

June 2015

# A Herculean Task for Judge Hercules: Analytical Avoidance in *Iran v. Elahi*

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## Recommended Citation

Gryta, Anneliese (2008) "A Herculean Task for Judge Hercules: Analytical Avoidance in *Iran v. Elahi*," *Akron Law Review*: Vol. 41 : Iss. 1 , Article 4.

Available at: <http://ideaexchange.uakron.edu/akronlawreview/vol41/iss1/4>

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## **A HERCULEAN TASK FOR JUDGE HERCULES: ANALYTICAL AVOIDANCE IN *IRAN V. ELAHI***

### I. INTRODUCTION

In *Iran v. Elahi*,<sup>1</sup> the United States Supreme Court missed a chance to weigh in on a seldom-used, yet completely radical tool in the war against terrorism: Section 1610(a)(7) of the Foreign Sovereign Immunities Act (FSIA).<sup>2</sup> Section 1605(a)(7) peels away sovereign immunity so that terrorist states may be sued in United States courts when they injure United States citizens.<sup>3</sup> Then remarkably, Section 1610(a)(7) allows victims to attach that foreign state's property in order to satisfy judgments obtained under the former provision.<sup>4</sup> Congress amended the FSIA in 1996 to include this provision, and in so doing, extended the jurisdictional reach of U.S. courts further than it ever had before.<sup>5</sup> Few countries in the world have so stripped away sovereign immunity protections, and those that have, have done so in response to this U.S. legislation.<sup>6</sup> This Comment examines the health and welfare of this statutory provision, exploring its history and tracking its status through a particular case: *Iran v. Elahi*. Viewed pragmatically, the 1610(a)(7) attachment provision should be removed from the books even though it supports the policies of deterrence and redress. The Supreme Court failed to render a clear decision on the issue, missing a chance to tell Congress that their provision was dead on arrival. For reasons explored in this Comment, it is unlikely that the provision will ever be used.<sup>7</sup> The Supreme Court should have delved more deeply into the heart of the provision and sent a clear signal to Congress. If the courts do not apply it, the terrorist state exception is left toothless.

In *Iran v. Elahi*, the 1610(a)(7) argument for attachment met with little success, even though it best supports the policies which underlie

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1. *Iran v. Elahi*, 546 U.S. 450 (2006).
  2. *See infra* Part IV.
  3. *See infra* Part II.
  4. *See infra* Part II.
  5. *See infra* Part II.
  6. *See infra* Part IV.B.3.
  7. *See infra* Parts III, V.

the terrorist state exception to immunity: deterrence and redress.<sup>8</sup> Almost all cases filed under the terrorist state exception have been marked by a default judgment, as there is little incentive for a terrorist state defendant to appear in court,<sup>9</sup> much less pay its judgment creditors. Recovery for the plaintiffs in *Alejandre*, *Flatow*, *Cicippio* and *Rein* has been characterized as a “Herculean task” by one scholar,<sup>10</sup> and has been documented somewhat less dramatically by many others.<sup>11</sup> As shown in Part III, Congress has struggled to provide a means of redress for victims of terrorist state attacks, but has not yet created an optimal solution.<sup>12</sup>

The availability of a monetary judgment in the United States which belongs to Iran distinguishes *Iran v. Elahi* from a series of similar cases - the judgment constitutes actual attachable assets located within the United States and does not present the same legal hurdles which have limited access to diplomatic or frozen assets.<sup>13</sup> By framing the issue as it did, however, the Supreme Court was able to avoid the 1610(a)(7) argument and an unpleasant quagmire involving the compensability of U.S. victims of terrorism, international politics, foreign policy, and the legislative history of the FSIA terrorist state exception.<sup>14</sup>

No other terrorist state exception case has presented such a favorable opportunity for redress (besides *Flatow*),<sup>15</sup> so it is particularly noteworthy that the Supreme Court missed an opportunity to clearly analyze the statutory pathways to redress for *Elahi* and shed light on murky FSIA doctrine for future plaintiffs. If *Iran v. Elahi* is not the type of case that Congress had in mind when it enacted the foreign state

8. See *infra* Parts III-IV (explaining how the 1610(a)(7) attachment provision is essential in order to carry out the underlying policies of the terrorist state exception).

9. William P. Hoye, *Fighting Fire With . . . Mire? Civil Remedies and the New War on State-Sponsored Terrorism*, 12 DUKE J. COMP. & INT'L L. 105, 136 (2002) [hereinafter Hoye, *Fighting Fire*] (“Until a more broadly based group of successful plaintiffs are able to collect routinely on judgments awarded under the Act, without the extraordinary and unusual remedy of special legislation, there seems to be little incentive for foreign state defendants or their agents to appear, much less to defend themselves aggressively, in Antiterrorism Act cases.”).

10. ERNEST K. BANKAS, *THE STATE IMMUNITY CONTROVERSY IN INTERNATIONAL LAW: PRIVATE SUITS AGAINST SOVEREIGN STATES IN DOMESTIC COURTS* 293-94 (2005) [hereinafter BANKAS, *STATE IMMUNITY*]. These cases are discussed throughout the article. See *infra* note 60 for a brief summary of each.

11. See *infra* Part II.D.

12. See *infra* Part II.

13. It has been difficult for other terrorist state exception judgment holders to recover, in part, because there are few assets of terrorist states or their agencies or instrumentalities located within the United States besides diplomatic or frozen assets; however, accessing these assets presents significant policy problems. See *infra* notes 60-63 and accompanying text.

14. See *infra* Parts III-IV.

15. See *infra* note 137 and accompanying text (explaining *Flatow v. Iran*, 999 F. Supp. 1 (D.D.C. 1998), in which the plaintiff similarly tried to attach the *Cubic* judgment).

attachment provision, then it is doubtful that it will *ever* be applied.<sup>16</sup> This Comment will analyze the duty of the judiciary to decide matters that parties set before it, arguing for a greater degree of analysis on both the Ninth Circuit and Supreme Court levels.<sup>17</sup>

This Comment examines the history, development, and application of the FSIA's terrorist state attachment exception through the lens of *Iran v. Elahi*, as well as the larger problems and ramifications which ripple forth from the case.<sup>18</sup> Part II, Sections A, B, and C present the background of the FSIA, the terrorist state exception, explaining the difference between 1610(a)(7) attachment of a foreign state's property and 1610(b)(2) attachment of the property of an agency or instrumentality of the foreign state.<sup>19</sup> Part III explores the intractable problem of recovery in terrorist state exception cases and the unfortunate foreign policy and constitutional ramifications of the statute as it stands.<sup>20</sup> Part IV presents the background facts and procedural history of *Iran v. Elahi*.<sup>21</sup> Part V explains the potential duty of the judiciary in applying scrupulous analysis to arrive at the "best" argument – the one contributing most fittingly to the development of the law.<sup>22</sup> This Comment advocates that the common law will be better served if judges aspire to Dworkin's Judge Hercules<sup>23</sup> – a fitting ideal in the face of a "Herculean task."<sup>24</sup>

## II. THE EVOLUTION OF THE PROVISION

### A. *History of the Foreign Sovereign Immunities Act*

The statutory provisions addressed in *Iran v. Elahi* originate within the Foreign Sovereign Immunities Act of 1976 (FSIA).<sup>25</sup> The FSIA codified a longstanding history of precedent and practice which gave foreign states immunity from suit in United States courts, with certain

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16. See *infra* Part IV.

17. See *infra* Part V.

18. See *infra* Parts II-V.

19. See *infra* Parts II.A, C.

20. See *infra* Part III.

21. See *infra* Part IV.

22. See *infra* Part V.

23. See *infra* notes 220-224 and accompanying text.

24. See *supra* note 10.

25. 28 U.S.C. §§ 1602-1611 (2007).

exceptions.<sup>26</sup> The earliest precedent regarding foreign sovereign immunity held that foreign states were granted absolute immunity in United States courts, as presented in the landmark 1812 case, *The Schooner Exchange v. M'Faddon*.<sup>27</sup>

In the 20th century, a restrictive theory of sovereign immunity<sup>28</sup> emerged in response to communism and growing governmental activity in the marketplace.<sup>29</sup> During the postwar period, when the issue of sovereign immunity arose, courts developed the practice of deferring to the State Department, which initially responded with the Tate Letter,<sup>30</sup> presenting the restrictive theory of sovereign immunity. The FSIA was enacted in 1976 to clear up confusion regarding the restrictive theory of

26. See Jeffrey Rabkin, *Universal Justice: The Role of Federal Courts in International Civil Litigation*, 95 COLUM. L. REV. 2120, 2132-33 (1995).

27. GARY B. BORN & DAVID WESTIN, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS: COMMENTARY AND MATERIALS* 450 (2d ed. 1992) (discussing *The Schooner Exchange v. M'Faddon*, 11 U.S. 116, 137-38 (1812)). This case describes the near absolute immunity granted to state sovereigns sued in United States courts during the 18th and 19th Centuries. *The Schooner Exchange v. M'Faddon*, 11 U.S. 116, 137-38 (1812). Absolute immunity was predicated on the notion that sovereigns were equal and independent, thus, no sovereign state could bring any other within its jurisdiction for purposes of suit. *Id.* at 136. In the case, a private American vessel was captured by the French and converted into a French warship. *Id.* at 117. Later, when the vessel was forced into a U.S. port due to weather, the owners were barred from suing France for libel due to foreign sovereign immunity. *Id.* at 146-47.

28. See *infra* note 30 and accompanying text (discussing the restrictive theory of sovereign immunity).

29. Joseph Keller, *The Flatow Amendment and State Sponsored Terrorism*, 28 SEATTLE U. L. REV. 1029, 1029 (2005). "[T]he onset of communism in the post World War II era" saw many foreign governments assuming commercial functions that had been traditionally carried out by private actors. *Id.* States took on such activities as operating airlines or commercial banks. *Id.* The policy behind the theory is that private citizens or companies enter into contracts with the foreign sovereign as they would with foreign citizens and companies and would be unable to recover for any breaches made by the foreign sovereign. DAVID M. ACKERMAN, CONGRESSIONAL RESEARCH SERVICE, *SUITS AGAINST TERRORIST STATES* 3 (2002), <http://fpc.state.gov/documents/organization/8045.pdf> [hereinafter ACKERMAN, SUITS].

30. Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep't of State, to Acting U.S. Att'y General Philip B. Perlman (May 19, 1952), reprinted in 26 DEP'T STATE BULL. 984-85 (1952). The Tate Letter sets forth the restrictive theory of sovereign immunity, whereby foreign states retain immunity for sovereign or public acts of the state, but not for private acts. *Id.* The letter failed to supply any guidelines for distinguishing public acts from private acts. *Id.* Previously, when a case against a foreign state arose, the State Department asked the Department of Justice to inform the court that the government supported the principle of absolute immunity, and the courts usually deferred to this advice. ACKERMAN, SUITS, *supra* note 29, at 3. "The Tate letter meant that the government would [cease to] make this suggestion in cases against foreign states involving commercial activity." *Id.*

sovereign immunity such that the judiciary could apply the law without application to the executive branch.<sup>31</sup>

Dating back to *The Schooner Exchange*, the Supreme Court implied that determinations of foreign sovereign immunity were better left to the branches of the government that deal in politics – an analysis derived from the constitutional separation of powers doctrine.<sup>32</sup> From the time of *The Schooner Exchange* until the Tate Letters, there were few suits against foreign sovereigns.<sup>33</sup> Even when suits were permitted, courts only tiptoed into the fray, deferring to the executive branch for guidance for over twenty years.<sup>34</sup> In 1973, the Department of State and the Department of Justice initiated the process to codify the doctrine.<sup>35</sup> Though well-intentioned,<sup>36</sup> the transfer of immunity determinations from the executive to the judicial branch has put the judiciary in what has historically been an uncomfortable proximity to foreign policy-making.<sup>37</sup>

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31. Keith Sealing, “*State Sponsors of Terrorism*” Is a Question, Not an Answer: *The Terrorism Amendment to the FSIA Makes Less Sense Now Than It Did Before 9/11*, 38 TEX. INT’L L.J. 119, 122 (2003).

32. See Todd Connors, *The Foreign Sovereign Immunities Act: Using Separation of Powers Analysis to Guide Judicial Decision-Making*, 26 LAW & POL’Y INT’L BUS. 203, 206-07 (1994) [hereinafter Connors, *Separation of Powers*]. Connors laments that the FSIA, “has during its brief lifetime been a financial boon for the private bar but a constant bane of the federal judiciary.” *Id.* at 203.

33. See *supra* note 27 and accompanying text (discussing *The Schooner Exchange*).

34. See *supra* notes 28-30 and accompanying text (discussing the Tate Letters).

35. Connors, *Separation of Powers*, *supra* note 32, at 213-14. The decision to codify the FSIA was not made without serious deliberation, as these departments consulted with the Judiciary Committee of the House of Representatives to draft H.R. 11315, which became the Foreign Sovereign Immunities Act of 1976. *Id.*

36. The act was actually created to help de-politicize determinations on foreign sovereign immunity. *Id.* at 215-16. The legislative history of the 1976 FSIA contains the following:

A principal purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process. The Department of State would be freed from pressures from foreign governments to recognize their immunity from suit and from any adverse consequences resulting from an unwillingness of the Department to support that immunity. As was brought out in the hearings on the bill, U.S. immunity practice would conform to the practice in virtually every other country-- where sovereign immunity decisions are made exclusively by the courts and not by a foreign affairs agency.

H.R. REP. 94-1487 at 7.

37. Connors, *Separation of Powers*, *supra* note 32, at 218 (“The Act, lacking a viable standard of guidance, provides the federal judiciary with tremendous incentive to evaluate or even formulate U.S. foreign policy.”).

### B. Structure of the FSIA

The FSIA preserves a traditional distinction between general sovereign immunity from suit and immunity from attachment in aid of execution.<sup>38</sup> Section 1604<sup>39</sup> sets forth the general rule that a foreign sovereign will be immune from suit in the United States, unless one of the exceptions listed in Section 1605 applies.<sup>40</sup> Section 1609<sup>41</sup> provides generally that the property of a foreign sovereign and that of its agencies and instrumentalities is immune from attachment and execution unless one of the exceptions listed in Section 1610<sup>42</sup> applies. The exceptions

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38. 28 U.S.C. 1602 (1976) (offering a statement of the purpose of the Foreign Sovereign Immunities Act). The provision reads:

The Congress finds that the determination by the United States courts of claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in the United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities.

*Id.* Iran v. Cubic Defense Systems, Inc. 385 F.3d 1206, 1218 (9th Cir. 2004). The Ninth Circuit commented that the drafters of the FSIA intended to lower the barriers to immunity from attachment in order to closely mirror the provisions on sovereign immunity (citing H.R. Rep. 94-1487, at 27 (1976), reprinted in 1976 U.S.C.A.N. 6604, 6626).

39. 28 U.S.C. § 1604 (1976) (“Subject to existing international agreements to which the United States is a party at the time of enactment of this Act [enacted Oct. 21, 1976] a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.”).

40. 28 U.S.C. § 1605 (1976) (“(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . .”). The statute then lists seven exceptions to general sovereign immunity, loosely paraphrased here as including: (1) when a sovereign implicitly or explicitly waives its immunity; (2) when the action is based on a commercial activity; (3) when rights in property taken in violation of international law are at issue and property exchanged for that property is in the United States in connection with a commercial activity; (4) when property in the United States acquired by gift or succession or rights in immovable property are in issue; (5) when a tort claim for money damages is sought against a foreign state for actions in the United States caused by the act or omission of that foreign state, official, or employee; (6) when an action is brought to enforce an agreement the foreign state made with a private party to submit to arbitration; (7) when a United States national seeks money damages against a foreign state, who has been named a state-sponsor of terrorism, for personal injury or death caused by a terrorist act such as torture or extra-judicial killing (terrorist state exception). *Id.*

41. 28 U.S.C. § 1609 (1976) (“Subject to existing international agreements to which the United States is a party at the time of enactment of this Act [enacted Oct. 21, 1976] the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.”).

