought actions in Massachusetts and Michigan. In those districts, however, it is uncertain whether Iran owns the artifacts sought for attachment, while in Illinois Iranian ownership has been conceded. *See* James Wawrzyniak, *Rubin v. The Islamic Republic of Iran: A Struggle for Control of Persian Antiquities in America* 9, 14 (HARV. L. SCH. STUDENT SCHOLARSHIP SERIES, Paper 17 2007), *available at* http://lsr.nellco.org/cgi/viewcontent.cgi?article=1017&context=harvard_students.

the antiquities held at the Chicago museums fell under the "commercial activity" exception to immunity from attachment.[139] That is to say the plaintiffs argued that "because the collections have been used for publishing and selling books in the United States" the antiquities should be subject to attachment.[140] In 2006, the district court held that Iranian interests, including defenses against the plaintiffs, could not be raised by a third party such as the museums housing the collections.[141] The court's holding led Iran to acquire U.S. counsel to represent its interests directly, further prolonging a final resolution.[142] Since the *Rubin* plaintiffs registered their judgment in the Northern District of Illinois, the plaintiffs, several museums, and the Iranian government have been engaged in a tug-of-war over control of ancient Persian artifacts.[143]

The 2008 amendments to the FSIA signaled yet another chapter in the *Rubin* litigation.[144] Specifically, the new terrorism provisions provide an easier mechanism for plaintiffs seeking to satisfy judgments entered under §1605A.[145] Pursuant to the amendments, the *Rubin* plaintiffs re-filed their action in the District Court for the District of Columbia.[146] Encouraged by the modified statutory framework, the *Rubin* plaintiffs believed that they were finally nearing the redress they had sought for over a decade, unaware that their efforts would once again be derailed by an unforeseen obstacle.

In the same month that the *Rubin* plaintiffs re-filed, another group of nearly 1,000 plaintiffs also sought to enforce their judgment against Iran in the District Court for the District of Columbia.[147] The plaintiffs in *Peterson v. Islamic Republic of Iran* are the family members of the 241 service members killed in the 1983 bombing of a United States Marine barrack in Beirut, Lebanon.[148] Similar to *Rubin*, Iran played a material role in funding the terrorist organization which carried out the attack in Beirut.[149] Iran also failed to appear in the *Peterson* litigation, prompting the court to enter default judgment for the plaintiffs and compensatory damages against the

139. *See* 28 U.S.C. § 1610(a) ("The property in the United States of a foreign state . . . used for commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States . . . .").

140. *Rubin*, 349 F. Supp. at 1110–11. Ultimately the court ruled that the Iran's conduct was not commercial. *See* Rubin v. Islamic Republic of Iran, 2007 U.S. Dist. LEXIS 24376, at *23. Nevertheless, the plaintiffs have continued to pursue litigation in the Northern District Illinois under the theory that the American museums are agents of Iran, and that the acts of the museums bring Iran within the commercial activity exception. *See id.*

141. *See* Rubin v. Islamic Republic of Iran, 436 F. Supp. 2d 938, 946 (N.D. Ill. 2006).

142. *See* Hilton, *supra* note 13, at 507.

143. *See Rubin*, 349 F. Supp. at 1109 (noting that the Oriental Institute of the University of Chicago participated in the proceeding as respondent); Hilton, *supra* note 13, at 495–97.

144. *See* Hilton, *supra* note 13, at 498–99.

145. *See* 28 U.S.C. § 1610(g)(1); *see also supra* notes 69–75 and accompanying text.

146. *See* Hilton, *supra* note 13, at 499.

147. *See* Peterson v. Islamic Republic of Iran, 515 F. Supp. 2d 25, 37 (D.D.C. 2007).

148. *See id.* at 36–37.

