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COLD COMFORT AND A PAPER TIGER: THE (UN)AVAILABILITY OF TORT COMPENSATION FOR VICTIMS OF INTERNATIONAL TERRORISM

I. INTRODUCTION

“Iran destroyed my life! I want justice! As an American citizen, *I should be entitled to my day in court.*”¹ Those dramatic words were the plea that former hostage David Jacobsen included in the statement he submitted to the United States Senate when it was considering creating a civil cause of action for private citizens against foreign governments for damages arising out of acts of terrorism.² In support of the same amendment, Jacobsen’s son wrote President Clinton a letter arguing that the culpability of terrorist-sponsoring states should be determined by the courts “on the basis of law and evidence, not [by] the State Department on the basis of diplomatic convenience.”³ Convinced that they are entitled to have their day in an American court and confident that litigation will deter future acts of terrorism, American victims of international terrorism like David Jacobsen and their families have sought to have their traumatic ordeals compensated for in the American court system.⁴ Instead, they have found themselves with empty victories—the cold comfort of

1. *Foreign Terrorism and U.S. Courts: Subcomm. on Courts and Admin. Practice, Hearing on the Foreign Sovereign Immunity (sic) Act*, 103d Cong. 60 (1994) (statement by David P. Jacobsen offered at the Hearing on the Foreign Sovereign Immunity Act of 1993 to Amend Title 28 of the United States Code) (available at 1994 WL 274223 (F.D.C.H.)) (emphasis added).

2. *Id.* Jacobsen’s written statement was submitted to the Senate Subcommittee on Courts and Administrative Practice when that subcommittee was considering an amendment to the Foreign Sovereign Immunities Act (“FSIA”). *Id.* The proposed amendment (which ultimately passed) provides a civil cause of action against nation-states who sponsor terrorism, and abrogates those states’ sovereign immunity in order to make the cause of action enforceable. *Id.*

3. *Id.* Letter from Eric D. Jacobsen, son of David Jacobsen, to President William Clinton (May 2, 1994), reprinted in *id.* at 61.

4. In a December 14, 2002 editorial to the Washington Post, Allan Gerson, co-counsel for a group of over 3,000 family members of the attacks of September 11, 2001 and counsel in other lawsuits against foreign governments arising out of terrorist acts, wrote that “[b]y making foreign sponsors of terrorism pay a heavy price for their misdeeds, the families of victims of terrorism hope to spare other Americans the pain they have endured.” Allan Gerson, Editorial, *Terrorists’ Sponsors Must Pay*, WASH. POST, Dec. 14, 2002, at A24. Victims and their families often believe that their suits are a form of retribution, both securing justice and preventing the occurrence of future terrorist acts. *See infra* notes 99–106.

unenforceable judgments and only an ineffectively deterrent paper tiger to wave at the governments of foreign states.⁵

To their initial satisfaction, the amendment sought by Mr. Jacobsen and other victims passed the House and Senate and was enacted in 1996 as part of the Antiterrorism and Effective Death Penalty Act (“AEDPA”).⁶ However, it has failed to achieve the compensation and deterrence results its supporters expected. Although the victims of terrorism have had some success in obtaining judgments against states who sponsor terrorism, efforts to recover the monetary damages awarded have repeatedly failed.⁷ The interplay between the compensation and deterrence goals of judiciary tort law and the foreign relations power of the political branches of government has rendered cases under the AEDPA and other legislation toothless.⁸

This interplay is the result of political and diplomatic maneuvering. The state of American law regarding the civil liability of foreign states for acts of terrorism has become a tug-of-war contest between two competing interests: The judicial interest in compensating plaintiff-victims and deterring future acts of terrorism, and the foreign relations interest in preserving and maintaining American diplomatic relations with nations in an increasingly tenuous international atmosphere.⁹ In this struggle, the three branches of the federal government have gone in separate and sometimes conflicting directions.¹⁰ Even as the judicial branch awards significant compensatory and punitive damages to plaintiffs in cases

5. The paper tiger to which this Note refers is the Antiterrorism and Effective Death Penalty Act (“AEDPA”), discussed *infra* notes 6, 44–50 and accompanying text.

6. Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104–132, 110 Stat. 1214 (1996) (codified as amendments to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(7) (2000)), discussed in more detail *infra* notes 29–34 and accompanying text.

7. Allison Taylor, *Another Front in the War on Terrorism? Problems with Recent Changes to the Foreign Sovereign Immunities Act*, 45 ARIZ. L. REV. 533, 539 (2003). At the time Taylor’s article was published, Iran, Iraq, Cuba, and Libya collectively owed hundreds of millions of dollars to plaintiffs from more than twenty lawsuits brought under the AEDPA. *Id.* For more detail on specific judgments and unpaid damage awards, see Kristine Cordier, Annotation, *Award of Damages Under State-sponsored Terrorism Exception to Foreign Sovereign Immunities Act* (28 U.S.C.A. § 1605(a)(7)), 182 A.L.R. Fed. 1 (2002).