42. 28 U.S.C. § 1610 (1976). Under § 1610 of the FSIA, property of a foreign state or property of a foreign state’s agencies or instrumentalities may be attached if it falls into one of the following exceptions:

- (a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall

are divided into two categories, with separate provisions for property of a foreign state and property of the foreign state's agencies or instrumentalities.<sup>43</sup>

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not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if –

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property –

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: provided that such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment, or

(6) the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement, or

(7) the judgment relates to a claim for which the foreign state is not immune under section 1605(a)(7), regardless of whether the property is or was involved with the act upon which the claim is based.

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if –

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a) (2), (3), (5), or (7), or 1605(b) of this chapter, regardless of whether the property is or was involved in the act upon which the claim is based.

28 U.S.C. § 1610(a)-(b). Section 1610(a)(7) and (b)(2) both remove attachment immunity after general sovereign immunity has been lifted due to the terrorist state exception of § 1605(a). *Id.* Section 1611 sets out certain types of property which are categorically immune to execution, including, for example, the property of a foreign central bank or property used in connection with a military activity. 28 U.S.C. § 1611 (1976).

43. *Id.*



### C. The Terrorist State Exception to the FSIA

The youngest of the FSIA exceptions, the terrorist state exception to general sovereign immunity, and the attendant exception to attachment immunity were not included in the original 1976 draft of the FSIA.<sup>44</sup> Congress amended the FSIA in 1996 to include Sections 1605(a)(7), 1610(a)(7), and 1610(b)(2) through the Antiterrorism and Effective Death Penalty Act (AEDPA).<sup>45</sup> The amendments to the FSIA formed a tiny part of a long series of measures intended to protect United States citizens from terrorism at home or abroad, and to provide victims and their families with redress.<sup>46</sup> The act authorizes civil suits by victims of terrorism against foreign states that the Department of State has designated as official state sponsors of terrorism.<sup>47</sup>

Two events spurred the passage of the terrorist exception to immunity: national frustration over the holding of *Smith v. Socialist People's Libyan Arab Jamahiriya*, which denied lifting Libya's sovereign immunity to permit the suit of the victims of the bombing of Pan Am flight 103;<sup>48</sup> and national outrage over the Oklahoma City bombing.<sup>49</sup> Families of the Pan Am bombing victims lobbied Congress

44. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended at 28 U.S.C. §§ 1605(a)(7), 1610(a)(7), and 1610(b)(2)).

45. *Id.* See also ACKERMAN, SUITS, *supra* note 29, at 3-4.

46. President's Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996, 32 Weekly Comp. Pres. Doc. 719, 721 (Apr. 29, 1996). The act included many tools that aid the fight against terrorism, such as an enlargement of jurisdiction to prosecute those who commit terrorist acts in the United States, a ban on fundraising for terrorist organizations in the United States, an increase in penalties for many terrorist crimes. *Id.* President Clinton did remark in the signing statement that the legislation was created as a response to the Oklahoma City bombings. *Id.*

47. 28 U.S.C. § 1605(a)(7) (1996). The list currently includes Cuba, Iran, Libya, North Korea, Sudan, and Syria. See 22 C.F.R. § 126.1(d) (2004).

48. *Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239 (1996), *cert. denied*, 520 U.S. 1204 (1997). Families of the victims of the Pan Am flight 103 crash sued Libya in federal court, arguing that Libya violated a *jus cogens* norm by its involvement causing the crash, thus waiving its sovereign immunity under the FSIA. *Id.* at 242-45.

49. S. Rep. No. 104-179, at 28 (1996), *as reprinted in* 1996 U.S.C.C.A.N. 1, 940-941. Senate Report on the Antiterrorism and Effective Death Penalty Act of 1996, which amended the FSIA to include the terrorist state exception to sovereign immunity, provided the context for the amendment in the comments of Senator Leahy:

When the bomb exploded outside the Murrah Federal Building in Oklahoma City earlier this year, my thoughts and prayers, and I suspect that those of all Americans, turned immediately to the victims of this horrendous act. It is my hope that through this substitute we will proceed to enact a series of improvements in our growing body of law recognizing the rights and needs of victims of crime. We can do more to see that victims of crime, including terrorism, are treated with dignity and assisted and compensated with government help. . . . The substitute will fill a gap in our law for residents of the United States who are victims of terrorism and mass violence that occur outside of the borders of the United States. . . . One of the continuing tragedies of the downing of Pan Am

for the ability to sue those responsible.<sup>50</sup> A 1994 Report of the House Judiciary Committee explained that the legislation was crucial because victims had no other means of redress.<sup>51</sup> The legislation was also supported by other policy reasons, such as deterrence of terrorist acts and the need to hold state supporters of terrorism accountable for their actions.<sup>52</sup>

There were voices in both the House of Representatives<sup>53</sup> and the Senate<sup>54</sup> that argued against the passage of the terrorist exception. Those who dissented felt that either the legislation was an unnecessary

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flight 103 over Lockerbie, Scotland is that the U.S. Government has no authority to provide assistance or compensation to the victims of that heinous crime. Likewise the U.S. victims of the *Achille Lauro* incident could not be given aid. This was wrong and should be remedied.

*Id.*

50. Allison Taylor, *Another Front in the War on Terrorism? Problems with Recent Changes to the Foreign Sovereign Immunities Act*, 45 ARIZ. L. REV. 533, 536 (2003) [hereinafter Taylor, *Another Front*] (citing *Victims' Access to Terrorist Assets: Hearing on Amendments to the Foreign Sovereign Immunities Act Before the Senate Comm. on the Judiciary*, 106th Cong. 44-45 (1999) (statement of Allan Gerson)).

51. H.R. Rep. No. 103-702, at 4 (1994). The report states:

The difficulty U.S. citizens have had in obtaining remedies for torture and other injuries suffered abroad illustrates the need for remedial legislation. A foreign sovereign violates international law if it practices torture, summary execution, or genocide. Yet under current law a U.S. citizen who is tortured or killed abroad cannot sue the foreign sovereign in U.S. courts, even when the foreign country wrongly refuses to hear the citizen's case. Therefore, in some instances a U.S. citizen who was tortured (or the family of one who was murdered) will be without a remedy.

*Id.*

52. 142 Cong. Rec. H3605-04, \*H3615 (1996) (Conf. Rep) ("We must not surrender to terrorism, we must conquer it. We cannot allow the seeds of destruction to be sewn in our country. We must send the message loud and clear that the United States will act decisively against those who attempt to undermine civility.").

53. Hon. Don Young of Alaska, Remarks before the United States House of Representatives (Apr. 18, 1996), in 142 Cong. Rec. E638-01, 1996 WL 200079 ("I strongly feel that this legislation is a knee jerk reaction to a most heinous crime. This body has passed enough legislation in previous years to catch and punish criminals who commit these atrocious acts against humanity.").

54. Jamison Borek offered reasons for Congress not to amend the FSIA to include the terrorism immunity exception. (1) it diverges from the general practice of states and, if other states perceive the U.S. as deviating too far from generally established immunity, decreases U.S. credibility and influence; (2) states do not want to enter into the domestic courts of another to defend alleged wrongdoing; (3) the bill may hurt U.S. foreign relations. In order to punish states that sponsor terrorism, the U.S. coordinates with other nations to impose sanctions. The possibility of civil suits against such sponsors of terrorism adds unpredictability to these delicate calibrations; (4) potential judgments may interfere with U.S. counter-terrorism goals; (5) if the U.S. expands jurisdiction over cases involving alleged harm by a foreign state done outside the U.S., there is the potential for other states to reciprocate. *The Foreign Sovereign Immunities Act: Hearing on S. 825 Before the Subcomm. on Courts and Administrative Practice of the Senate Comm. on the Judiciary*, 103d Cong. 12 (1994) (statement of Jamison S. Borek, Deputy Legal Advisor, Department of State).

emotional response<sup>55</sup> or that it would upset foreign relations.<sup>56</sup>

Nevertheless, Congress passed the terrorist state exception and its attendant exceptions to attachment liability, which has led to the following conundrum.<sup>57</sup>

### III. THE PROBLEM OF ENFORCEMENT AND THE PROBLEM WITH ENFORCEMENT

#### A. *The Problem of Enforcement*

For plaintiffs who have obtained judgments against state sponsors of terrorism, recovery has been nearly impossible.<sup>58</sup> As earlier noted, Bankas has colorfully labeled the enforcement of such judgments a “Herculean task.”<sup>59</sup> In most cases, the terrorist state has failed to respond to the suit and the court has entered a default judgment.<sup>60</sup> Finding no commercial property to attach (and for reasons explored in

55. See *supra* note 53 and accompanying text.

56. See *supra* note 54 and accompanying text.

57. See *supra* note 40 and accompanying text.

58. See *infra* note 66 and *supra* note 51 (regarding the extreme difficulty in having judgments paid). Micco writes:

The primary goal of these plaintiffs is to have a court render such a judgment publicly with the prospect of inflicting financial retribution upon the offending state and its agent. The matter of monetary damages may be dispensed for purposes of this analysis, since the prospect of actual recovery under any scenario advanced, thus far, is negligible.

Richard T. Micco, *Putting the Terrorist-Sponsoring State in the Dock: Recent Changes in the Foreign Sovereign Immunities Act and the Individual’s Recourse Against Foreign Powers*, 14 TEMP. INT’L & COMP. L.J. 109, 142 (2000). He also remarks that terrorist states are unlikely to submit themselves to the jurisdiction of U.S. courts. *Id.* at 111. The problem of recovery has been amplified when the defendant is Iran. ALICIA M. HILTON, AMERICAN BAR ASSOCIATION, *THE PERSEPOLIS TABLETS: TERROR VICTIMS TARGET ANCIENT PERSIAN ARTIFACTS* (2007) [http://www.abanet.org/litigation/litigationupdate/2007/april\\_hottopics.html](http://www.abanet.org/litigation/litigationupdate/2007/april_hottopics.html) (quoting attorney David J. Strachman: “Iran is a very rich country but with few to no assets in the United States. Most were liquidated decades ago; the rest is generally diplomatic property immune under the Vienna Accords.”).

59. See BANKAS, STATE IMMUNITY, *supra* note 10 and accompanying text.

60. See, e.g., *Alejandre v. Republic of Cuba*, 996 F. Supp. 1239 (S.D. Fla. 1997). In *Alejandre*, a federal district court awarded the families of three of the four occupants of the “Brothers to the Rescue” planes a total of \$187.7 million in a default judgment against Cuba. See also *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1 (D.D.C. 1998) (default judgment); *Cicippio v. Iran*, 18 F. Supp. 2d 62 (D.D.C. 1998) (default judgment); *Anderson v. Islamic Republic of Iran*, 90 F. Supp. 2d 107 (D.D.C. 2000) (default judgment); *Daliberti v. Republic of Iraq*, 97 F. Supp. 2d 38 (D.D.C. 2000) (default judgment); *Higgins v. Islamic Republic of Iran*, No. 99-377, 2000 WL 33674311 (D.D.C. Sept. 21, 2000) (default judgment). In a particularly interesting case, *Rubin v. Iran*, the plaintiffs tried to enforce their default judgment by attempting to attach ancient Persian artifacts in the possession of the University of Chicago using the 1610(a)(7) commercial activity exception, under a theory of agency. *Rubin v. Iran*, 349 F. Supp. 2d 1108 (N.D.Ill.2004).

Part V, it is unlikely they would),<sup>61</sup> plaintiffs in the first lawsuits creatively attempted to satisfy their awards by attaching consular property and frozen assets until the Clinton administration intervened to stop the attachments.<sup>62</sup>

In 1998, Congress attempted to remedy the situation by specifically authorizing the attachment of frozen and diplomatic assets to satisfy judgments obtained under the terrorist exception.<sup>63</sup> However, Congress was only able to bypass a presidential veto by including a provision which allowed the president to waive attachment in the interest of national security.<sup>64</sup> Congress continued the tug-of-war in 2000 by

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61. One of the main reasons for this is the abundance of trade embargos and restrictions the United States maintains with the terrorist sovereigns on the State Department's list. *See infra* Part V. A related obstacle to satisfying judgments, the extreme nature of the terrorist exception, makes it unlikely to be enforced by the courts of other nations. According to Strauss:

One impediment to the enforcement of the judgments against terrorist organizations and the parties that support them can be found in the common trends of international law. As a general matter, judgments of U.S. courts will often be enforced by foreign courts on the basis of reciprocity and comity in countries where the losing party or its property can be found. Foreign courts, however, sometimes refuse to enforce judgments of U.S. courts if they view the amount of money awarded to be excessive, if there are punitive or treble damages, or if they think the court extended its net of jurisdiction too widely.

Debra M. Strauss, *Enlisting the U.S. Courts in a New Front: Dismantling the International Business Holdings of Terrorist Groups Through Federal Statutory and Common-Law Suits*, 38 VAND. J. TRANSNAT'L L. 679, 724-25 (2005) [hereinafter Strauss, *Enlisting*].

62. JENNIFER K. ELSEA, CONGRESSIONAL RESEARCH SERVICE, LAWSUITS AGAINST STATE SPONSORS OF TERRORISM: AN OVERVIEW 3 (2005), <http://www.fas.org/sgp/crs/terror/RS22094.pdf> ("[T]he Clinton administration intervened to oppose the attachments, arguing that the United States has international treaty obligations to protect all countries' diplomatic and consular properties, that the blocked assets of foreign States provide useful diplomatic leverage and should remain available for future use, that the attachment of the blocked assets by early claimants under the FSIA exception would mean that nothing would be left to compensate future claimants, and that the attachment of both kinds of assets would expose U.S. assets to reciprocal action in certain foreign States."). The administration also said that the attachment of frozen assets would violate the Vienna Convention on Diplomatic Relations, the Vienna Convention on Consular Relations and the Iran-United States Claims Tribunal agreements. ACKERMAN, SUITS, *supra* note 29, at 6-7. Frozen assets were notably and successfully used as political leverage to obtain the release of hostages during the Iranian hostage crisis. *Id.*

63. Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, § 117, 112 Stat. 2681-491 (1998).

64. When he signed Public Law No. 105-277 into law, President Clinton executed the waiver. Presidential Determination No. 99-1 waived all of the requirement that certain property described by the statute "be subject to execution or attachment in aid of execution of any judgment" entered pursuant to 28 U.S.C. § 1605 (a)(7). 53 Fed. Reg. 59201 (1999). Presidential Determination No. 99-1 was then superseded by Presidential Determination No. 2001-03 which says:

By the authority vested in me as President by the Constitution and laws of the United States of America, including section 2002 (f) of H.R. 3244, "Victims of Trafficking and Violence Protection Act of 2000," (approved October 28, 2000), I hereby determine that subsection (f)(1) of section 1610 of title 28, United States Code, . . . would impede the ability of the President to conduct foreign policy in the interest of national security and

enacting Section 2002 of the Victims of Trafficking and Violence Protection Act of 2000 (VTVPA),<sup>65</sup> which allocated United States Treasury funds to pay money damages to judgment holders in eleven separate cases.<sup>66</sup> The band-aid statute provided no means of recovery for subsequent claimants.<sup>67</sup>

In the wake of 9/11, Congress passed the September 11th Victim Compensation Fund of 2001, providing another avenue of redress for terrorism victims, albeit victims of one specific attack.<sup>68</sup> Then, seeking to broaden the availability of redress, Congress enacted the Terrorism Risk Insurance Act of 2002 (TRIA), which allows plaintiffs to satisfy

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would, in particular, impede the effectiveness of such prohibitions and regulations upon financial transactions. Therefore, pursuant to section 2002(f) of H.R. 3244, the "Victims of Trafficking and Violence Protection Act of 2000," I hereby waive subsection (f)(1) of section 1601 of title 28, United States Code, in the interest of national security.