149. *See* Hilton, *supra* note 13, at 500.

defendants totaling nearly $3 billion.[150] Consequently, in a disturbing turn of events, the 2008 FSIA amendments have pitted victims of Iranian supported terrorism against one another.[151]

The *Rubin* plaintiffs' attempts to attach the Persian antiquities located in Chicago continued on October 26, 2009, when the Seventh Circuit heard oral arguments in Iran's appeal of a 2007 district court decision that required Iran to disclose a list of Iranian-owned assets in the United States.[152] To date there has been no decision. However, even if the Seventh Circuit's decision favors the *Rubin* plaintiffs, they will still have to withstand the competing judgment of the *Peterson* plaintiffs, whose multi-billion dollar judgment may leave the *Rubin* plaintiffs empty-handed once again.

The *Rubin* litigation represents the typical uphill battle that victims of terrorism face when seeking redress from a state sponsor of terrorism.[153] Over the course of seven years, despite legislative amendments and judicial proceedings in multiple federal districts, the *Rubin* plaintiffs are no closer to executing upon their substantial judgment. Indeed, the *Rubin* plaintiffs have overcome one obstacle after another only to encounter unexpected foes and mounting legal fees.[154] Regrettably, Congress's worthy intention of providing victims of state sponsored terrorism a forum to seek compensation is not being met under the FSIA's current rubric.[155] Moreover, aside from granting plaintiffs jurisdiction to bring a cause of action with no adequate remedy, there is little by way of empirical proof to support the belief that the provisions have or will deter state sponsored acts of terrorism.

B. Analyzing the Deterrence Argument

Measuring trends in global terrorism is difficult in the abstract; when attempting to isolate state sponsored acts of terrorism from the aggregate, the task of assessing what, if any, deterrent effect the FSIA's terrorism provisions have becomes nearly impossible. The National Counterterrorism Center (NCTC) is responsible for national and international counterterrorism efforts.[156] The NCTC releases annual reports on global terrorism, providing statistics and information about attacks in the previous year and notes on future trends.[157] Its 2009 report did not include specific statisti-

150. *See Peterson*, 515 F. Supp. 2d at 60.

151. *See* Hilton, *supra* note 13, at 501.

152. *See* Lynne Marek, *DOJ Urges 7th Circuit to Shield Iranian Artifacts from Seizure by Terrorism Victims*, NAT'L L.J., Nov. 2, 2009, *available at*, http://www.law.com/jsp/article.jsp?id=1202435093688&DOJ_Urges_th_Circuit_to_Shield_Iranian_Artifacts_From_Seizure_by_Terrorism_Victims.

153. *See* Hilton, *supra* note 13, at 481.

154. *See id.* at 495.

155. *See supra* notes 138–51 and accompanying text.

156. *See* National Counterterrorism Center, http://www.nctc.gov/about_us/about_nctc.html.

157. *See id.*

cal information on state sponsored acts of terrorism,[158] but in a 2006 report submitted to Congress, its researchers noted a decline in instances of state sponsored terrorism.[159] However, the report went on to suggest a few notable exceptions including ongoing support of terrorist organizations by Iran and Syria, two of the four countries designated by the State Department as state sponsors of terrorism.[160]

A 2009 report released by the American Security Project (ASP) announced that state sponsorship of terrorism "remains at historically low levels."[161] However, a more in depth analysis of the report undermines that general finding, suggesting the need to evaluate other factors when assessing a state's direct or indirect involvement with terrorist organizations. For example, ASP notes that there is no differentiation "between those countries who are genuine partners in counter-terrorism and those who tolerate terrorist organizations within their borders or turn a blind eye to terrorist fundraising."[162] Indeed, the report cautions against relying too heavily on the statistical information released by the U.S. government because there are often political and diplomatic considerations that influence how a country's counterterrorism efforts are actually measured.[163]

Next, the report goes on to stratify state-sponsored terrorism into categories, including the following: (1) active sponsors,[164] (2) agreements with terrorists,[165] (3) tolerate fundraising,[166] (4) tolerate presence,[167] (5) fail-

158. *See* NATIONAL COUNTERTERRORISM CENTER, 2008 REPORT ON TERRORISM (Apr.30, 2009), *available at*, http://wits.nctc.gov/ReportPDF.do?f=crt2008nctcannexfinal.pdf. [hereinafter NCTC REPORT].