8. W. Michael Reisman & Monica Hakimi, 2001 HUGO BLACK LECTURE: *Illusion and Reality in the Compensation of Victims of International Terrorism*, 54 ALA. L. REV. 561, 573 (2003). The authors discuss cases under the AEDPA as “exercises of judicial therapy for the families of victims,” and say that “the decisions had an eerie, autistic national character; their effects remained largely within the United States and were never tested against international law—because, from the standpoint of international law, in the absence of execution of judgment, nothing was happening.” *Id.*

9. See *infra* notes 112–25 and accompanying text.

10. See *infra* notes 112–25 and accompanying text.

against states that sponsor terrorism,¹¹ the executive branch continues to attempt to restrict attachment of foreign assets and limit the enforcement of the judgments awarded by the judiciary.¹² Meanwhile, the legislative branch treads a fine line between responding to voter demands for tort compensation and maintaining the international responsibilities dictated by the foreign relations power granted to it by the United States Constitution.¹³

This Note examines the effectiveness and advisability of civil actions against foreign governments that sponsor terrorism, and argues that the conflict between tort law and foreign relations has: (1) created false hopes for plaintiffs seeking compensation through civil action,¹⁴ (2) failed to deter future terrorist action,¹⁵ and (3) tied the hands of the political branches with regard to the diplomatic relations of the United States.¹⁶ As such, the cause of action and exception to sovereign immunity contained in the AEDPA, the Flatow amendment, and successive amendments should be abrogated. This Note concludes by calling for legislative consideration of an alternative compensation scheme, in the vein of a flexible but regularly-funded federal program similar to the fund created to compensate victims of the terrorist attacks of September 11, 2001.

Part II of this Note discusses the history of the American doctrine of sovereign immunity and the development of the exception for state-sponsored acts of terrorism.¹⁷ Part III briefly surveys the alternative

11. See, e.g., Marcia Coyle, *A Case of Terrorism: How Two Lawyers Brought a Suit They Just Might Win*, 24 NAT'L L.J., No. 60, Nov. 11, 2002, at A1. While the figures given for currently outstanding monetary judgments vary, awards are undoubtedly in the cumulative billions and have been significant enough to inspire two lawyers to file a *more than \$1 trillion* suit on behalf of more than 3,000 family members against the government of Saudi Arabia arising out of the events of September 11, 2001. *Id.*

12. See Bill Miller, *Albright Seeks Ways to Help Terror Victims Collect Damages*, WASH. POST, Feb. 17, 2000, at A6 (discussing the Administration's effort to satisfy plaintiff's demands while preventing attachment of assets and citing former Secretary of State Madeleine Albright: "the challenge is to help the families [of victims] 'in some way that does not harm our overall foreign policy interests.' [Albright] said U.S. officials want to be careful 'not to undercut our international obligations.'").

13. The grant of foreign relations power to the political branches in the United States Constitution is found in Article I, section 8 for powers granted to the Legislature and Article II, section 2 for powers granted to the President. U.S. CONST. art. I, § 8, cl. 10, 11; U.S. CONST. art. II, § 2, cl. 2. See also H.R. REP. 106-733, at 5 (2000), as an example of Congress' current attitude towards personal civil suits against terrorist states ("the President's continued use of his waiver power [to waive attachment of assets for use in satisfying judgments] has frustrated the legitimate rights of victims of terrorism.").

14. See *infra* notes 99-106 and accompanying text.

15. See *infra* notes 107-11 and accompanying text.

16. See *infra* notes 112-23 and accompanying text.

17. See *infra* notes 21-87 and accompanying text.

compensation fund program developed for the victims of the September 11th terrorist attacks.¹⁸ Part IV addresses the compensation, deterrence, and separation of powers problems with the law as it currently exists,¹⁹ and suggests that a fund program similar to the September 11th compensation fund should be considered as a model on which to base further discussion of alternative compensation schemes for the victims of future terrorist attacks, in place of the current availability of civil suits.²⁰

II. HISTORY

Over a century ago, the United States and most other internationally-active countries granted broad sovereign immunity from actions within their domestic court systems to the governments of other nation-states.²¹ Initially, this policy of sovereign immunity was nearly absolute, though it has been gradually eroded over the years.²² The original broad-reaching sovereign immunity was first modified in 1952 with the adoption of the “restrictive” theory of sovereign immunity advocated in the Tate Letter.²³ Under this restrictive theory of sovereign immunity, private and commercial acts of a foreign state are not protected from civil suits in American courts.²⁴ Modern American sovereign immunity is still loosely based on the restrictive theory but has been eroded to provide less