65 Fed. Reg. 66483 (2000).

65. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No.106-386, § 2002, 114 Stat. 1541 (2000). The bill provided for compensatory damages of the eleven judgments to be paid out of United States Treasury funds, with one exception. *Id.* The plaintiffs in *Alejandre v. Cuba* were to be paid out of Cuba's frozen assets – a move which proved controversial. *Id.* The other judgments were all against Iran. *Id.* After these judgments were paid (up to a maximum of \$400 million), the United States was to seek its own reimbursement from Iran. *Id.* Under the statutory scheme, plaintiffs could choose to accept 110% of their compensatory damages if they relinquished enforcing their judgments in court; or 100% of their compensatory damages if they relinquished the right to attach assets such as diplomatic property and frozen assets. *Id.* Those who accepted the latter option could continue to seek court enforcement of their punitive damage awards. *Id.* In 2001, the United States government disbursed about half of Cuba's \$193.5 million in blocked assets to pay the three plaintiffs. Taylor, *Another Front*, *supra* note 50, at 541. This act engendered much criticism because there has been no compensation for the 6,000 claims determined valid by the Foreign Claims Settlement Commission in the late 1960s against Cuba for death, injury, and expropriation during and after Castro's takeover. Strauss, *Enlisting*, *supra* note 61, at 733-34. The U.S. Treasury has paid approximately \$350 million to satisfy the judgments against Iran. Taylor, *Another Front*, *supra* note 50, at 541.

66. These judgments include *Alejandre v. Republic of Cuba*, 996 F. Supp.1239 (S.D. Fla.1997), *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 2d 1 (D.D.C.1998), *Cicippio v. Islamic Republic of Iran*, 18 F. Supp. 2d 62 (D.D.C. 1998), *Anderson v. Islamic Republic of Iran*, 90 F. Supp. 2d 107 (D.D.C. 2000), *Eisenfeld v. Islamic Republic of Iran*, 2000 U.S. Dist. LEXIS 9545 (D.D.C. July 11, 2000), *Higgins v. Islamic Republic of Iran*, No. 99-377, 2000 WL 33674311 (D.D.C. Sept. 21, 2000); *Sutherland v. Islamic Republic of Iran*, 151 F.Supp.2d 27 (D.D.C. 2001), *Pohill v. Islamic Republic of Iran*, 2001 U.S. Dist. LEXIS 15322 (D.D.C. Aug. 23, 2001), *Jenco v. Islamic Republic of Iran*, 154 F. Supp. 2d 27 (D.D.C. 2001), *Wagner v. Islamic Republic of Iran*, 172 F. Supp. 2d 128 (D.D.C. 2001), and *Stenholm v. Islamic Republic of Iran* (not yet decided).

67. See Victims of Trafficking and Violence Protection Act § 2002.

68. September 11th Victim Compensation Fund of 2001, Pub. L. No. 107-42 § 406(b), 115 Stat. 230, 240 (2001). This legislation created a government claims process as a means to redress, rather than individual litigation. See Seth N. Stratton, *Taking Terrorists to Court: A Practical Evaluation of Civil Suits Against Terrorists Under the Anti-Terrorism Act*, 9 SUFFOLK J. TRIAL & APP. ADVOC. 27 (2004); Georgene Vairo, *Remedies for Victims of Terrorism*, 35 LOY. L.A. L. REV. 1265, 1273-85 (2002) (explaining provisions of the legislation).

their judgments against terrorist states or their agencies and instrumentalities by attaching frozen assets.<sup>69</sup> TRIA limited the presidential waiver of the 1998 Amendments so that the president must make an “asset-by-asset” determination that waiver is necessary.<sup>70</sup> The State Department opposed this legislation, but it passed nonetheless.<sup>71</sup> TRIA was the only source of the compensation received by the plaintiff in *Iran v. Elahi*.<sup>72</sup>

## B. The Problem with Enforcement

### 1. International Law and Foreign Policy Implications

There are powerful, unspoken foreign policy reasons that may explain why the Supreme Court effectively barred attachment under the 1610(a)(7) foreign state provision in *Iran v. Elahi*.<sup>73</sup> The exercise of the FSIA terrorist state exception may very well be a violation of international law, including customary international law and various treaties.<sup>74</sup> The Ninth Circuit itself, before authorizing the attachment,

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69. Terrorism Risk Insurance Act of 2002, Pub. L. No. 107- 297, § 201, 116 Stat. 2322, 2337 (codified at 28 U.S.C. § 1610 (2002)). Section 201(a) specifically allows the attachment (“(a) In general.—Notwithstanding any other provision of law, and except as provided in subsection (b)[of this note], in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, or for which a terrorist party is not immune under section 1605(a)(7) of title 28, United States Code, the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment in aid of execution in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable.”).

70. Terrorism Risk Insurance Act § 201(b)(1). See also Strauss, *Enlisting*, *supra* note 61, at 735 (noting that TRIA has provided relief to at least one plaintiff with a judgment against Iran, namely in *Hegna v. Islamic Republic of Iran*, 2003 U.S. Dist. LEXIS 14039 (N.D. Ill. 2003)). Elahi recovered partial payment under TRIA. See *infra* note 162 and accompanying text.

71. Taylor, *Another Front*, *supra* note 50, at 544 (regarding the State Departments efforts to thwart attachment).

72. See *infra* note 174.

73. Taylor, *Another Front*, *supra* note 50, at 544. Taylor says that the most significant problem with the practice of permitting suit against foreign states is that it allows the courts to intrude on foreign policy. *Id.*

74. BANKAS, STATE IMMUNITY, *supra* note 10, at 293. Bankas states that the FSIA attachment immunity exception authorizing a plaintiff to claim state-owned property used for commercial activity in the United States, regardless of whether the property is the subject of the claim, runs counter to prevailing customary international law. *Id.* He believes that such attachment may violate various international agreements such as the Vienna Convention on Diplomatic Relations, The Vienna Convention on Consular Relations and the General Convention on Privileges and Immunities of the United Nations. *Id.* at 293–95. He specifically refers to § 1610(a)(7) and (b)(2) as “draconian.” *Id.* at 294. In the next sentence, Bankas says that foreign state defendants should welcome the fact that the statutory amendments can be neutralized by presidential waiver,

noted the “historical and international antipathy to executing against a foreign state’s property.”<sup>75</sup> From the perspective of international law, it is at least clear that if the United States authorizes the attachment of diplomatic property it will violate the Vienna Convention on Diplomatic Relations and the Vienna Convention on Diplomatic Consular Relations.<sup>76</sup> Absolute attachment immunity in domestic law is prevalent worldwide.<sup>77</sup> Chapter VII of the United Nations Charter provides for attachment and other enforcement mechanisms only when a nation has violated international law.<sup>78</sup> When properly set within this legal landscape, it becomes clear that the 1610(a)(7) extension of U.S.

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which President Clinton exercised when Congress attempted to explicitly authorize the attachment of diplomatic assets in 1998. *Id.*

75. *Iran v. Cubic Defense Systems, Inc.* 385 F.3d 1206, 1219 (9th Cir. 2004).

76. Taylor, *Another Front*, *supra* note 50, at 547. Vienna Convention on Diplomatic Relations and Optional Protocol on Disputes, Apr. 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502. Article 22 requires that a host country protect the property of diplomatic missions and Article 45(a) says that if diplomatic relations are broken off, the host country must protect the diplomatic mission, its property and archives, even in the event of armed conflict. *Id.*

77. Even so Glannon and Atik write that, “We are not aware of any other nation that would similarly subject foreign states to private party actions in its domestic courts for extraterritorial acts.” Joseph W. Glannon & Jeffery 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, 701-02 (1999) [hereinafter Glannon & Atik, *Politics and Personal Jurisdiction*].

78. HAZEL QC. FOX, *THE LAW OF STATE IMMUNITY: FOUNDATIONS OF PUBLIC INTERNATIONAL LAW*, 28-29 (2002) [hereinafter FOX, *THE LAW OF STATE IMMUNITY*]. Fox explains that:

The application by one State of forcible measures of constraint against the conduct or property of another State is an unfriendly act generally prohibited by international law, except where that state itself has contravened international law. Thus exceptionally, under Chapter VII of the UN Charter in respect of threat to or breach of international peace and security, the United Nations Security Council may authorize the application of sanctions against a State, and those sanctions may take the form of national measures of constraint against a State’s property, as with the UN-ordered bloc of Iraq’s assets following the invasion of Kuwait. Such orders may also be made to protect a State which itself is disabled, as with the freezing orders in respect of assets of the State of Kuwait. Unilateral countermeasures against another State may only be taken by way of reprisal against another State for violation of international law, such as the US’ freezing of assets in response to the seizure of US diplomats by Iran in 1979.

*Id.* This view coincides with that of the scholars who recommend the ICC as the only appropriate forum for enforcement against terrorist states. Taylor, *Another Front*, *supra* note 50, at 556. Victims would have a greater likelihood of recovery in such a forum because judgments could be enforced in any state where the defendant has assets. *Id.* Hoye, *Fighting Fire*, *supra* note 9, at 149-50 (advocating the ICC as a potential site of a “credible, independent and global compensation system.”). The FSIA attachment provisions related to terrorist acts against United States citizens do not present the type of sovereign reprisal that Fox says is legal by international law. FOX, *THE LAW OF STATE IMMUNITY* at 28-9. With these statutes, a private citizen is arguably bringing the “reprisal,” which is subject to the individual motivations and whims of the private litigant. 28 U.S.C. § 1610.

jurisdiction rests on much shakier ground than perhaps Congress considered.

Likewise, the egregious jurisdictional reach may negatively impact foreign relations and foreign policy by presenting problems of reciprocity. Few other countries have enacted terrorist state exceptions to their foreign sovereign immunity doctrines and the ones who have enacted such provisions have done so in response to U.S. suits naming them as defendants.<sup>79</sup> The United States must consider the burdensome effect of opening itself up to reciprocal suits in other nations, as the United States has carried out many operations in foreign nations susceptible to the characterization of “terrorist.”<sup>80</sup>

Similarly, the United States may offend other nations by allowing suits to proceed in which that particular state may have an interest.<sup>81</sup> Presenting a related problem, the existence of outstanding judgments against terrorist states may make it more difficult to improve relations with these states in the future.<sup>82</sup> Scholars have suggested that the only venue competent to execute against the property of a state may be the International Court of Justice or another similar venue with international backing.<sup>83</sup> Fox notes that even when it may be legal to attach a foreign state’s property within a forum state, the forum state may be reluctant to authorize such attachment due to the political ramifications,<sup>84</sup> and this could be the case in *Iran v. Elahi*.

Besides the history of the doctrine working against attachment,

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79. Iran and Cuba have already enacted reciprocal policies. Taylor, *Another Front*, *supra* note 50, at 549-50.

80. Taylor, *Another Front*, *supra* note 50, at 549. Taylor explains that the United States has been responsible for military operations around the world many have labeled as “terrorist” in nature so it should be unsurprising if the United States were to find itself named as defendant and hauled before a foreign court. *Id.*

81. Glannon and Atik offer the example of the litigation of the families of the Lockerbie bombing victims. Glannon & Atik, *Politics and Personal Jurisdiction*, *supra* note 77, at 701-02. They write, “[T]he United Kingdom may decide that it has a greater stake in the Lockerbie case than has the United States because the Pan Am flight had departed London and exploded over Scotland, killing many on the ground as well as those on board the airliner. Consequently, the United Kingdom might resent U.S. proceedings and refuse enforcement.” *Id.* Also on the question of reciprocity, Bankas writes that:

In fact, it there is more involved in the enforcement process . . . and state practice over the years has been obscured by conflicting municipal court decisions, and it would appear that those states which have totally embraced the restrictive immunity are hesitant and apprehensive in having it applied at the enforcement phase, for fear of retaliation or similar action from other states.

BANKAS, STATE IMMUNITY, *supra* note 10, at 294.

82. Taylor, *Another Front*, *supra* note 50, at 546.

83. *See supra* note 78.

84. FOX, THE LAW OF STATE IMMUNITY, *supra* note 78, at 29.



there is the complex history of litigation between the United States and Iran: in return for the release of United States hostages during the 1979 Iranian hostage crisis, the President signed an executive agreement terminating litigation in U.S. courts between U.S. citizens and Iran.<sup>85</sup>

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85. Exec. Order No. 12,294, § 3, 46 Fed. Reg. 14,111, at 14,111 (1981). *Iran v. Elahi* would not be covered by the agreement because the Tribunal only hears claims which became ripe before January 19, 1981. *Id.* Nancy Amoury Combs provides further background on the situation:

Prior to Iran's 1979 Islamic Revolution, the United States and Iran were close allies. For years, Iran purchased vast quantities of United States military equipment, and during the 1970s in particular, Iran sought American technology, equipment, and investment for a variety of large-scale projects such as road construction, factory modernization, and communications systems. Consequently, by the late 1970s, Iran was home to a considerable number of American business interests, and more than 40,000 American citizens. But the Islamic Revolution in Iran brought those commercial relations to an abrupt end and by the end of 1978, most Americans living in Iran had fled the country. The new government established by the Ayatollah Khomeini instituted many 'reforms' that would have severe consequences for the American companies that had been doing business there. For instance, it nationalized numerous industries, expropriated the property of American corporations, and cancelled government contracts with American companies.

These events were no doubt troubling to the affected Americans, but few took any legal action to recover their losses. Then, on November 4, 1979, militant Iranian students stormed the United States Embassy in Tehran and took the American nationals there hostage. President Carter soon responded by, *inter alia*, blocking the transfer of all Iranian funds in American banks, both in the United States and abroad. He froze more than \$12 billion, and the news of these frozen assets sent many of the victimized American companies to United States courts bringing breach-of-contract and expropriation claims, and often seeking attachment of the frozen assets. By the time the hostages were released in early 1981, more than 400 suits against Iran were pending in American courts, with approximately \$4 billion of Iranian assets the subject of pre-judgment attachments.

Thus, when Iran and the United States began to negotiate in earnest to resolve the hostage crisis in the autumn of 1980, each state had something the other wanted. The United States wanted its citizens released. Iran wanted its money back and wanted to get out from what it viewed as burdensome litigation before American judges. However, the United States could not simply return Iran's assets upon the release of the hostages because most of the assets had been judicially attached. Consequently, after lengthy and complicated negotiations, the two countries concluded an agreement in January 1981--the Algiers Declarations--which ordered the release of the hostages, the return of most of Iran's money, and the creation of the Iran-United States Claims Tribunal. The Tribunal has jurisdiction over claims then outstanding by nationals of each country against the government of the other; claims between the two governments arising out of contracts between them for the purchase and sale of goods and services; and any subsequent disputes between the two governments concerning the interpretation or performance of the Algiers Declarations.

Nancy Amoury Combs, *Diplomatic Adjudication*, 2 CHI. J. INT'L L. 267, 267-69 (2001) [hereinafter Combs, *Diplomatic Adjudication*]. See generally Lisa D. Goekjian, *Jurisdiction Under the FSIA and the Algiers Accord, A Loose Application: Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 59 GEO. WASH. L. REV. 1311 (1991) (explaining the operation of Iran-United States Claims Tribunal in reference to the FSIA).

Over 3,500 claims have been submitted to the Iran-United States Claims Tribunal, created as an alternative to the litigation.<sup>86</sup> Within the Tribunal, Iran has employed many underhanded tactics, such as stalling, to delay and frustrate settlement.<sup>87</sup> In light of this tempestuous history and uncertain future, it is a reasonable conclusion that neither the Supreme Court, nor Elahi, would search exhaustively for reasons to apply this controversial foreign attachment provision of the FSIA in *Iran v. Elahi*.<sup>88</sup>

## 2. Constitutional Questions

Scholars have argued that the FSIA raises two constitutional problems, namely that immunity determinations are political questions<sup>89</sup> and that the 1996 Amendments permits suits against defendants without the requisite “minimum contacts” for due process.<sup>90</sup> A claim presents a nonjusticiable political question when it fits within one of the categories set forth in *Baker v. Carr*.<sup>91</sup> Connors first argues that most immunity determinations present political questions<sup>92</sup> because of a “textually demonstrable constitutional commitment”<sup>93</sup> to the executive branch.<sup>94</sup>

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86. Peter W. Adler, *The U.S.-Iran Accords and the Taking Clause of the Fifth Amendment*, 68 VA. L. REV. 1537, 1537 (1982).