159. *See* CRS REPORT FOR CONGRESS, TRENDS IN TERRORISM: 2006, 6 (July 21, 2006), *available at*, http://fpc.state.gov/documents/organization/69479.pdf ("The report suggests that active, direct, state sponsorship of terror is declining.").

160. *See id.*

161. *See* Christine Bartolf & Bernard I. Finel, *Are We Winning? Measuring Progress in the Struggle Against Al Qaeda and Associated Movements*, AMERICAN SECURITY PROJECT, 1, 18 (2009), *available at*, http://www.americansecurityproject.org/resources/2009_AWW.pdf; *see also* American Security Project, http://www.americansecurityproject.org/content/about/ ("[ASP] is a non-profit, bipartisan public policy and research organization dedicated to fostering knowledge and understanding of a range of national security issues, promoting debated about the appropriate use of American power, and cultivating strategic responses to 21st century challenges.").

162. *Id.*, at 18.

163. *See e.g.*, *id.* ("North Korea was only recently dropped off the state sponsorship list, despite only a cursory mention of actual state sponsorship. Countries that have strong diplomatic and economic relations with countries designated as state sponsors of terror are not rebuked in reports. Designations and details in these State Department reports should therefore be taken as an informative, but political, work—not as a full description of a country's counterterrorism efforts.").

164. *See id.* at 19 ("Active sponsors are countries that directly support terrorist organizations with funds, arms, and intelligence. They also provide political support to terrorist groups and largely refuse to cooperate with international efforts to reign in terrorism.").

165. *See id.* ("[A]greements [with terrorists] include offers of amnesty in return for unverified cooperation.").

166. *See id.* ("[Includes] states that tolerate . . . fundraising and knowingly allow agents of terrorist groups to operate on their soil and openly solicit funds for their activities abroad.").

ure to prosecute and failure to pass or implement laws.[168] Only three countries are categorized as active sponsors, including Iran, Syria, and Venezuela, which is not designated as a state sponsor of terrorism by the State Department.[169] Significantly, Afghanistan, Eritrea, Pakistan, and Yemen—none of which are included on the State Department's list of designated state sponsors of terrorism—are noted as states that tolerate the presence of known terrorists within their borders.[170] Lastly, over ten countries—from Brazil to Mauritania and Turkmenistan—are listed as states "that have failed to pass laws and regulations" to combat terrorism yet have the capacity to implement such a regulatory system.[171]

The ASP study calls into question the feasibility of acquiring data that could ever factually support the arguments of proponents of the current statutory framework who believe that the threat of suit and civil liability will likely discourage continued state-sponsored terrorism.[172] Indeed, threat of civil suit is but one of a number of sanctions imposed on countries designated as state sponsors of terrorism; perhaps the threat of "prohibitions on economic assistance" is what is truly deterring countries from supporting terrorism.[173] Iran and Syria, two of the four countries against which individuals can bring suit under the FSIA, still engage in state-sponsored terrorism.[174] Moreover, even if *active* state-sponsored terrorism is at an all time low, overall rates of global terrorism remain high, which begs the question: is the designation process reaching all the foreign sovereigns that engage in, directly or indirectly, state-sponsored terrorism?[175]

Although the aim of the FSIA's terrorism exception is honorable, its backward-looking focus presents American diplomatic efforts as two-faced.[176] No one can deny that the victims of terrorist acts deserve justice and an opportunity to receive amends; however, given the cost and length of litigating FSIA cases and the low likelihood of being able to satisfy judgments, the political branches should reevaluate the continued utility of the

167. *See id.* ("[S]tates that tolerate the presence of known terrorists on their soil and fail to either arrest or extradite terrorist operatives.").

168. *See id.* ("Countries that have failed to pass laws and regulations to enforce their international obligations.").