18. See *infra* notes 88–94 and accompanying text.

19. See *infra* notes 95–123 and accompanying text.

20. See *infra* notes 124–25 and accompanying text.

21. See, e.g., JOSEPH M. SWEENEY, U.S. DEPT. OF STATE, *THE INTERNATIONAL LAW OF SOVEREIGN IMMUNITY* 20–21 (1963), stating that broad sovereign immunity existed generally for states until the turn of the century, with the exception of the category of cases described in *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812). In *The Schooner Exchange*, the Court first stated that general principles of international law and territorial sovereignty supported a doctrine of sovereign immunity and cited the United States’ executive branch’s support for the doctrine before establishing that the French naval vessel in question was outside the jurisdiction of American courts. 11 U.S. (7 Cranch) at 122, 132–35. As the Court stated, “justice is to be administered with a due regard to the law of nations, and to the rights of other sovereigns.” *Id.* at 123.

22. See, e.g., SWEENEY, *supra* note 21, at 20–21.

23. Changed Policy Concerning the Granting of Sovereign Immunity to Foreign Governments, Letter from Jack B. Tate, Acting Legal Advisor, to Phillip B. Perlman, Acting Attorney General (May 19, 1952) (reprinted in 26 Dep’t. St. Bull. 984 (1952)) [hereinafter Tate Letter]; also reprinted in GARY B. BORN, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 202, 208 (3d ed. 1996). The Tate Letter stated that: “widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts.” *Id.*

24. For a general discussion of the historical development of the American sovereign immunity doctrine, see BORN, *supra* note 23, at 199–202.

protection for sovereign states, to an extent beyond that of other countries.²⁵

After its adoption, the doctrine of restrictive sovereign immunity espoused in the Tate Letter proved difficult for the State Department to apply because it required the executive branch to perform a judicial-like function through the State Department.²⁶ To determine whether a government was immune from suit, the State Department had to make a factual determination on the basis of the complaint.²⁷ This difficulty in application has led both the judicial and legislative branches to clarify and alter the sovereign immunity extended by the American government in the years following the writing of the Tate Letter.²⁸

As part of this further development of American sovereign immunity, Congress enacted the Foreign Sovereign Immunities Act²⁹ (“FSIA”) in 1976 to alleviate some of the confusion surrounding the sovereign immunity doctrine and transfer responsibility for the factual determination of immunity to the judiciary.³⁰ As of its adoption, the FSIA became the only source of jurisdiction over foreign nations.³¹ The FSIA established a presumption of immunity with several enumerated exceptions.³² These exceptions conformed generally to the Tate Letter’s restrictive immunity, providing immunity only for sovereign acts and not for private or

25. *Id.* at 211.

26. *Id.* See also Daveed Gartenstein-Ross, *Note: a Critique of the Terrorism Exception to the Foreign Sovereign Immunities Act*, 34 N.Y.U. J. INT’L. L. & POL. 887, 894 (2002) (noting that while the Tate Letter purported to distinguish between acts that did or did not subject a foreign government to liability, in reality there were few concrete guiding principles for use in making such determinations, and the result was that “the diplomatic pressure that other countries exerted came to influence the determination of grants of immunity more than the Tate Letter’s criteria.”).

27. BORN, *supra* note 23, at 211. Because the State Department was required to make factual determinations while being subject to political pressures, the results were arbitrary and unpredictable. *Id.*, citing *Rich v. Naviera Vacuba SA*, 295 F.2d 24 (4th Cir. 1961).

28. *Id.*

29. The Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified as amended at 28 U.S.C. § 1330, §§ 1602–1611).

30. *Id.* See also Ved. P. Nanda, *Human Rights and Sovereign Individual Immunities (Sovereign Immunity, Act of State, Head of State Immunity and Diplomatic Immunity)—Some Reflections*, 5 ILSA J. INT’L & COMP. L. 467 (1999).