87. Combs, *Diplomatic Adjudication*, *supra* note 85, at 269-70.

88. *See infra* notes 149-164.

89. Connors, *Separation of Powers*, *supra* note 32, at 217-24.

90. *See infra* notes 104-105.

91. *Baker v. Carr*, 369 U.S. 186, 217 (1962) (“Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing a lack of respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.”).

92. Connors, *Separation of Powers*, *supra* note 32, at 222. The FSIA cases which do not present political questions are simple contract cases. *Id.* at 227-29.

93. *See supra* note 91 and accompanying text.

94. Connors, *Separation of Powers*, *supra* note 32, at 222. Connors explains that the “Constitution gives the Executive branch power to receive foreign ambassadors and to recognize foreign states, thereby conferring upon them all the rights and immunities granted to foreign states to U.S. law, including foreign sovereign immunity.” *Id.* at 222-23. He says that the judicial branch usurps the power of the executive branch when it makes foreign sovereign immunity determinations. *Id.* at 223. Connors describes the effects of this infringement as such:

Thus, despite its purpose to depoliticize sovereign immunity decisions, the FSIA frustrates that end by encouraging similar cases to be subjected to the foreign policy whims of different judges. Whereas the common law encouraged executive branch encroachment of the judicial function, the FSIA, welcomes judicial infringement of executive foreign policy prerogative. To the extent foreign policy does influence FSIA

Second, he argues that immunity determinations present political questions when they lack “judicially manageable standards”<sup>95</sup> through which to resolve the case.<sup>96</sup> Third, Connors argues that these determinations risk “embarrassment from multifarious pronouncements,”<sup>97</sup> because the executive and judicial branch may differ on their opinions regarding immunity.<sup>98</sup> It makes sense that courts are uncomfortable in this territory – but, it does not help that they do not clearly say so in *Elahi*. The executive branch is clearly involved in that they name the states listed as terrorists,<sup>99</sup> but the extent of its influence is unclear. At least one FSIA suit has recently been dismissed as presenting a nonjusticiable political question on the circuit court level.<sup>100</sup>

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decisions, the federal judiciary exceeds its constitutional power and disregards its primary function of guaranteeing litigants due process of law by denying uniform treatment to foreign states, particularly in cases “where socioeconomic norms conflict as to whether a given activity is commercial or governmental.”

*Id.* at 215-16. In *Rein*, the Supreme Court rejected challenges on this ground because Congress wrote the terrorist state exception so that it applies to states that the State Department has designated as state sponsors of terrorism, thus, the decision is left up to the executive branch. *Rein v. Socialist People's Libyan Arab Jamahiriya*, 162 F.3d 748, 762-63 (2d Cir. 1998) (rejecting the argument that there has been an unconstitutional delegation of the core legislative power to determine the subject matter jurisdiction of the federal courts); *Daliberti v. Republic of Iraq*, 97 F. Supp. 2d 38 (D.D.C. 2000).

95. See *supra* note 91 and accompanying text.

96. Connors, *Separation of Powers*, *supra* note 32, at 223. Connors argues that the FSIA presents inadequate guidance on “commercial activity” and that courts must refrain from adjudication on any case that may involve this. *Id.*

97. See *supra* note 91 and accompanying text.

98. Connors, *Separation of Powers*, *supra* note 32, at 223 (arguing that instead of protecting one branch from usurpation by another, this provision protects all branches of the federal government).

99. See *supra* note 47 and accompanying text.

100. *Whiteman v. Dorotheum GMBH & Co.*, 431 F.3d 57 (2d Cir. 2005). See generally *Separation of Powers – Foreign Sovereign Immunity – Second Circuit Uses Political Question Doctrine to Hold Claims Against Austria Nonjusticiable under Foreign Sovereign Immunity Act – Whiteman v. Dorotheum GMBH & Co.*, 431 F.3d 57 (2d Cir. 2005), 119 HARV. L. REV. 2292 (2006) [hereinafter *Separation of Powers*]. This article explains that the United States offered a statement of interest in the case, on which the outcome ultimately turned. *Id.* at 2292. In this case, plaintiffs sued Austria for compensation for assets liquidated during the Nazi era. *Whiteman*, 431 F.3d at 59-60. While the case unfolded, the United States entered an executive agreement with Austria to establish an alternative dispute resolution system for these cases. The United States offered its statement of interest in the case because the only obstacle to implementation of the system was this outstanding case. *Whiteman*, 431 F.3d at 59. While the court dismissed the action because of this foreign policy concern presented by the executive branch, it avoided creating precedent which would establish pure deference to the executive branch in FSIA cases. *Separation of Powers* at 2292. It argues that the court acted rightly by reinforcing “principles of deference present in existing doctrines” instead of “creating a new doctrine of ‘executive deference’” because of the lack of clarity presented in recent Supreme Court decisions. *Id.* at 2295. In *Iran v. Elahi*, the court did not have a clear foreign policy decision in its hands; however, it did solicit an amicus brief from the United States before deciding whether or not to grant certiorari. *Iran v. Elahi*, 544 U.S.

Although it is outside the scope of this Comment, the judges in *Whiteman v. Dorotheum GMBH & Co.* applied a murky, emerging doctrine of “case-specific deference” in order to shed light on this question.<sup>101</sup>

While no brief or opinion ever mentions this issue, there are elements of such deference to the executive branch in *Iran v. Elahi*. For example, the Court requested an amicus brief from the United States before deciding whether or not to grant certiorari.<sup>102</sup> Later, the United States intervened after the case was remanded to the Ninth Circuit.<sup>103</sup> There is a pattern of interaction between the different branches of government that the Supreme Court could have taken the opportunity to clarify – but did not.

There is another constitutional argument that the FSIA terrorist state exception presents problems with “minimum contacts” because it can confer jurisdiction over litigation resulting from acts occurring off of U.S. soil.<sup>104</sup> However, Professors Glannon and Atik would argue that there is no problem here, because the United States Constitution was not contemplated to provide protection to foreign nations – but to protect individuals and U.S. states.<sup>105</sup>

#### IV. IRAN V. ELAHI

##### A. Background Facts

On the morning of October 23, 1990, Dr. Cyrus Elahi, a United States citizen<sup>106</sup> and champion of democracy in Iran,<sup>107</sup> was shot eight

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998 (2005).

101. *Separation of Powers*, *supra* note 100, at 2296 (citing *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2766 (2004) and *Republic of Austria v. Altmann*, 124 S. Ct. 2240, 2255 (2004)). The author noted that the “case-specific deference” doctrine was only referenced in a footnote within the forty page *Sosa* opinion and a single paragraph in the *Altmann* opinion. *Id.*

102. *See infra* note 151 and accompanying text.

103. *See infra* note 162 and accompanying text.

104. *Daliberti v. Republic of Iraq*, 97 F. Supp. 2d 38, 48-49 (D.D.C. 2000). In *Daliberti*, Iraq unsuccessfully argued that “the FSIA as a whole, or at least the state sponsored terrorism exception, violates due process by abrogating the minimum contacts requirement that is always necessary for the exercise of personal jurisdiction.” *Id.*

105. Glannon & Atik, *Politics and Personal Jurisdiction*, *supra* note 77, at 688. The terrorist state exceptions allow for states to be sued for actions which could never conceivably be argued to bear the requisite “minimum contacts.” *Id.* However, “[t]he Fifth and Fourteenth Amendment Due Process Clauses were meant to protect individuals from capricious government action, rather than to protect foreign, coequal sovereigns.” *Id.* at 692.

106. *Elahi v. Iran*, 124 F. Supp. 2d 97, 103 (D.D.C. 2000).

107. *Id.* at 102-03. *See infra* note 114 and accompanying text.

times by an assassin using a gun with a silencer while on the steps of his apartment building in Paris, France.<sup>108</sup> Dr. Elahi's brother, Dr. Dariush Elahi, sought redress for the vicious attack by filing a wrongful death action against Iran and its Ministry of Defense in a United States district court.<sup>109</sup>

Before the Iranian Revolution of 1979, Dr. Elahi was a political science professor at the National University in Tehran.<sup>110</sup> Because of his work as an education advisor to the deposed Shah, Dr. Elahi was placed on a list of two hundred individuals designated as official enemies of the Khomeini regime.<sup>111</sup> The regime issued a fatwa calling for Elahi's assassination.<sup>112</sup> Elahi spent a period in hiding before he moved to the United States and obtained United States citizenship.<sup>113</sup>

In 1986, Dr. Elahi's close friend, Dr. Manouchehr Ganji established the Flag of Freedom Organization to promote democracy in Iran.<sup>114</sup> Dr. Ganji located the organization's headquarters in Paris and Dr. Elahi relocated to Paris and worked closely with Dr. Ganji as his second-in-command.<sup>115</sup>

Both United States and French authorities attributed Dr. Elahi's death to the Iranian Ministry of Information and Security (MOIS), which operates the most highly developed assassination program in the Middle East.<sup>116</sup> MOIS is also the largest intelligence agency in the Middle East,

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108. *Id.* at 103.

109. *Id.* at 99.

110. *Id.* at 103.

111. *Id.*

112. *Id.* The court explained that a fatwa is religious edict, which authorizes a faithful Muslim to kill certain opponents of the Iranian regime. *Id.* Fatwas are not outwardly published, but they filter out to the public indirectly. *Id.*

113. *Id.*

114. *See* MANOUCHEHR GANJI, *DEFYING THE IRANIAN REVOLUTION: FROM A MINISTER TO THE SHAH TO A LEADER OF RESISTANCE 181-207* (2002). Dr. Ganji established the organization in 1986 after meeting with Prince Reza, a son of the Shah, who inspired him to form an organization to promote a democratic and pluralistic Iran, which would respect the fundamental rights of its citizens. *Id.* The Front for the Liberation of Iran already existed in Paris, but its leader was aging and the organization had been diminishing its activities. *Id.* Dr. Ganji and Dr. Elahi took over the headquarters for their new organization. *Id.* They worked to promote a non-violent regime change in Iran through radio broadcasts, the publication of booklets, information gathering, and maintaining contact with opposition leaders within Iran. *Id.* They supported boycotts, strikes and other public demonstrations within Iran and abroad. *Id.* Dr. Ganji and Dr. Elahi directed their supporters within Iran to spread the idea of non-cooperation with the regime and to carry out acts of non-violent demonstration and protest. *Id.* In one notable campaign, the Flag of Freedom booklets instructed anyone dissatisfied with the regime to write the word "NO" (or "NAA" in Persian) on any available public surface in Iran. *Id.* Dr. Ganji writes that millions of "NAA" appeared on surfaces in Iran and that they are still being created as of the time of the book's publication. *Id.*

115. *Iran*, 124 F. Supp 2d at 103.

116. *Id.* at 101. Note that in the appeals, MOIS is renamed the Ministry of Defense (MOD).

boasting an annual budget of up to \$500 million.<sup>117</sup> After hearing the case, the Paris Supreme Criminal Court convicted Mojtaba Mashadi and Hoseyn Yazdanseta, agents of MOIS, of conspiracy to commit terrorist acts.<sup>118</sup>

Dariush Elahi, brother of Cyrus Elahi and executor of his estate, sued the Islamic Republic of Iran and MOIS for the wrongful death of Cyrus in the United States District Court for the District of Columbia.<sup>119</sup> The district court granted jurisdiction under the terrorist state exception of the FSIA, which allows foreign states and their agencies to be sued for personal injury or death to American nationals which results from state-sponsored terrorist activities, such as extra-judicial killing.<sup>120</sup> The district court considered it “uncontradicted” that the murder of Dr. Elahi was executed by agents of the Ministry of Defense at the direction of the Islamic Republic of Iran.<sup>121</sup>

Both defendants failed to enter an appearance before the district court entered a default judgment against them.<sup>122</sup> Compensatory damages were awarded to Dariush Elahi in the amount of \$11 million and punitive damages totaling \$300 million were leveled against the defendants, both of which the defendants failed to pay.<sup>123</sup>

As the district court noted, Iran and its agencies were not strangers to the American judicial system.<sup>124</sup> The Iranian Ministry of Defense had filed a petition to confirm an arbitration award amounting to nearly \$3,000,000 against Cubic Defense Systems, Inc. in the United States District Court for the Southern District of California and obtained the confirmation on December 7, 1998.<sup>125</sup> As a judgment creditor, Dariush

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Iran v. Cubic Defense Systems, Inc., 385 F.3d 1206, 1206 (9th Cir. 2004).

117. *Iran*, 124 F. Supp 2d at 101. It should be noted that the district court awarded Elahi punitive damages totaling \$300 million – an amount quite significant in that it had the potential to decimate MOIS’s annual budget. *Id.* at 114.

118. *Id.* at 104-05. According to an Iran Press Service 2001 article, a Paris criminal court eventually acquitted Mojtaba Mashadi for Elahi’s murder because the prosecutor decided to examine the case as a political murder. Iranj Fatemi, *Paris Criminal Court Cleared Mashadi of Charges in Elahi’s Murder*, IRAN PRESS SERVICE, June 29, 2001, available at [http://www.iran-press-service.com/articles\\_2001/jun\\_2001/elahi\\_court\\_ends\\_29601.htm](http://www.iran-press-service.com/articles_2001/jun_2001/elahi_court_ends_29601.htm). Mashadi said in depositions that he worked for the Iranian Intelligence Ministry. *Id.* The article tersely notes that Hoseyn Yazdanseta died under “mysterious circumstances” after being released from jail. *Id.*

119. *Iran*, 124 F. Supp 2d at 99.

120. *Id.* 28 U.S.C. §1605(a)(7) (1996). See *supra* notes 38-42 and accompanying text (regarding the terrorist state exception).

121. *Iran*, 124 F. Supp 2d at 105.

122. *Id.* at 99.

123. *Id.* at 112-14.

124. *Id.* at 100.

125. *Iran v. Cubic Defense Systems Inc.*, 29 F. Supp. 2d 1168, 1170-72 (1998). In 1977, Iran

Elahi and another creditor, Stephen Flatow, filed notices of lien against Iran's judgment against Cubic.<sup>126</sup> The Iranian Ministry of Defense then initiated a petition in the same court to determine whether or not the judgment was immune from attachment.<sup>127</sup>

### *B. District Court Ruled for Elahi on Waiver of Immunity*

The district court evaluated a number of arguments from Iran that the judgment was immune under the FSIA.<sup>128</sup> After dismissing Iran's arguments, the court contended that Iran implicitly waived general jurisdictional immunity under Section 1605(a)(1) of the FSIA.<sup>129</sup> The court based this argument on two grounds.<sup>130</sup> First, it cited Ninth Circuit precedent stating that Section 1605(a)(1) waiver of immunity is made when a foreign state submits to arbitration in another country.<sup>131</sup> Second, the court believed that Iran's Ministry of Defense ("MOD") had waived its immunity by petitioning to confirm the award.<sup>132</sup> It cited precedent stating that "filing pleadings in federal court without raising the issue of sovereign immunity is an implicit waiver under Section 1605(a)(1)."<sup>133</sup> The court then elaborated that the Ministry of Defense, "could not have obtained the judgment against Cubic without" giving up some of its immunity and, "reason now dictates that it cannot now raise the same shield to protect the judgment."<sup>134</sup>

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contracted with Cubic to purchase an Air Combat Maneuvering Range. *Id.* Due to the Iranian Revolution, Cubic withdrew its specialists and failed to deliver the Air Combat Maneuvering Range. *Id.* Pursuant to their contract, Cubic and Iran arbitrated the dispute in the International Chamber of Commerce in Switzerland. Brief for the United States as Amicus Curiae at 4, Iran v. Elahi, 546 U.S. 450 (2006) (No. 04-1095), 2005 WL 3477863.