169. *See id.*

170. *See id.*

171. *See id.*

172. *See e.g.*, Perles & Lajeunesse, *supra* note 15, at 9–10 (calling on the Obama administration to depart from the Bush administration's policy and embrace the benefits of the FSIA's terrorism provisions).

173. *See, e.g.*, 22 U.S.C. § 2371 (2006).

174. *See* NCTC REPORT, *supra* note 158, at 19.

175. *See id.* at 13 ("Approximately 11,800 terrorist attacks against noncombatants occurred in various countries during 2008, resulting in over 54,000 deaths, injuries and kidnappings."); *see, e.g.*, RAY WALSER, THE HERITAGE FOUNDATION, STATE SPONSORS OF TERRORISM: TIME TO ADD VENEZUELA TO THE LIST, , (2010), *available at* http://www.heritage.org/Research/Reports/2010/01/State-Sponsors-of-Terrorism-Time-to-Add-Venezuela-to-the-List.

176. *See* CRS REPORT FOR CONGRESS, SUITS AGAINST TERRORIST STATES, 9, 12–13 (Jan. 25, 2002) *available at* http://fpc.state.gov/documents/organization/8045.pdf.

terrorism provisions. Furthermore, given the questionable deterrent effect of the provisions, the struggle against global terrorism may be better served by a different tactical approach, or at the least, by the synchronization of U.S. foreign policy objectives. A meaningful and critical inspection will lead to a more successful avenue of redress for victims of terrorism and stronger diplomatic relations with currently disenfranchised states.

C. Collateral Damage: Cultural Diplomacy

Scholars and political leaders have long recognized the value of cultural diplomacy—the fostering of understanding between citizenry of different nations through the exchange of ideas, information, art, and other influential aspects of culture.[177] Cultural diplomacy strongly contributes to what political scientist Joseph Nye describes as a nation's soft power—the "ability to get what [it] want[s] through attraction rather than through coercion."[178] Critics of the theory favor traditional forms of hard power, such as militaristic or economic might, over the subtle and less quantitative instruments of soft power.[179] According to Nye, "soft power arises from the attractiveness of a country's culture, political ideas, and policies. When [a nation's] policies are seen as legitimate in the eyes of others, [that nation's] soft power is enhanced."[180] Indeed, in the years leading up to World War II, President Roosevelt recognized cultural diplomacy as a valuable tool of persuasion in the struggle against Fascism.[181]

It was during the Cold War, however, when cultural diplomacy took on a significant role in shaping the U.S. foreign policy.[182] In 1948, Congress enacted the Information and Educational Exchange Act of 1948; relevant language from the Act reveals the primacy of cultural diplomacy in the struggle against communism:

> The purpose and objectives of this program are to "enable the Government of the United States to promote a better understanding of the United States in other countries and to increase mutual understanding between the people of the United States and the people of other countries." Among the means to be used in achieving these objectives is the international exchange of persons, knowledge, and skills.[183]

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177. *See* U.S. Department of State, Report of the Advisory Committee on Cultural Diplomacy, Cultural Diplomacy The Linchpin of Public Diplomacy 3 (Sept. 2005) [hereinafter Cultural Diplomacy Report].

178. Joseph S. Nye, Jr., *Soft Power and American Foreign Policy,* 119 Political Science Quarterly 255, 256 (2004) [hereinafter Nye, *Soft Power and Foreign Policy*]

179. *See id.*

180. *See id.*

181. *See* Center for Arts and Culture, Globalization and Cultural Diplomacy 29 (Nov. 2001), *available at,* http://www.culturalpolicy.org/pdf/globalization.pdf ("The attempted seduction by the Axis powers of our allies in Latin America led American decision makers to involve the cultural aspects of diplomacy as yet another means of counteracting the influence of Fascism in the region. This effort provided the basis for post-war uses of cultural diplomacy to support the spread of Western democratic notions.") [hereinafter Globalization & Cultural Diplomacy].