126. Iran v. Cubic Defense Systems Inc., 236 F. Supp. 2d 1140, 1143 (S.D.Cal. 2002).

127. *Id.* at 1140.

128. *Id.* at 1144-52.

129. *Id.* at 1151 (citing 28 U.S.C. 1605(a)(1) ("A foreign state shall not be immune from the jurisdiction of courts of the United States . . . in which the foreign state has waived its immunity either explicitly or by implication.")).

130. *Id.*

131. *Id.* (citing *In re Republic of Philippines*, 309 F.3d 1143 (9th Cir. 2002)).

132. *Id.* (citing *Joseph v. Office of the Consulate General of Nigeria*, 830 F.2d 1018, 1021 (9th Cir. 1987)).

133. *Id.*

134. *Id.* The district court determined that the FSIA supported this ruling. *Id.* Section 1609 of the FSIA holds that property of a foreign state is immune from attachment only subject to existing international agreements to which the United States is a party. *Id.* (citing 28 U.S.C. 1609 (1976) ("Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution. . . .")). The court then looked to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards and found that judgments confirming an arbitration award shall have the same force and effect, in all respects, as, and be subject to all

*C. The Ninth Circuit Affirmed on the Agency or Instrumentality Exception*

Iran appealed to the Ninth Circuit Court of Appeals,<sup>135</sup> which overturned the reasoning of the lower court, but affirmed the judgment on the alternative grounds that it falls within the exception to immunity set out in Section 1610(b)(2) of the FSIA – the agency/instrumentality exception.<sup>136</sup> Iran’s appeal was consolidated with that of Stephen Flatow, who also attempted to place a lien on the Cubic judgment under circumstances very similar to Elahi’s.<sup>137</sup>

The Ninth Circuit dismissed the waiver argument accepted by the lower court and<sup>138</sup> determined that Elahi’s attachment was valid through 1610(b)(2).<sup>139</sup> Applying the two elements of the test, the court decided that the judgment would not be immune under 1610(b)(2) if MOD

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provisions relating to a judgment in an action in federal court, and it may be enforced as if entered in an action in the court in which it is entered. *Id.* The district court reasoned that this provision entitled Federal Rule of Civil Procedure 64 to come into effect which allows for the attachment of a debtor’s property by judgment creditors. *Id.* at 1152. The court, therefore, determined that Elahi’s lien was valid. *Id.*

135. *Iran v. Cubic Defense Systems, Inc.*, 385 F.3d 1206, 1206 (9th Cir. 2004).

136. *Id.* at 1219 (referencing § 1610(b)(2), which states: “[A]ny property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this act, if – (2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a)(2), (3), (5), or (7) or 1605(b) of this chapter, regardless of whether the property is or was involved in the act upon which the claim is based.”). *See supra* notes 38-42 and accompanying text (regarding the terrorist state exception to the FSIA).

137. *Cubic*, 385 F.3d at 1210. Stephen Flatow’s daughter, Alisa Michelle Flatow, was killed in a terrorist attack in Jerusalem on April 10, 1995 attributed to Iran and its Ministry of Defense. *Flatow v. Iran*, 999 F. Supp. 1, 6-9 (D.D.C. 1998). Flatow sued Iran and its Ministry of Defense. *Id.* at 7-8. Both defendants failed to enter an appearance and a default judgment was entered against them in the amount of \$20,000,000 in compensatory damages and \$250,000,000 in punitive damages. *Id.* at 32-33; *Cubic*, 385 F.3d at 1210. Flatow attempted to attach the Cubic judgment. *Id.* When Iran petitioned the district court for a determination on the judgment’s immunity, the court granted the immunity with regards to Flatow because he had waived his claims to Iran by choosing to collect under § 2002 of the Victims of Trafficking and Violence Protection Act of 2000. *Id.* at 1212-17. The Ninth Circuit affirmed the lower court’s decision. *Id.* at 1226. Elahi did not accept any payments under this Act, so his claim could proceed. *Id.* at 1217.

138. *Cubic*, 385 F.3d 1206, 1218. The court explained that the lower court had overlooked the distinction in the FSIA between general sovereign immunity and attachment immunity. *Id.* at 1217-18. MOD conceded that it waived its general sovereign immunity. *Id.* at 1218. The Ninth Circuit held that a waiver of general sovereign immunity does not also constitute a waiver of immunity from attachment. *Id.* The court noted that before the existence of the FSIA there was precedent holding that a waiver of general immunity was not a waiver of attachment immunity and the FSIA did nothing to change this rule. *Id.* *See* Restatement (Third) of Foreign Relations Law of the United States § 456(1)(b) (1987).

139. *Cubic*, 385 F.3d at 1221-22.



participated in commercial activity within the United States and Elahi's judgment related to a claim that the MOD is not immune of through Section 1605(a)(7).<sup>140</sup> The court found the Cubic judgment to be "commercial activity" because it emerged from a dispute regarding a contract to purchase military equipment.<sup>141</sup> Also, the court found that Elahi's judgment related to a claim that MOD is not immune through the terrorist state exception (1605(a)(7)).<sup>142</sup>

The Ninth Circuit considered Section 1603(a) of the FSIA in its reasoning over whether the Ministry of Defense qualified as a foreign state for the purposes of 1605(a)(7).<sup>143</sup> The court wrote that Section 1603(a) defines the term "foreign state" to include "a political subdivision of a foreign state or an agency or instrumentality;" therefore, "under 1605(a)(7), once a foreign state has engaged in state-sponsored terrorist activity, all of its agencies and instrumentalities are likewise not immune from jurisdiction."<sup>144</sup>

In addition, the court applied the five factors established by *First National City Bank v. Banco Para El Comercio Exterior De Cuba*<sup>145</sup>

140. *Id.* at 1219-22. The court said that the 28 U.S.C. § 1610(b)(2) exception to immunity from attachment applies if the underlying judgment relates to a claim for which the agency/instrumentality is not immune by 1605(a)(7) and the agency or instrumentality is engaged in commercial activity in the United States. *Id.*

141. *Id.* at 1220. 28 U.S.C. § 1603(d) defines commercial activity as "either a regular course of commercial conduct or a particular commercial transaction or act." *Id.* at 1219 (quoting 28 U.S.C. § 1603(d)). 28 U.S.C. § 1603(d) makes clear that the "commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." *Id.* at 1219-20 (quoting 28 U.S.C. § 1603(d)). In two previous decisions, the Ninth Circuit has found contracts to purchase military equipment to be commercial in nature. *Id.* (citing *Joseph v. Office of the Consulate Gen. of Nigeria*, 830 F.2d 1018, 1023 (9th Cir. 1987) and *Park v. Shin*, 313 F.3d 1138, 1145 (9th Cir. 2002)). The court also cited other decisions in the Eighth and D.C. Circuits which had come to similar conclusions. *Id.* These decisions are also consistent with the legislative history of the FSIA. *Id.* The court cited the FSIA House Report at page 16 which stated that a foreign government's contract to buy military provisions or equipment is commercial activity. *Id.* (citing H.R. Rep. 94-1487, at 27 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6626).

142. *Cubic*, 385 F.3d at 1220. See 28 U.S.C. §1605(a)(7) ("A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case – (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 (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 of his or her office, employment, agency. . . ."). The Act goes on to require that the foreign state was officially designated a state sponsor of terrorism and the victim is a United States national. *Id.* See also *supra* note 47 and accompanying text (regarding the official list of state sponsors of terrorism).

143. *Cubic*, 385 F.3d at 1220.

144. *Id.*

145. *Cubic*, 385 F.3d at 1221 (citing *First National City Bank v. Banco Para El Comercio*

and determined that the Ministry of Defense could be considered a “foreign state” under 1605(a)(7).<sup>146</sup> In applying these factors, the Ninth Circuit ascertained that the Ministry of Defense is a central “organ” of the government of Iran and is subject to the direct control of the government.<sup>147</sup> The court concluded that the MOD lacked immunity from attachment.<sup>148</sup>

*D. The Supreme Court Vacates and Remands for Determination on MOD’s Status*

Iran appealed the Ninth Circuit’s judgment.<sup>149</sup> The Supreme Court granted certiorari as to the question of whether property in the United States of a foreign state is immune from attachment under Section 1610(a)(7).<sup>150</sup> Before the Supreme Court granted certiorari, however, it requested an amicus brief from the Acting Solicitor General on behalf of the United States.<sup>151</sup> He recommended that the Court grant certiorari and consider two questions (though he noted the existence of a third): whether the property of a foreign state is immune from attachment and

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*Exterior De Cuba*, 462 U.S. 611, 626-27 (1983), which states that there is a presumption that the foreign government and foreign agency shall have separate status, but that this presumption can be overcome through the weight of five factors, including: (1) the amount of the government’s economic control over the agency; (2) whether the agency’s profits go to the government; (3) the degree to which government officers handle the agency’s daily affairs; (4) whether the government derives the real benefit from the agency’s actions; (5) whether a separate status would give the foreign state undue benefit in United States courts).

146. *Id.* at 1221-22.

147. *Id.*

148. *Id.*

149. Petition for Writ of Certiorari, *Iran v. Elahi*, 546 U.S. 450 (2006) (No. 04-1095), 2005 WL 363255. The MOD presented three main issues to the Supreme Court. *Id.* First, it argued that there is a need for a review of a circuit split regarding the attachment of foreign sovereign property under the FSIA and *Bancec*. *Id.* at 13-20 (“But the Ninth Circuit’s error appears to be doctrinally systemic and has been replicated in other decisions.”). Second, MOD argued that there is a circuit split regarding the proper scope of the military property exception of the FSIA. *Id.* at 20-22. Third, there is confusion regarding whether a party can collaterally attack subject matter jurisdiction under the FSIA. *Id.* at 22-30. Within the first argument MOD argued that the Ninth Circuit contradicted itself by calling MOD a central organ of the government of Iran, yet allowing attachment under the 1610(b)(2) provision for agencies or instrumentalities. *Id.* at 14-15.

150. *Iran*, 546 U.S. at 451-452.

151. *Iran v. Elahi*, 544 U.S. 998, 998 (2005) (“The Acting Solicitor General is invited to file a brief in this case expressing the views of the United States.”). The brief was written by the Legal Advisor to the Department of State, an attorney for the Department of Justice, the Solicitor General, and his deputy and assistant. See Brief for the United States as Amicus Curiae, *Iran v. Elahi*, 546 U.S. 450 (2006) (No. 04-1095), 2005 WL 3477863. The brief recommended that the court grant certiorari, vacate, and remand for a determination on whether 28 U.S.C. §1610(b)(2) attachment is appropriate. *Id.* at 15-17.

whether the MOD is a foreign state or an agency or instrumentality,<sup>152</sup> but the Court granted the writ only as to the first question.<sup>153</sup> It is notable that the United States wrote in its amicus brief that 1610(a) applies both to foreign sovereigns and their agencies and instrumentalities, but the Supreme Court did not analyze this argument.<sup>154</sup>

The Supreme Court found that the 1610(a)(7) commercial activity attachment provision only applies to property “used” for a commercial activity.<sup>155</sup> The Court tidily disposed of its analysis of the 1610(a)(7) argument by saying that 1610(a)(7) “does not contain the ‘engaged in

152. *Id.* at 8. The United States says the “threshold question” is whether or not MOD is a foreign state. *Id.* This is because the FSIA defines foreign state inclusively, as containing agencies and instrumentalities. *Id.* at 2 (“Because the FSIA defines a ‘foreign state’ as including an ‘agency or instrumentality of a foreign state’ . . . , Section 1610(a) applies both to a foreign sovereign and to its agencies or instrumentalities . . . , Section 1610(b) provides ‘addition[al]’ bases for attachment that apply only to property of a foreign state’s agencies or instrumentalities.”). Therefore, the § 1610(a)(7) exceptions can apply here. *Id.* at 12. Then, the United States goes on to state that “the question remains” whether MOD is also subject to the agency or instrumentality exceptions of § 1610(a)(7). *Id.* at 9. This is because the FSIA defines agency or instrumentality restrictively, as a “separate legal person” that is an “organ” of a foreign state. *Id.* at 9-10. The United States argues that current case law suggests that there is at least a presumption that a defense ministry is not an agency or instrumentality because it would strip the state of its core sovereign functions. *Id.* at 11 (“But even if a foreign state conceivably might formally organize its ministry of defense as a ‘separate legal person,’ . . . there should be, at a minimum, a strong presumption that it has not.”). Then, the United States said that the Ninth Circuit and the petitioner failed to address whether § 1610(a)(7) or § 1610(b)(2) applied. *Id.* at 11-12. “Resolution of that question would require a determination whether merely obtaining a money judgment qualifies as ‘use[] for a commercial activity’” under 1610(a)(7). *Id.* at 11. The United States called this a “thornier” ground for attachment, but it did not come to a conclusion on its applicability. *Id.*

153. *Iran*, 546 U.S. at 451-52. The court stated:

The Ministry filed a petition for certiorari asking us to review that decision. The Solicitor General agrees with the Ministry that we should grant the writ but limited to the Ministry’s Question 1, namely whether “the property of a foreign state *stricto sensu*, situated in the United States” is “immune from attachment . . . as provided in the Foreign Sovereign Immunities Act.” The Solicitor General also asks us to vacate the judgment of the Court of Appeals and remand the case for consideration of whether the Ministry is simply a “foreign state” (what the Ministry calls “a foreign state *stricto sensu*”) or whether the Ministry is an “agency or instrumentality” of a foreign state (as the Ninth Circuit held). We grant the writ limited to Question 1.

*Id.* (alteration in original) (citations omitted).

154. *Id.* at 450-53.

155. *Id.* at 452. The Supreme Court determined that § 1610(a), which “applies to ‘property in the United States of a foreign state’ does not contain the ‘engaged in commercial activity’ exception. . . .” *Id.* (quoting 28 U.S.C. § 1610(a) (alteration in original) (citation omitted)). The Supreme Court distinguished between § 1610(a), pertaining to “foreign states,” which contains the language “property . . . of a foreign state used for a commercial activity” (quoting 28 U.S.C. § 1610(a) (emphasis added), and § 1610(b), pertaining to “agencies or instrumentalities,” which contains the language “property . . . of an agency of instrumentality of a foreign state engaged in commercial activities.” *Id.* (quoting 28 U.S.C. § 1610(b) (emphasis added)).

commercial activity’ exception that the Ninth Circuit described;”<sup>156</sup> however, it does contain the language “used for a commercial activity.”<sup>157</sup> As the Comment demonstrates in Part V, the Supreme Court ignored a few essential points of analysis.<sup>158</sup> While the Court did not decide whether the MOD was an agency or instrumentality of the state or part of the state itself, it cited precedent which held that foreign defense ministries are generally considered to be a part of the state.<sup>159</sup> In a terse per curiam opinion, the Supreme Court remanded to the Ninth Circuit so that court could decide whether the property of a foreign state, strictly speaking located in the United States, is immune from attachment according to the FSIA.<sup>160</sup>

### *E. On Remand to the Ninth Circuit*

On May 30, 2007, the Ninth Circuit decided that the judgment was immune from attachment under the commercial activities provision of the FSIA.<sup>161</sup> The United States intervened in the case and argued that Elahi waived his right to the attachment because he accepted partial compensation pursuant to TRIA.<sup>162</sup> According to the briefs, Elahi

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156. *Id.* The only difference in language between the two exceptions is that the Section 1610(a)(7) exception applies when the property of a foreign state *is used* for a commercial activity, while the Section 1610(b)(2) exception applies when the property of an agency or instrumentality of a foreign state is engaged in a commercial activity. *Id.* The Supreme Court did no analysis of why Congress chose these different terms. *Id.* at 1193-95. By framing the issue as it did, and rejecting the Amicus Brief’s second question, the Supreme Court functionally buried a crucial determination which could have led to redress.

157. *See supra* notes 38-42 (presenting the text of the law).

158. *See infra* Part IV (analysis regarding the 1610(a)(7) argument and others).