182. *See* Cummings, *supra* note 17, at 4–11.

183. J. Manuel Espinosa, *Inter-American Beginnings of U.S. Cultural Diplomacy, 1936-1948*, *in* Bureau of Educational & Cultural Affairs, U.S. Dep't of State, Cultural

From academic exchange programs, like the Fulbright Scholarship, to translations of literature and visual arts exhibitions that introduced American artistic movements to countries around the world, the United States engaged in a two-front attack against the Soviet Union.[184] Accordingly, as the Cold War lingered on, the government came to rely on the efforts of non-profits and private sector organizations to aid in the promulgation of American culture and ideals to the global community.[185] Thus, through the use of cultural diplomacy the United States projected a favorable—and apolitical—image of American society abroad, relying on cultural exchange to form alliances with other nations that shared cultural commonalities with the United States.[186] Indeed, Nye argues that it was the successful combination of hard and soft powers that allowed the United States to form a system of alliances that eventually brought down the Iron Curtain.[187]

In the aftermath of the Cold War, the United States has emerged as the world's sole hegemonic power.[188] However, America's image within the international community has since plummeted.[189] Although cultural diplomacy played a role in shaping U.S. foreign policy for over half a century, recent presidential administrations have abandoned the lessons of the Cold War, favoring more visible sources of strength or hard power.[190] With the advent of global terrorism, however, scholars urge political leaders to build a new system of diplomatic alliances to combat extremism and engage in cultural diplomacy with countries that traditionally share less cultural and historic ties to the United States.[191]

Museums provide the perfect setting for cultural diplomacy. Indeed, museums have fully embraced the importance of "two-way" cultural diplomacy. By engaging in diverse cross-cultural exchange, museums provide Americans with the opportunity to learn about less familiar cultures

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RELATIONS PROGRAMS OF THE U.S. DEPARTMENT OF STATE, HISTORICAL STUDIES: NUMBER 2, 342 (1976), *available at* http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/36/1c/e5.pdf.

184. *See* Cummings, *supra* note 17, at 4–5.

185. *See* GLOBALIZATION & CULTURAL DIPLOMACY, *supra* note 181, at 28 ("[T]he biggest players have been large foundations, non-profit organizations, and academic institutions . . . . [which] funded education, research, artistic touring companies and international exchanges of all kinds.").

186. *See id.*

187. *See* Nye, *The Decline of America's Soft Power*, *supra* note 22, at 16.

188. *See id.*

189. *See* Nye, *Soft Power and Foreign Policy*, *supra* note 178, at 255.

190. *See* Nye, *The Decline of America's Soft Power*, *supra* note 22, at 19–20 ("The United States' most striking failure is the low priority and paucity of resources it has devoted to producing soft power. The combined cost of the State Department's public diplomacy programs . . . is just over a billion dollars, about four percent of the nation's international affairs budget. That total is about three percent of what the United States spends on intelligence and a quarter of one percent of its military budget.").

191. *See, e.g.*, CULTURAL DIPLOMACY REPORT, *supra* note 177, at 1 ("[C]ultural diplomacy can enhance our national security in subtle, wide-ranging and sustainable ways . . . . For the values embedded in our artistic and intellectual traditions form a bulwark against the forces of darkness.").

through the visual arts.[192] Accordingly, cultural diplomacy's promise of international support through cooperation is furthered each time an American sees a piece of art and understands or identifies with the culture that produced it.[193] For example, the Metropolitan Museum of Art's 2008 *Beyond Babylon* offered viewers a vision of the ancient Near East in terms familiar to the modern American: globalization and diversity.[194] However, the overall effect of the exhibition was undermined by Syria's decision not to participate:

> [T]he Metropolitan's inability to borrow objects from Syria for an exhibition indicates the danger [the FSIA] legislation and litigation pose to cultural exchange. American citizens have been deprived of the opportunity of appreciating and learning from archaeological artifacts and works of art from one of the world's oldest civilizations. The actions in question therefore pose a serious threat to cultural exchange and cultural diplomacy, which are extremely important in building understanding among peoples.[195]

Furthermore, cultural exchange allows American academics and archaeologists to study important artifacts, to publish their findings, and to translate their meaning to society at large.[196] The University of Chicago's Oriental Institute, a party of interest in *Rubin*, discovered clay tablets in Iran in 1933, and with the permission of the Iranian government is still studying the significance of the artifacts.[197] Each year, as archaeologists decipher the ancient writing on the tablets, they discover more about the sophistication of daily life in Ancient Persia.[198] However, with the *Rubin* plaintiffs seeking attachment, the cultural exchange and comity that developed between the Oriental Institute and Iran for over half a century has been placed on hold indefinitely.[199]

Diplomatic ties with Syria, a designated state sponsor of terror, are precisely the type that could benefit from increased cross-cultural exchange.[200] The U.S. government, however, must make greater strides toward providing a lasting support system for public diplomacy before American museums can effectively engage in cultural diplomacy.[201]

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192. *See id.*
193. *See* AIA Statement, *supra* note 7, at 2.
194. *See* Cotter, *supra* note 3, at C25.
195. AIA Statement, *supra* note 7, at 2.
196. *See* University of Chicago, Press Release, *University of Chicago Returns Ancient Persian tablets Loaned by Iran* (Apr. 28, 2004), *available at* http://www-news.uchicago.edu/releases/04/040428.tablets.shtml.
197. *See id.*
198. *See id.*
199. *See* Daniel Pipes, *The University of Chicago vs. Victims of Terror*, Nov. 22, 2009, http://www.danielpipes.org/blog/2006/06/the-university-of-chicago-vs-victims-of.
200. *See, e.g.*, DeVoss, *supra* note 19 (noting the improvement in U.S. and Chinese diplomatic relations as a result of a series of ping-pong games between American and Chinese players).
201. *See* CULTURAL DIPLOMACY REPORT, *supra* note 177, at 1 ("[W]hen our nation is at war, every tool in the diplomatic kit bag is employed, including the promotion of cultural activities. But when peace returns, culture gets short shrift, because of our traditional lack of public support for the arts. Now that we are at war again, interest in cultural

Indeed, until the FSIA terror provisions are revised, or at least until attachment of cultural property is unquestionably barred, Cuba, Iran, Sudan, and Syria are unlikely to participate in cultural exchanges with American institutions, severely limiting the potential reach and effectiveness of cultural diplomacy.[202] The emergence of global terrorism as an international security threat has recharged scholarly debate about the need to reassert America's soft power through cultural diplomacy.[203] Perhaps through the exchange of art, ideological schisms may slowly be bridged and diplomatic ties forged between the United States and countries both officially designated as state sponsors of terrorism, and unofficially recognized as supporting terrorist organizations.

IV. Foreign Policy under the Obama Administration

During his campaign for the presidency, Barack Obama cited renewing American diplomatic efforts as a top foreign policy priority.[204] Significantly, President Obama remains committed not only to strengthening existing alliances, but also to fostering relations with currently hostile nations, including Iran.[205] Since taking office, Obama has already taken steps toward fulfilling his campaign promises. In June of 2009, Obama visited Egypt and gave his now famous speech at the University of Cairo during which he reached out to the Muslim world, openly addressing American and Muslim relations and offering a hand of friendship, signaling a new direction in American foreign policy.[206] Moreover, in February 2010, President Obama nominated an ambassador to Syria, filling a position that has been left vacant for five years.[207] President Obama also cites the promotion of cultural diplomacy as an important policy goal of his administration.[208] Indeed, in a campaign fact sheet Obama explicitly referenced the success of cultural diplomacy during the Cold War, hoping that "artists can be utilized again to help [the United States] win the war of ideas against Islamic extremism."[209]

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diplomacy is on the rise. Perhaps this time we can create enduring structures within which to practice effective cultural diplomacy.").