159. *Iran*, 546 U.S. at 452 (citing *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 153 (C.A. D.C. 1994)). The court in *Transaero* held that, “armed forces are as a rule so closely bound up with the structure of the state that they must in all cases be considered as ‘the foreign state’ itself, rather than a separate ‘agency or instrumentality’ of the state.” *Id.*

160. *Id.*

161. *Iran v. Elahi*, 2007 WL 2034047 at \*10 (9th Cir. July 17, 2007)). The Ninth Circuit, upon remand, explained that the property at issue in *Iran v. Elahi* was a “blocked asset” because Iran’s interest in the asset arose before President Carter’s 1979 Executive Order to freeze Iranian assets after the Iranian hostage crisis. *Id.* at \*6.

162. E-mail from Jonathan R. Mook, Esq., Counsel of Record, DiMuro Ginsberg, P.C., to author (Dec. 28, 2006, 16:34:32 EST) (on file with author). The Brief of Dariush Elahi in Response to Amicus Brief of the United States explained that:

In November 2002, Congress enacted the Terrorism Risk Insurance Act of 2002 (“TRIA”), P.L. No. 107-297, 116 Stat. 2322 (2002). That statute amended the Victims Protection Act to expand the class of judgment creditors eligible to receive payment from the U.S. Treasury Department for judgments against state sponsors of terrorism.

As pointed out in Elahi’s answering brief before this Court, Subsection 201(c) of the TRIA allowed him to make an application to the Department of Treasury to receive payment for compensatory damages from certain designated funds relating to rental

defended against this attack<sup>163</sup> and argued that MOD acted as an agency or instrumentality of Iran primarily because it sued in its own name.<sup>164</sup> Rejecting this argument, the Ninth Circuit examined the foreign state attachment provision, 1610(a)(7).<sup>165</sup> The Ninth Circuit ruled against the attachment under 1610(a)(7) by hanging its hat on the “used for”/“engaged in” distinction.<sup>166</sup> The court ruled that the judgment would not be used for commercial activity because Iran intended to fold it into the general budget.<sup>167</sup> As explored in Part V, this argument warrants much more judicial attention.

## V. SHORT SHRIFT FOR 1610(A)(7)

### A. *Unexplored Territory in Elahi: 1610(a)(7) Attachment of Foreign State Property*

The 1610(a)(7) attachment immunity exception is appropriate if the judgment is related to a claim for which the foreign state is not immune under 1605(a)(7) (the terrorist state exception);<sup>168</sup> the property at issue is property of a foreign state, as defined in 1603(a);<sup>169</sup> and the property at

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proceeds from Iranian diplomatic properties and monies attributable to Iran’s Foreign Military Sales Account with the U.S. Treasury Department. *See* Answering Brief of Appellee at 43 n. 25.

Brief of Dariush Elahi in Response to Amicus Brief of the United States at 1, *Iran v. Elahi*, 495 F.3d 1024 (2007) (No. 03-55015), 2006 WL 2951912.

163. Elahi argued that he did not relinquish his right to attach the Cubic judgment because of this partial payment. Brief of Dariush Elahi in Response to Amicus Brief of the United States at 2-3, *Iran v. Elahi*, 495 F.3d 1024 (2007) (No. 03-55015), 2006 WL 2951912. He also argued that this issue is beyond the scope of the remand and that the United States did not properly raise it. *Id.* at 4-6. Elahi cited cases which state that an appellate court may not consider issues that were not raised by the parties to the appeal. *Id.* Elahi then argued that it would be “fundamentally unfair” and against public policy to hold that Elahi relinquished his claim to the judgment. *Id.* at 10-12.

164. Elahi’s Response to MOD’s Supplemental Rejoinder at 1-3, *Iran v. Elahi*, 495 F.3d 1024 (2007) (No. 03-55015), 2006 WL 3014410 (“The House Report on the FSIA specifically states that ‘entities which meet the definition of an “agency or instrumentality of a foreign state” could assume a variety of forms, including . . . a governmental . . . ministry which acts and is suable in its own name.’ *Gates v. Victor Fine Foods*, 54 F.3d 1457, 1460 (9th Cir. 1995), quoting H.R. Rep. No. 94-1487, 94th Cong. 2nd Sess. 15-16 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6614.”).

165. *Iran v. Elahi*, 2007 WL 2034047 at \*9-10 (9th Cir. July 17, 2007).

166. *Id.*

167. *Id.*

168. 28 U.S.C. § 1610(a)(7) (“The judgment relates to a claim for which the foreign state is not immune under section 1605(a)(7), regardless of whether the property is or was involved with the act upon which the claim is based.”).

169. 28 U.S.C. § 1603(a) says, “A ‘foreign state,’ except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).” 28 U.S.C. § 1603(a). Subsection (b) states that “an ‘agency or

issue is used for a commercial activity.<sup>170</sup> The 1610(a)(7) attachment provision was added to the FISA in order to deter terrorism and to provide redress to victims of terrorism.<sup>171</sup> While there is a traditional hesitance toward executing upon the property of a foreign state, the terrorist state exception cannot do its job of providing redress to victims and deterring terrorism without it.<sup>172</sup> If traditional policies for restricting execution against foreign state's property are applied to restrict the attachment provisions of terrorist state exception, the policies effectively render the terrorist state exception impotent.<sup>173</sup>

In *Iran v. Elahi*, Section 1610(a)(7) made a few appearances in the lower court opinions and briefs<sup>174</sup> before the Supreme Court effectively

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instrumentality of a foreign state' means any entity which is a separate legal person, corporate or otherwise, and which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country." 28 U.S.C. § 1603(b).

170. See *supra* notes 38-42 and accompanying text (containing statutory language). 28 U.S.C. § 1603(d) defines commercial activity as "a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d).

171. See *supra* note 30 and accompanying text (discussing the restrictive theory of sovereign immunity). See *infra* Part III.B and accompanying text (regarding the worldwide hesitation to execute upon the property of another state). Compare *De Letelier*, 748 F.2d at 799 (stating that Congress "was more cautious when lifting immunity from execution against property owned by the State itself."), and Appellant's Reply Brief at 27, *Iran v. Cubic Defense Systems*, 385 F.3d 1206 (2004) (No. 03-55015), 2003 WL 22724233 ("One of the chief motifs of the FSIA is to limit as much as possible disrupting the 'public acts' or 'Jure imperii' of sovereigns, while restricting their purely commercial activity." (citing H.R. Rep. 94-1487 at 7)), and *Cubic*, 385 F.3d 1206, 1219 (2004) (citing *De Letelier* for the proposition that "Congress did not intend 'to reverse completely the historical and international antipathy to executing against a foreign state's property even in cases where a judgment could be had on the merits.'" *De Letelier*, 748 F.2d at 798-99), with H.R. Rep. 103-702 at 4 (discussing the need to provide terrorism victims with redress), and 142 Cong. Rec. H3605-04, \*H3615 (1996) (explaining the need to deter terrorist states from harming U.S. citizens). It is the foreign states that Congress intended to punish, not their agencies or instrumentalities. *Id.*

172. See *supra* note 9 and accompanying text (regarding the widespread practice of terrorist states failing to enter an appearance after they have been sued under the FSIA).

173. Jennifer Elise Plaster, *Cold Comfort and a Paper Tiger: The (Un)Availability of Compensation for Victims of International Terrorism*, 82 WASH. U. L.Q. 533, 533-34 (2004) [hereinafter Plaster, *Cold Comfort*].

174. In its Ninth Circuit Appellant's Brief, MOD presented the main arguments under separate headings, consisting of the following: that Iran did not waive sovereign immunity, Brief of Appellant at 10-17, *Iran v. Elahi*, 385 F.3d 1206 (2003) (No. 03-55015), 2003 WL 22724220, that the Cubic judgment is not subject to attachment under § 1611 (property of a military character or property of a central bank), *Id.* at 17-32, and that Iranian law prohibits the attachment. *Id.* at 32-33. Elahi responded to each of MOD's arguments. Answering Brief of Appellee at 9-36, *Iran v. Elahi*, 385 F.3d 1206, (2003) (No. 03-55015), 2003 WL 22724229. He added that the judgment is subject to attachment under § 1610(f)(1)(A) or § 1610(a)(7) and added that vacating the attachment would frustrate United States foreign policy against terrorism. *Id.* at 41-51. See also *supra* note 69 and

accompanying text (regarding TRIA). When the case was finally remanded to the Ninth Circuit, the United States challenged the attachment on the grounds that Elahi accepted TRIA funds. *See supra* notes 162, 163 and accompanying text. While Elahi argued MOD is a foreign state in order to satisfy § 1610(a)(7), he also briefly noted § 1610(b)(2) would still allow the attachment if the court considered MOD to be an agency or instrumentality. *Id.* at 47 (“If MOD is considered ‘an agency or instrumentality of a foreign state,’ rather than the foreign state itself, Mr. Elahi’s attachment still is valid under 28 U.S.C. § 1610(b)(2), which allows the attachment of any property of ‘an agency or instrumentality of a foreign state engaged in commercial activity in the United States’ where, as here, the judgment relates to a claim under Section 1605(a)(7).”).

In his Ninth Circuit Answering Brief of Appellee, Elahi argued that the § 1610(a)(7) attachment immunity exception provided a “separate, independent statutory basis for affirming the district court’s determination upholding the validity of Mr. Elahi’s lien.” Answering Brief of Appellee at 50, *Iran v. Elahi*, 385 F.3d 1206 (2004) (No. 03-55015), 2003 WL 22724229. Elahi’s attorneys thoroughly analyzed the § 1610(a)(7) path to attachment immunity, devoting an entire section to the argument. *Id.* at 45-50. In the brief, Elahi argued first that Iran had waived its right to invoke sovereign immunity under § 1605(a)(1) and § 1605(a)(6) and disputed Iran’s argument regarding third party claims. *Id.* at 10-20. Next, Elahi argued that the judgment is not immune as “military property” under § 1611(b)(2) or “property of a central bank” under § 1611(b)(1). *Id.* at 24-32. Then, Elahi argued that Iranian asset control regulations do not prevent the attachment of the judgment. *Id.* at 36-41. In case the waiver argument did not establish the exception to immunity, Elahi then argued that the judgment could be attached under § 1610(f)(1)(A) (TRIA) and § 1610(a)(7). *Id.* at 42-50. Finally, Elahi argued that the removal of the lien would frustrate United States policy in combating terrorism. *Id.* at 50-52. The brief mentions that § 1610(b)(2) authorizes the attachment as well but, Elahi never committed to a position on whether or not MOD is an agency or instrumentality (implicating § 1610(b)(2)) or a foreign state (implicating § 1610(a)(7)), leaving the debate to the court.

Instead of saying that MOD is a “foreign state” or an “agency or instrumentality,” Elahi principally presents the § 1610(a)(7) argument (implying that he believes MOD is a foreign state), but slips in “but if MOD is considered an agency or instrumentality. . . ,” implying that he is not ready to answer the question himself. Elahi may have done this because the § 1610(a)(7) exception applies if the property is that of a foreign state as defined in § 1603(a), which includes agencies and instrumentalities. Therefore, any real debate between “foreign state” and “agencies or instrumentalities” is unnecessary under § 1610(a)(7). However, the debate is still important in determining whether § 1610(a)(7) or § 1610(b)(2) applies.

MOD responded directly to the § 1610(a)(7) argument and briefly referenced the 1610(b)(2) argument. Appellant’s Reply Brief at 27-28, *Iran v. Elahi*, 385 F.3d 1206, (2003) (No. 03-55015), 2003 WL 22724233. MOD first introduces the difference in word choice between § 1610(a)(7) and § 1610(b)(2). *Id.* at 25-26. It notes that § 1610(a)(7), which allows attachment of a foreign state’s property, only allows attachment of property *used* for a commercial activity, while § 1610(b)(2), which allows attachment of an agency or instrumentality’s property, allows the attachment to proceed as long as the agency or instrumentality has engaged in commercial activity in the United States. *Id.* In support of its interpretation, MOD references *de Letelier*, which says that Congress intended to be more cautious in lifting attachment immunity over property belonging to the foreign state itself. *Id.* at 3 (citing *De Letelier v. Republic of Chile*, 748 F.2d 790, 798-99 (2d Cir. 1984)). MOD goes on to say that Congress intended the FSIA to limit the disruption of sovereign acts. *Id.* at 26-27 (citing H.R. Rep. No. 94-1487). MOD’s Reply Brief attempted to refute the § 1610(a)(7) argument for attachment. Appellant’s Reply Brief at 25-28, *Iran v. Elahi*, 385 F.3d 1206, (2003) (No. 03-55015). MOD felt the argument was significant enough to devote three pages of its brief to it. *Id.* The Ninth Circuit authorized the attachment based on § 1610(b)(2), which governs attachment of the property of agencies or instrumentalities of a foreign state. *Iran*, 385 F.3d at 1219-22.

At the Supreme Court level, the United States, as *amicus curiae*, found it significant that

shut it down.<sup>175</sup> Without explanation, the Court stated that the “engaged in commercial activity” exception did not apply to property of a foreign state - it only applied to property of an agency or instrumentality of a foreign state.<sup>176</sup> The Court failed to provide any analysis of the significance of the “engaged in” and “used for” language and why the former applies only to property of an agency or instrumentality while the latter applies only to foreign states.<sup>177</sup> If it had looked closer, the Court might have discovered a flaw in the engaged in/used for statutory language. Instead, the Supreme Court simply cited *Transaero* for the proposition that a defense ministry is a part of a foreign state, but said it would not make a determination on MOD’s status.<sup>178</sup>

As noted in Part III, the Ninth Circuit, upon remand hung its hat on the fact that Iran planned on incorporating the proceeds of the settlement into its general budget:

To satisfy § 1610(a), MOD must have used the Cubic judgment for a commercial activity in the United States, and this it has not done. We have recently stated that “property is ‘used for a commercial activity in the United States’ when it is put into action, put into service, availed or employed *for* a commercial activity, not *in connection* with a

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MOD did not have a chance to argue sufficiently on the 28 U.S.C. § 1610(a)(7) or (b)(2) determination. Brief for the United States as Amicus Curiae at 12, *Iran v. Elahi*, 546 U.S. 450 (2006) (No. 04-1095), 2005 WL 3477863 (“Petitioner did not address the applicability of 28 U.S.C. § 1610(a)(7) or 28 U.S.C. § 1610(b)(2), perhaps because the district court had not done so.”).

The Supreme Court concluded that the Ninth Circuit found for Elahi on a ground that the parties had not argued. *Iran v. Elahi*, 546 U.S. 450, 452 (2006). Also, at the Supreme Court level, the Brief for the United States as Amicus Curia mentioned that the Ninth Circuit missed an important antecedent determination as to whether § 1610(a)(7) or § 1610(b)(2) could authorize the attachment. Brief for the United States as Amicus Curiae at 4, *Iran v. Elahi*, 546 U.S. 450 (2006) (No. 04-1095), 2005 WL 3477863 (“The court therefore did not consider whether the attachment fell within the exception to that immunity in either 28 U.S.C. § 1610(a)(7) or 1610(b)(2).”).

175. *Iran*, 546 U.S. at 452 (regarding the Supreme Court’s usage of *Transaero*).

176. *Id.* The court stated:

The Act, as it applies to the “property in the United States of a *foreign state*,” . . . does *not* contain the “engaged in commercial activity” exception that the Ninth Circuit described. That exception applies only where the property at issue is property of an “agency or instrumentality” of a foreign state. Compare § 1610(b) (“property . . . of an agency or instrumentality of a foreign state engaged in commercial activity”) with § 1610(a) (“property . . . of a foreign state *used for a commercial activity*”) (emphasis added). The difference is critical.

*Id.* (alteration in original).

177. *Id.* at 451-52. See also *supra* notes 152 (regarding the amicus brief analysis on “inclusive language”), 153 (presenting the Supreme Court’s terse analysis), 154 (on the amicus brief interpretation), 156 (showing the “used for”/ “engaged in” attachment immunity language difference for foreign states and their agencies/instrumentalities), and 164 (presenting the legislative history “variety of forms” language).