202. *See* AIA Statement, *supra* note 7.

203. *See e.g.*, Nye, *The Decline of America's Soft Power*, *supra* note 22, at 16.

204. *See* Organizing for America, Foreign Policy, http://www.barackobama.com/issues/foreign_policy/index_campaign.php#diplomacy (last visited May 24, 2010).

205. White House, Foreign Policy, http://www.whitehouse.gov/issues/foreign-policy (last visited May 24, 2010).

206. *See Obama in Egypt Reaches Out to Muslim World*, CNN, June 4, 2009, http://www.cnn.com/2009/POLITICS/06/04/egypt.obama.speech/index.html/ (last visited May 24, 2010).

207. *See* Landler, *supra* note 30, at A10; *see also* Robert Burns, *Clinton: US Sees Value in Diplomatic Ties to Syria*, Associated Press, April 22, 2010.

208. *See* Organizing for America, *Barack Obama and Joe Biden: Champions for Arts and Culture*, http://www.barackobama.com/pdf/issues/additional/Obama_FactSheet_Arts.pdf (last visited May 24, 2010) ("American artists, performers, and thinkers—representing our values and ideals—can inspire people both at home and all over the world.").

209. *See id.*

In *Rubin,* during oral arguments before the Seventh Circuit, the Department of Justice (DOJ) filed an amicus curiae brief supporting Iran's effort to overturn the trial court's disclosure ruling.[210] During oral arguments a DOJ attorney remarked that "the questions of foreign sovereign immunity at issue in this case are ones of significant interest to the United States . . . [t]hey have an impact not just in this case obviously, but in an all litigation involving foreign states in U.S. courts and also have a ramification for the treatment of the U.S. in foreign courts abroad."[211] Regardless of whether the Obama administration's decision to support Iran's appeal stemmed from concerns over comity or foreign policy, one thing is clear: the executive branch effectively requested that in the *Rubin* proceeding, the applicability of the FSIA's terrorism provisions be waived, echoing President Bush's veto of the initial 2008 amendments, which did not include a waiver provision for Iraq.[212]

Conclusion

Politicians and scholars continue to heavily debate the appropriate response to the threat of global terrorism.[213] Generally, advocates of the FSIA's current scheme advance two major benefits, aside from providing victims redress, which stem from allowing victims of terrorism to sue state sponsors. First, because the FSIA provides the potential for substantial monetary damages, suits brought against state sponsors of terrorism may deter future support of terrorist organizations, or at the very least, impair the state's ability to devote resources to the funding of terrorist activity.[214] Second, proponents argue that the private cause of action created under the FSIA allows the U.S. government to remain neutral and continue to participate in diplomatic discourse with sovereigns suspected of terrorist activity while allowing private citizens to expose those sovereigns before the international community.[215] Both benefits, however, fail to appreciate an unintended consequence of allowing victims of terrorism to sue state sponsors—namely, the FSIA's effect on international cultural exchange. Furthermore, it is disingenuous to suggest that the executive may continue to effectively engage in diplomacy and "save face" because it is not directly involved in FSIA suits. Indeed, considering that Congress created the terrorism exception,[216] and the judiciary oversees actions brought thereon,[217] it is difficult to argue that the U.S. government is not very much directly involved.

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210. *See* Marek, *supra* note 152.
211. *See id.*
212. *See* Herszenhorn, *supra* note 67, at A28.
213. *See* Strauss, *supra* note 66, at 308.
214. *See id.* at 310.
215. *See* Perles & Lajeunesse, *supra* note 15, at 9–10.
216. *See* Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891; Bahr, *supra* note 32, at 1125.
217. *See* Kim, *supra* note 76, at 514.

Other scholars, while not directly endorsing the FSIA's terrorism provisions, have suggested loopholes and ambiguities that can be read into the statute that may prevent the attachment of cultural objects.[218] Such interpretive gambling, however, did not persuade Syria to loan objects to the Metropolitan for an influential exhibit.[219] Although the Metropolitan obtained a grant of immunity from the State Department for the promised cultural property, both Syria and the Metropolitan decided to avoid any risk by simply not going forward with Syria's participation.[220] End-running the statute, moreover, does not answer the underlying foreign policy issues raised by granting victims of terrorism jurisdiction to bring actions against foreign sovereigns.[221] Furthermore, recall that generally the FSIA is a jurisdiction-stripping statute.[222] The terrorism exception is but one of the enumerated instances under which states are prevented from raising the defense of sovereign immunity.[223] Essentially, therefore, those scholars seeking to find a middle-ground between endorsing and opposing the terrorism provisions would further muddy the FSIA's already complicated framework by asking courts to read exceptions into exceptions.

Congress passed the FSIA in an attempt to clarify and simplify the process of granting or denying claims of sovereign immunity by shifting such determinations from the executive to the judiciary.[224] However, by creating and in 2008 expanding the terrorism provisions, Congress has effectively usurped an area of control historically reserved for the executive branch.[225] Indeed, President Obama has not embraced the statutory framework in place, likely understanding that allowing victims of terrorist acts to sue foreign sovereigns presents U.S. diplomatic efforts as two-faced.[226] Naturally, states will question the sincerity of executive rhetoric, for example, wanting to rebuild ties with Syria, when American courts are entering multi-million dollar judgments against them in their sovereign capacity.[227]

Given the exception's minimal compensatory and deterrent impact, and substantial diplomatic costs,[228] its continued use should be seriously reassessed. Accordingly, Congress should repeal the FSIA terrorism excep-

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218. *See* Hilton, *supra* note 13, at 482 (arguing that courts should find that objects on loan to American museum do not constitute commercial activity thereby shielding them from possible attachment).

219. *See* AIA Statement, *supra* note 7.

220. *See id.* at 2.

221. *See supra* Part IV.

222. *See* U.S.C. §§ 1602–10.

223. *See id.*

224. *See* Republic of Austria v. Altmann, 541 U.S. 677, 716–17 (2004).

225. *See supra* notes 35–45 (describing the history of sovereign immunity determinations).

226. *See, e.g.*, Marek, *supra* note 152.

227. *See* Gates v. Syrian Arab Republic, 580 F. Supp. 2d 53, 75 (D.C. Cir. 2008); Landler, *supra* note 30.

228. *See* Taylor, *supra* note 55, at 534 ("In the years since the terrorism exception was added to the FSIA, it has accomplished neither compensation nor deterrence. Instead, suits against state sponsors of terrorism negatively affect U.S. foreign policy and do little to bring compensation or closure to the victims of terrorism or their families.").

tion and return to the historic system whereby the executive branch dictated sovereign immunity determinations on a case-by-case basis.[229] Alternatively, if the current system remains, Congress should create a provision that delegates authority to the President to waive the terrorism exception's applicability to any designated state sponsor of terrorism if he determines that waiver will promote the security and diplomatic interests of the United States.[230] Perhaps, after meaningfully scrutinizing the current statutory system, the political branches may still structure an effective framework by which victims of terrorism may obtain redress without frustrating the goals of cultural diplomacy. Regardless of whether victim compensation is feasible, if the United States hopes to effectively combat the threat of global terrorism, American foreign policy should focus on coordinating the efforts of private actors, engaging in cultural exchange, and rebuilding a network of alliances through diplomatic relations.[231]

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229. This note does not argue for the repeal of the entire FSIA, only those provisions granting jurisdiction under the terrorism exception. *See* 28 U.S.C. §§ 1602–11.

230. *See e.g.*, Republic of Iraq v. Beaty, 129 S. Ct. 2183, 2189 (2009) (approving such provision that allowed President Bush to waive the applicability of the terrorism exception with respect to Iraq).

231. *See generally* Nye, *The Decline of America's Soft Power*, *supra* note 22.