178. *Iran*, 546 U.S. at 452.



commercial activity or *in relation* to a commercial activity.” *Af-Cap Inc.*, 475 F.3d at 1091 (emphasis in original). Cautioning that “FSIA does not contemplate a strained analysis of the words ‘used for’ and ‘commercial activity,’ “we instructed courts to “consider[ ] the use of the property in question in a straightforward manner.” *Id.* The Ministry has not used the Cubic judgment as security on a loan, as payment for goods, or in any other commercial activity. Instead, Iran intends to send the proceeds back to Iran for assimilation into MOD’s general budget. Because repatriation into a ministry’s budget does not constitute commercial activity, we hold that the Cubic judgment is not subject to attachment under § 1610(a).<sup>179</sup>

A close analysis of the Ninth Circuit’s language is warranted. Even if it can be convincingly argued that the Cubic judgment is not “used for a commercial activity” according to the strictures of the language, the Court should have widened its scope to consider the overall logic of that language. Impossibly, the statute requires the Court to project the future, determining what the foreign state intends to do with the property at issue. Also, it is highly unlikely that any state whose property is up for attachment would inform the tribunal of its intent to put the property to the immediate purpose which would lead to its attachment.

Another logical flaw in the big picture is the fact that it is nearly impossible for any of the terrorist states to conduct commercial activity in the United States, even if they wanted to.

To be subject to this particular exception, the state must have earned the dubious honor of inscription on the State Department’s list of terrorist states. Logic indicates that it is unlikely that the U.S. would be carrying on any substantial trade with any of these nations and, indeed, the U.S. is not.<sup>180</sup> Since the 1977 implementation of the International

179. *Iran v. Elahi*, 2007 WL 2034047 at \*10 (9th Cir. July 17, 2007).

180. See *supra* note 47 for the State Department list of terrorist states. The United States trade embargo against Cuba commenced in 1962. Eric Green, United States Department of State, *U.S. Commerce Secretary Defends Trade Embargo on Cuba* (2007), <http://usinfo.state.gov/xarchives/display.html?p=washfile-english&y=2007&m=February&x=200702211655561xeneerg0.2393457>. While the United States has eased the near total 1950 trade embargo on North Korea, the U.S. State Department describes trade interactions with North Korea as “minimal” and emphasizes that North Korea “does not enjoy ‘Normal Trade Relations’ with the United States.” U.S. DEP’T OF STATE, BACKGROUND NOTE: NORTH KOREA (2007), <http://www.state.gov/r/pa/ei/bgn/2792.htm>. In 1997, President Clinton signed an Executive Order establishing a trade embargo with Sudan. U.S. DEP’T OF THE TREASURY, AN OVERVIEW OF THE SUDANESE SANCTIONS REGULATIONS (2006), <http://www.treas.gov/offices/enforcement/ofac/programs/sudan/sudan.pdf>. The order also froze Sudanese assets within the United States. *Id.* The trade embargo against Libya was substantially lifted in 2004, subject to certain limitations, in response to Libya’s sacrifice of its weapons of mass destruction. Press Release, White House Press Secretary, U.S. Eases Economic Embargo Against

Emergency Economic Powers Act, the United States has maintained a trade embargo with Iran and has variously ceased trade with the other terrorist states, the recent exception being Libya.<sup>181</sup> If the only way that the property of a terrorist state may be attached is if it is used for commercial activity in the United States, and those foreign states subject to the necessary antecedent terrorist state exception to immunity cannot conduct commercial activity in the United States, any judgment obtained against any of these states is unavoidably impotent from inception.

It would have been helpful for the Supreme Court to have explained the effect of 1603(a), which defines “foreign state” for the purposes of the FSIA.<sup>182</sup> As the Ninth Circuit wrote in its first opinion, the 1603(a) definition includes “a political subdivision of a foreign state or an agency or instrumentality.”<sup>183</sup> This definition would appear to have great effects on 1610(a)(7), but it was never explored.

Telescoping out even further, it can be argued that the general terrorist state exception to immunity treats plaintiffs inconsistently because it provides no redress for victims of terrorism caused by states which are not on the State Department’s list and victims of terrorism caused by states on the list, but who were injured before the state was placed on the list.<sup>184</sup> Also, providing full redress to victims is unlikely because of a lack of attachable assets.<sup>185</sup> Even if some plaintiffs recovered through the available assets, the assets would soon run out, creating an unfair situation for future plaintiffs.<sup>186</sup> All of these flaws with the terrorist state exception of the FSIA add up to propagate unenforceable judgments.<sup>187</sup> No court ever mentioned any of the larger ramifications of the statute discussed in Part III of this Comment.<sup>188</sup> These include the international law, foreign policy, and constitutional

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Libya (April 23, 2004), <http://www.whitehouse.gov/news/releases/2004/04/20040423-9.html>. Also in 2004, the United States imposed trade sanctions on Syria in response to Syria’s failure to stop militants from streaming into Iraq. *US slaps trade sanctions on Syria*, BBC NEWS, May 11, 2004, available at [http://news.bbc.co.uk/2/hi/middle\\_east/3705783.stm](http://news.bbc.co.uk/2/hi/middle_east/3705783.stm).

181. See 50 U.S.C. §§ 1701-1707 (2007); PL 95-223, 1977 HR 7738. See also Press Release, White House Press Secretary, U.S. Eases Economic Embargo Against Libya (April 23, 2004), <http://www.whitehouse.gov/news/releases/2004/04/20040423-9.html>.

182. See *supra* notes 141-142.

183. *Cubic*, 385 F.3d at 1220.

184. Taylor, *Another Front*, *supra* note 50, at 550-53 (citing *Saudi Arabia v. Nelson*, 507 U.S. 349, 363 (1993) (denying claim because Saudi Arabia is not on the list); *Roeder v. Islamic Republic of Iran*, 195 F. Supp. 2d 140, 159-60 (D.D.C. 2002) (denying claim because the terrorist act occurred before Iran was on the list)).

185. Taylor, *Another Front*, *supra* note 50, at 552.

186. *Id.*

187. See *supra* Part III.A.

188. See *supra* Part III.B.

questions presented by the terrorist state attachment provision.<sup>189</sup> The 1610(a)(7) argument was given short shrift in the Supreme Court, which swept all of these issues under the rug. Because the Supreme Court gave no guidance on the 1610(a)(7) path of reasoning, Elahi safely, yet nonsensically, argued MOD as an “agency or instrumentality” under 1610(b)(2) in his remand brief.<sup>190</sup> In the face of the longstanding rule against attaching the property of a foreign sovereign, and without the support of the Supreme Court (as they had cited *Transaero*), it makes sense that Elahi would hesitate to invoke this controversial statutory provision (1610(a)(7)) on remand.<sup>191</sup> It is unfortunate that Elahi was forced to argue that MOD is an agency or instrumentality of Iran because it is unlikely that a defense ministry would be characterized as anything other than the foreign state itself.<sup>192</sup>

The Supreme Court never assessed the real difference between 1610(a)(7) and 1610(b)(2), and never reached the heart of the matter.<sup>193</sup> If it is never appropriate to attach the property of a foreign state, then the terrorist state exception can never be used to do anything other than obtain worthless judgments<sup>194</sup> – or judgments that will eventually be paid out of frozen funds or diplomatic assets,<sup>195</sup> which provide some redress,<sup>196</sup> but skimp on deterrence.<sup>197</sup>

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189. See *supra* Part III.B.

190. See *supra* note 164 and accompanying text (regarding Elahi’s argument that MOD is an agency or instrumentality of Iran).

191. *Iran v. Elahi*, 546 U.S. 450, 450-53 (2006).

192. See *supra* note 159 and accompanying text (discussing *Transaero*).

193. *Iran*, 546 U.S. at 450-53.

194. See *supra* notes 9, 13, 60 (regarding the chronic proliferation of default judgments in terrorist state exception cases) and accompanying text.

195. See *supra* notes 13, 62-64, and accompanying text (regarding the use of frozen assets and diplomatic property to pay judgments as hurtful to foreign policy). See also *supra* notes 69-72 (regarding TRIA).

196. Kim explains the problems with TRIA:

The act also provides for the payment of some judgments against Iran. However, this compensation is disbursed arbitrarily; payment is contingent upon the speed with which the plaintiffs were able to secure judgments. First, the act prioritizes payment to a few plaintiffs who secured judgments on specific dates. Other successful plaintiffs are next in line, followed by those with decisions currently pending. Future plaintiffs will theoretically be paid with whatever remains of Iran’s frozen assets. The result is that some plaintiffs will receive legislative priority and collect more than others, while the fate of future victims of terrorism who may bring suit in the coming years is uncertain at best. Moreover, the system of payment under TRIA ensures that no plaintiff will receive the full amount of the judgment awarded by the courts since judgments will be paid on a by-share basis and payments are limited to compensatory damages only. Also, the 2002 legislation fails to mention punitive damages.

Although well-intentioned, this latest modification to plaintiffs’ remedies is far from sufficient in addressing the problems with the terrorist exceptions to the FSIA. While

### B. The Court's Duty

Just as there is no rule requiring the party to present the best argument for the development of the law, the party's attorney is merely obligated to present the most winning arguments for the sake of the client.<sup>198</sup> These arguments must be simply supported by citation to authority<sup>199</sup> and analysis.<sup>200</sup>

Likewise, there is no clear current standard outlining a court's duty

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the new legislation gives some plaintiffs the promise of payment, efforts to secure payment will continue to involve uphill battles as plaintiffs try to force the U.S. government to release frozen assets.

Jeewon Kim, *Making State Sponsors of Terrorism Pay: A Separation of Powers Discourse Under the Foreign Sovereign Immunities Act*, 22 BERKELEY J. INT'L L. 513, 522 (2004) [hereinafter Kim, *Making State Sponsors Pay*]. Taylor, *Another Front*, *supra* note 50, at 550-53 (citing Saudi Arabia v. Nelson, 507 U.S. 349 (1993) (claim denied because Saudi Arabia is not on the official list of terrorist states); Roeder v. Islamic Republic of Iran, 195 F. Supp. 2d 140, 159-60 (D.D.C. 2002) (claim denied because terrorist act accomplished before Iran was on the list)).

197. Kim, *Making State Sponsors Pay*, at 521 (discussing how there is no deterrent effect on Iran because Iran does not actually pay when frozen assets are used to pay plaintiffs). Plaster, *Cold Comfort*, *supra* note 173, at 550-51 (explaining the deterrence failure).

198. The ABA Model Rules of Professional Conduct require a lawyer to act with reasonable diligence in representing a client, from which it can be implied that the lawyer must present the best arguments for the client, but not that the lawyer must present the best objective legal argument in furtherance of the development of the law. MODEL RULES OF PROF'L CONDUCT R. 1.3 (2004). There is a somewhat heightened standard for criminal cases where incarceration may result, which states, "A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established." MODEL RULES OF PROF'L CONDUCT R. 3.1 (2004). However, there is also rule on expediting litigation, which states that, "A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client." MODEL RULES OF PROF'L CONDUCT R. 3.2 (2004).

199. *See, e.g.*, *McLemore v. Fleming*, 604 So.2d 353, 353 (Ala. 1992) (requiring arguments to be supported by citation to authority); *Wilson v. Taylor*, 577 N.W.2d 100, 105 (Mich. 1998) (stating that a statement without authority is insufficient to raise an issue before the court); *Charolais Breeding Ranches, Ltd. v. FPC Securities Corp.*, 279 N.W.2d 493, 499 (Wis. 1979) (requiring that arguments be supported by citation to authority).

200. *See, e.g.*, *People v. DeSantis*, 831 P.2d 1210, 1224 (Cal. 1992) ("Defendant contends there is 'also another reason for suppressing the physical lineup,' i.e., the fact that defense counsel had been barred from questioning the witness immediately following her identification at the physical lineup. As noted, the trial court excluded evidence of the physical lineup because of this fact. To the extent defendant argues that this exclusion alone rendered the in-court identification inadmissible, regardless of any suggestiveness in the lineups, he does not support the claim with adequate argument. We therefore reject the point as not properly raised."); *Allmaras v. Yellowstone Basin Properties*, 812 P.2d 770, 773 (Mont. 1991) ("Plaintiffs cite no legal authority, nor do plaintiffs explain how the Wrongful Discharge Act violates substantive due process beyond a reiteration that it is discriminatory, which has already been addressed under Issue II. Rule 23(a)(4), M.R. App. P. requires the appellant to file a brief containing 'the contentions of the appellant with respect to the issues presented, and the reasons therefore, with citations to the authorities . . . relied on.' Plaintiffs' due process argument fails to comply with this requirement and this Court will not address this issue.").

to adjudicate on the merits of all arguments presented to the court or to discover and apply the “best” or “most needed” legal arguments.<sup>201</sup> The ABA Model Code of Judicial Conduct does not directly address the judge’s duty to evaluate presented arguments or to dig for better arguments if those presented by the parties are not the most optimal for developing the law.<sup>202</sup> The only duty imposed by the ABA Model Code which remotely establishes a duty to analyze arguments is Canon 2.<sup>203</sup> The few ABA Model Code elements which support the judge in his endeavors to uncover better arguments include Rule 2.9, which permits a judge to consult an expert on the law<sup>204</sup> and the Comments section to Canon 3 in the 2004 Code, which says that judges may ask parties to submit additional factual findings and conclusions of law.<sup>205</sup>

There are portions of the Model Code establishing case management duties which address the minimum treatment that judges must give their cases, but the practical realities of the overburdened United States court system work against finding a judicial duty to analyze all arguments, remark upon all arguments, or press forward to

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201. See *infra* notes 210-214 and accompanying text (regarding the lack of a standard establishing duty to adjudicate).

202. See generally MODEL CODE OF JUDICIAL CONDUCT (2007) available at [http://www.abanet.org/judiciaethics/ABA\\_MCJC\\_approved.pdf](http://www.abanet.org/judiciaethics/ABA_MCJC_approved.pdf).

203. MODEL CODE OF JUDICIAL CONDUCT Canon 2 (2007) (“A judge shall perform the duties of judicial office impartially, competently, and diligently.”). MODEL CODE OF JUDICIAL CONDUCT R. 2.7 (2007) (“A judge shall hear and decide matters assigned to the judge, except when disqualification is required by Rule 2.7 or other law.”); MODEL CODE OF JUDICIAL CONDUCT Canon 1 (2007) (“A judge shall uphold and promote the independence, integrity and impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety.”). A duty to analyze arguments that the parties present can be implied from the duty to hear and decide and the duty to uphold the integrity of the judiciary. A judge hears factual evidence and legal argument and is duty bound to render a decision. A judge would not be able to uphold the integrity of the judiciary without analyzing the arguments the parties present. Indeed, the ABA Model Code commentary to Canon 1 says that, “‘Integrity’ means probity, fairness, honesty, uprightness, and soundness of character.” MODEL CODE OF JUDICIAL CONDUCT Canon 1 cmt. (2007), available at [http://www.abanet.org/cpr/mcjc/canon\\_1.html](http://www.abanet.org/cpr/mcjc/canon_1.html).

204. “A judge may obtain the written advice of a disinterested expert on the law applicable to a proceeding before the judge, if the judge gives advance notice to the parties of the person to be consulted and the subject matter of the advice to be solicited, and affords the parties a reasonable opportunity to object and respond to the notice and to the advice received.” CODE OF JUDICIAL CONDUCT R. 2.9(2) (2007).

205. “A judge may request a party to submit proposed findings of fact and conclusions of law, so long as the other parties are apprised of the request and are given an opportunity to respond to the proposed findings and conclusions.” CODE OF JUDICIAL CONDUCT Canon 3 cmt. (2004), available at [http://www.abanet.org/cpr/mcjc/canon\\_3.html](http://www.abanet.org/cpr/mcjc/canon_3.html). The Committee, which revised the Model Code of Judicial Conduct in 2007, removed this language because it felt that it was such a well-established concept that the language was unnecessary. A.B.A. JOINT COMMISSION TO EVALUATE THE MODEL CODE OF JUDICIAL CONDUCT, REPORTER’S EXPLANATION OF CHANGES, ABA MODEL CODE OF JUDICIAL CONDUCT, 2007, <http://www.abanet.org/judiciaethics/mcjc-2007.pdf>.

find the best argument.<sup>206</sup> Under the current law, there is little hope for any of the issues ventilated in this Comment to see the light of a courtroom.

### C. Emerging Scholarship

An array of scholars, including Professors Oldfather, Cravens and Dworkin, have considered the issue and argue that the legal system can and should do better to get to the “right” argument. There are arguably two different levels of analysis which were both neglected in *Iran v. Elahi* – the first being a deeper treatment of the 1610(a)(7) argument as a means for attachment,<sup>207</sup> the second being a more complete analysis of the constellation of issues sparking off of the Elahi situation.<sup>208</sup> Professor Oldfather couches the issue in terms of “judicial inactivism.”<sup>209</sup> In the face of the frustrating dearth of case or statutory law on the topic,<sup>210</sup> Oldfather reasons that judges are subject to a duty to

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206. The ABA Model Code reminds judges that “[p]ublic confidence in the judicial system depends upon timely justice.” CODE OF JUDICIAL CONDUCT R. 2.12 cmt. [2] (2007). However, the practical realities of the overburdened modern court system are reflected in the lack of rigid standards on this issue. Most judges labor under an immense caseload. See Sarah B. Duncan, *Pursuing Quality: Writing a Helpful Brief*, 30 ST. MARY’S L.J. 1093, 1098-99 (1999) (explaining the high judicial workload from the perspective of an appellate judge). This reality forms the central counterargument to imposing any distinct requirement on judges to analyze each argument presented to them or to delve further than the parties in uncovering the truth. Some scholars argue that the deluge of cases flooding the system leads to a breakdown in the fulfillment of adjudicative duty, particularly in the Ninth Circuit. Stefanie A. Lindquist, *Bureaucratization and Balkanization: The Origins and Effects of Decision-Making Norms in the Federal Appellate Courts*, 41 U. RICH. L. REV. 659, 659-63 (2007).

207. See *supra* Part V.A.

208. These being the constitutional, foreign policy, and international law implications. See *supra* Part III.

209. See Chad M. Oldfather, *Defining Judicial Inactivism: Models of Adjudication and the Duty to Decide*, 94 GEO. L. J. 121, 123 (2005) [hereinafter Oldfather, *Inactivism*] (“And if there is good reason to be concerned about judges acting in ways that go beyond their assigned role, then there is good reason to be concerned about judges acting in ways that fall short of their assigned role.”). Unfortunately, he says that when judges fail to act, the failure is often difficult to detect, because “doing nothing generally leaves fewer traces than doing something.” *Id.* See also Sarah M.R. Cravens, *Involved Appellate Judging*, 88 MARQ. L. REV. 251, 267-74 (2004) [hereinafter Cravens, *Involved*] (explaining the passive and active models of judging).

210. A diligent sifting of the law turns up no statements of the actual judicial mandate to decide. Oldfather, *Inactivism*, *supra* note 209, at 127-28. “And despite the occasional suggestions of a more broadly applicable duty, there simply does not exist a body of law that meaningfully supports such a doctrine, to say nothing of a developed jurisprudence addressing what the duty might require.” *Id.* at 129. While there is not a body of law on the courts’ duty to decide, courts have occasionally addressed the issue. *Id.* at 128 (citing *United States v. Garza*, 165 F.3d 312, 314 (5th Cir. 1999); *Bernklau v. Principi*, 291 F.3d 795, 801 (Fed. Cir. 2002)). Oldfather also notes the broad spectrum of “simply picking a winner” to evaluating every single argument presented by the parties. *Id.* at 126.

adjudicate which extends beyond merely deciding cases.<sup>211</sup> Explaining the standard's functioning, Oldfather states "In any event, it seems indisputable that, even if a court can be excused for electing not to do the parties' work for them, there must come a point where the parties have satisfied their participatory obligations with respect to an argument, thereby triggering the adjudicative duty."<sup>212</sup> Oldfather proposes that a judge has a duty to explain her reasoning on arguments that the parties have presented "in a meaningful way."<sup>213</sup> But what of decisions sans analysis, or decisions accompanied by analysis, but analysis of a low quality?<sup>214</sup> This incomplete or shoddy analysis would normally be corrected in a higher court, but, as in *Iran v. Elahi*, not when the opinion is issued by the Supreme Court or an appellate court on remand.

On the appellate level, there is a persuasive argument that the Respondent's Brief in Opposition presented the 1610(a)(7) argument to the court in a meaningful way, but the opinion barely regarded its existence.<sup>215</sup> On the Supreme Court level, the United States, in its

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211. *Id.* at 127. Oldfather concludes that the existence of justiciability doctrines (which excuse courts from deciding certain issues) implies that there is a requirement to decide. *Id.*

212. *Id.* at 130-31. Oldfather particularly notes that it is not reasonable for the court to address every single argument presented in the brief. For example, it is reasonable for the court to gloss over a small undeveloped argument presented at the end of the brief. *Id.* However, if the court neglects an argument at the forefront of the brief, there is an argument that the court has neglected to do its job. *Id.* In contrast, Judge Richard Posner lambastes unrealistic scholars (including Dworkin) who, from their ivory towers, admonish judges to consider all relevant arguments and sources of law. He argues that the realities and pressures of the job lead most judges to apply a more pragmatic approach to decision making. Richard A. Posner, *The Role of the Judge in the Twenty-First Century*, 86 B.U. L. REV. 1049, 1053-54 (2006). However, there is a convincing argument that judges are the trustees of the common law, which belongs to all in society, and, as such, judges need to arrive at the best reasoning since it has the potential to impact all in society. Cravens, *Involved*, *supra* note 209, at 252-55. If, due to the practical realities of the job, judges cannot carry out this task, perhaps society itself needs to do more to ensure the proper care and feeding of its common law.

213. Oldfather, *Inactivism*, *supra* note 209, at 130.

214. Various scholars have been writing on the vital importance of the publication of meaningful reasoning in judicial opinions. See Sarah M.R. Cravens, *Judges as Trustees: A Duty to Account and an Opportunity for Virtue*, 62 WASH. & LEE L. REV. 1637, 1639 (2005); David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2626 (1995). For a discussion of judicial candor, see generally Scott C. Idleman, *A Prudential Theory of Judicial Candor*, 73 TEX. L. REV. 1307 (1995).

215. See *supra* Part V.A. Elahi's attorneys presented the argument in Section F of the brief, titled "MOD's Judgment Is Subject to Attachment under Section 1610(a)(7)." Answering Brief of Appellee at \*ii, *Iran v. Elahi*, 385 F.3d 1206, (2003) (No. 03-55015), 2003 WL 22724229. The attorneys developed the argument over the course of six pages, analyzing each of the elements. *Id.* at 45-51. The Ninth Circuit obliquely addressed the argument after determining that § 1610(b)(7) authorized the attachment: in a single sentence, the court absolved itself of the need to address any other arguments for attachment because it was satisfied with the § 1610(b)(2) basis.

Amicus Brief, spotlighted the 1610(a)(7) argument.<sup>216</sup> However, all the attention that the Supreme Court could muster for the argument was delivered in three sentences<sup>217</sup> within an opinion of less than two pages. As discussed earlier, the Court dismissively left the Ninth Circuit to decide whether MOD is a “state” or an “agency or instrumentality of a state.” Upon remand, Elahi focused his attentions on arguments other than 1610(a)(7) - for good reasons.<sup>218</sup>

Even though the current standard does not require an appellate court to address arguments not adequately presented in briefs,<sup>219</sup> Professor Dworkin, in his *Law as Integrity* thesis, argues that the judiciary should be held to a higher standard.<sup>220</sup> Residing at the extreme end of the spectrum, Dworkin contends that judges are obligated to develop and refine the law to be the best that it can be.<sup>221</sup> To develop his theory, Dworkin imagined an idealized character - “Judge Hercules” - possessing limitless time and full knowledge of all relevant legal sources.<sup>222</sup> Dworkin argues that Judge Hercules would always be able to come to a “right answer” if he assessed all relevant sources of law and then employed the reasoning which best suited the common law as a whole.<sup>223</sup>

If the Herculean tasks in *Iran v. Elahi* were presented to Judge Hercules, the opinions would have turned out quite differently. Judge Hercules would have considered the landscape of the law “as a whole.” The judges who heard the case would have been doing a service to all if

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216. Brief for the United States as Amicus Curiae at 13, 546 U.S. 450 (2006) (No. 04-1095), 2005 WL 3477863 (“Given the way the parties presented the case on appeal, it is puzzling that the court of appeals failed to consider the applicability of Section 1610(a)(7), which respondent had expressly identified as an alternative ground for affirmance, and instead proceeded to hold that the property is subject to attachment under Section 1610(b)(2), on which respondent had not relied as an alternative ground for affirmance. The court did so, moreover, without even advertent to the critical antecedent question of whether petitioner falls within the FSIA’s definition of an ‘agency or instrumentality’ covered by Section 1610(b)(2).”).

217. *Iran v. Elahi*, 546 U.S. 450, 452 (2007) (“The Act, as it applies to the ‘property in the United States of a foreign state,’ . . . , does *not* contain the ‘engaged in commercial activity’ exception that the Ninth Circuit described. That exception applies only where the property at issue is property of an ‘agency or instrumentality’ of a foreign state. Compare § 1610(b) (‘property . . . of an agency or instrumentality of a foreign state engaged in commercial activity’) with § 1610(a) (‘property . . . of a foreign state *used for a commercial activity*’) (emphasis added). The difference is critical.” (emphasis in original)).

218. See *supra* note 164 and accompanying text.

219. See *supra* note 210 and accompanying text.

220. RONALD DWORKIN, *LAW’S EMPIRE* 87-114, 225-75 (1986) [hereinafter DWORKIN, EMPIRE]. Dworkin believes that judges operate under a mandate to “perfect” the law. *Id.*

221. *Id.*

222. *Id.* at 239-75.

223. *Id.* at 245.



it they had written opinions considering the case's wider implications, such as those concerning the constitutional, statutory construction, foreign policy, and international law issues. Dworkin advises against compartmentalization of the law.<sup>224</sup> The glaring omissions in *Iran v. Elahi* may have been a product of such compartmentalization - the courts steered clear of turning it into a constitutional case or an international law/foreign policy case when they easily could have.

These omissions may also have been a product of a system which generally relies on parties to raise the best arguments and advise the court on the law. Cravens argues that the U.S. common law system, which relies so heavily on precedent, cannot afford to accord individual parties inordinate control over judicial decision-making, as individual parties are capable of missing relevant arguments.<sup>225</sup> Thus enters the notion that the common law is "owned" by society, while judges act as "trustees" over it.<sup>226</sup> It is not insignificant that the oft-cited rule that parties waive any issues not raised below applies only to the parties and not to judges.<sup>227</sup> The courts in *Iran v. Elahi* were in no way prevented from taking up such issues.<sup>228</sup>

Under Dworkin's analysis, the Ninth Circuit and Supreme Court would be required to take into account the 1610(a)(7) provision on foreign state property attachment and the peripheral issues. *Iran v. Elahi* arguably presents twelve analytical labors for Judge Hercules. The first group deals with Part III's Problem of Enforcement and includes: (1) the

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224. *Id.* at 251 ("Law as integrity has a more complex attitude towards departments of law. Its general spirit condemns them because the adjudicative principle of integrity asks them to make the law coherent as a whole, so far as they can, and this might be better done by ignoring academic boundaries and reforming some departments of law radically to make them more consistent in principle with others.").

225. Cravens writes that:

On one side is the idea that the role of the court is to act as an impartial arbiter -- to settle the specific disputes between the parties before the court, answering only the questions explicitly presented, and doing so by considering only the arguments the parties have explicitly presented. On the other side is the idea that the role of the court is to determine and announce what the law is, and that in a common law system, determination of the law affects more than just the parties before a single court in a given case. When so much value is placed on precedent, the ramifications of decisions are too important to allow parties any kind of absolute control over the decision-making process.

Cravens, *Involved*, *supra* note 209, at 254-55. To set up her arguments, Cravens queries, "[W]hat happens when the parties simply miss the point?" *Id.* at 251.

226. *See supra* note 212 (regarding judges as trustees).

227. Cravens, *Involved*, *supra* note 209, at 267.

228. For a treatment of the arguments against sua sponte decision-making, see generally Barry A. Miller, *Sua Sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity to be Heard*, 39 SAN DIEGO. L. REV. 1253 (2002).

under-inclusiveness of the terrorist state exception;<sup>229</sup> (2) the statutory language forcing the court to consider the terrorist state's intended purpose for the property in assessing the "engaged in/used for" distinction;<sup>230</sup> (3) the Section 1603 definition of "foreign state," which happens to include "agencies and instrumentalities;"<sup>231</sup> (4) the fact that the U.S. would not be likely to carry on trade with any terrorist state, making recovery nearly impossible from the statute's inception;<sup>232</sup> (5) the proliferation of unenforceable judgments under the terrorist state exception due to the growing problem of terrorism;<sup>233</sup> (6) whether or not 1610(a)(7) has been pre-empted by TRIA and other recovery provisions; (7) the fact that the Congressional purpose of deterrence cannot be achieved when judgments get paid out of TRIA frozen assets;<sup>234</sup> (8) that even with partial recovery under TRIA, plaintiffs can never achieve full redress.<sup>235</sup> The second group of labors for our Judge Hercules concerns Part III's Problem with Enforcement and includes: (9) the potential violations of international law inherent in 1610(a)(7);<sup>236</sup> (10) the foreign policy problems of reciprocity;<sup>237</sup> (11) whether or not the whole issue presents a non-justiciable political question;<sup>238</sup> (12) the issue of minimum contacts.<sup>239</sup>

While it may be impossible for judges to realistically consider all relevant sources comprising the fabric of the common law,<sup>240</sup> the garish analytical deficiencies in *Iran v. Elahi* present a compelling argument that courts need to be doing more than they are. When presented with such a cumbersome and complex statute packing ponderous ramifications, it would behoove the court to look outside of the certain arguments presented by individual parties and into the larger context surrounding the issue.

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229. *See supra* note 185.

230. *See supra* Part V.A.

231. *Id.*

232. *Id.*

233. *See supra* Part III.A.

234. *See supra* Part V.A.

235. *See supra* note 46 and note 197.

236. *See supra* Part III.B.1

237. *Id.*

238. *See supra* Part III.B.2.

239. *Id.*

240. Dworkin realizes the constraints imposed by reality, but believes that judges can, "imitate Hercules in a limited way." DWORKIN, *EMPIRE*, *supra* note 220, at 245.

## VI. CONCLUSION

If 1610(a)(7) and the avoided quagmire addressed in Part III is viewed through the lens of The Twelve Labors of Judge Hercules, the courts' neglect becomes striking. If the courts in *Iran v. Elahi* had taken some minimum extra analytical steps suggested by Oldfather, Cravens, or Dworkin in order to analyze the worth of 1610(a)(7), there would be some much needed clarity regarding this radical doctrine, which is so far out of step with the rest of the world.<sup>241</sup>

If there had been a clear analysis, future terrorist victims would be able to know whether the expense of a terrorist state exception lawsuit would ever result in cash. Likewise, future terrorist victim judgment holders would know whether 1610(a)(7) is a reliable source of redress, or if it would never be applied so that they should limit their expectations to TRIA.<sup>242</sup> Most importantly, if, after careful analysis, the court deemed 1610(a)(7) a viable means to take meaningful assets away from terrorist states, those state actors could even be deterred from sponsoring acts of terrorism.<sup>243</sup>

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241. See *supra* Part IV.B.3.

242. See *supra* Part II.B.

243. See *supra* Part III-IV (explaining how the 1610(a)(7) attachment provision is essential to carry out the underlying policies of the terrorist state exception, deterrence, and redress).