31. Ismael Diaz, *A Critique of Proposals to Amend the Foreign Sovereign Immunities Act to Allow Suits Against Foreign Sovereigns for Human Rights Violations*, 32 U. MIAMI INTER-AM. L. REV. 137, 142 (2001). Since its enactment, the FSIA has been the source of approximately 10–15 cases per year, 5 of which have progressed to the Supreme Court. Joseph W. Dellapenna, *Civil Remedies for International Terrorism*, 12 DEPAUL BUS. L.J. 169, 242 (2000). However, the majority of these cases have been litigated under the commercial acts exception to the FSIA. *Id.*

32. For the exceptions provided in the FSIA, see 28 U.S.C. § 1605 or see generally *infra* note 29.

commercial acts.³³ For cases falling under the FSIA exceptions, the statute grants both personal and subject-matter jurisdiction.³⁴

In *Argentine Republic v. Amerada Hess Shipping Co.*,³⁵ the Supreme Court held that the FSIA constitutes the sole basis for suing a foreign government.³⁶ As such, there can be no cause of action against a foreign government without application of one of the enumerated exceptions contained within the FSIA.³⁷ The *Amerada* holding was a blow to those seeking civil recourse from foreign governments for human rights violations because there was no enumerated exception under the FSIA that would directly apply to human rights violations.³⁸ Therefore, after *Amerada*, those seeking to bring civil suits against foreign states arising out of human rights-related torts attempted to mold their cases in such a way as to fit them under the non-commercial torts exception to the FSIA, with some limited success.³⁹ However the Supreme Court soon responded by narrowing the use of the non-commercial torts exception in *Saudi Arabia v. Nelson*,⁴⁰ holding that a commercial activity must still be the “gravamen of the complaint.”⁴¹ The Court in *Nelson* also required that the

33. Prior to the 1996 amendments (see the AEDPA, discussed *infra* notes 44–50), there were eight general categories of cases excepted from sovereign immunity under the FSIA: (1) those in which sovereign immunity is waived, (2) those which concern a commercial activity with an appropriate nexus to the United States, (3) those in which property within the United States has been taken in violation of international law, (4) those involving the rights to property within the United States obtained by succession or as a gift, (5) those in which the cause of action arises out of a noncommercial tort occurring within the borders of the United States, (6) those relating to arbitration, (7) those dealing with certain specified admiralty matters, and (8) counterclaims. 28 U.S.C. § 1605; BORN, *supra* note 23, at 226.

34. BORN, *supra* note 23, at 211. Note, however, that the jurisdiction granted by the FSIA is limited by 28 U.S.C. § 1330(a) only to non-jury civil actions. *Id.* at 212. This limitation was apparently intended to prevent arbitrary or unpredictable decisions by American juries where the liability of a foreign sovereign is at stake. *Id.*

35. 488 U.S. 428 (1989).

36. *Id.* at 434.

37. *Id.* at 443. The plaintiff in *Amerada Hess* brought suit under the Alien Tort Claims Act, 28 U.S.C. § 1350 (1994), against the Argentine Republic for destruction of its ship in the course of the Falkland Islands War. *Id.* at 432. The Supreme Court held that the suit could not be brought against the government of Argentina in American courts under the Alien Tort Claims Act, instead requiring an explicit exception to the FSIA in order to hurdle the immunity requirement. *Id.* at 443. The Alien Tort Claims Act provides: “The district courts shall have original jurisdiction of any civil action by an alien for tort only, committed in violation of the law of nations or of a treaty of the United States,” and provides federal jurisdiction over tort cases brought by an alien, arising out of a violation of the law of nations or a treaty. 28 U.S.C. § 1350.

38. Nanda, *supra* note 30, at 471 (noting that the enumerated exceptions in the FSIA yield little opportunity for human rights-related suits, and that courts have rejected the argument that a gross violation of human rights should not be excused from liability, regardless of sovereign immunity).

39. BORN, *supra* note 23, at 226.

40. 507 U.S. 349 (1993).

41. *Id.* at 357, *citing* Callejo v. Bancorner, S.A., 764 F.2d 1101, 1109 (5th Cir. 1985).

activity leading to the complaint must have actually taken place within the United States or cause a “direct effect” in the United States.⁴² Thus, after *Nelson*, the victims of international terrorism were precluded from bringing suit against the governments of states that sponsored terrorism, and were often left with no legal recourse and little opportunity for compensation.⁴³

Victims of terrorism saw some renewed potential for civil suits in 1996, when Congress enacted the AEDPA⁴⁴ in the interest of compensating those victims and deterring future acts of terrorism

42. *Id.*

43. For an indication of the sentiment of terrorism victims prior to the enactment of the AEDPA, *infra* notes 44–50, see *Foreign Terrorism and U.S. Courts: Subcomm. on Courts and Admin. Practice, Hearing on the Foreign Sovereign Immunity (sic) Act*, 103d Cong., 2d Sess. (1994) (statement by David P. Jacobsen offered at the Hearing on the Foreign Sovereign Immunity Act of 1993 to Amend Title 28 of the United States Code) (available at 1994 WL 274223 (F.D.C.H.)). In 1985, Jacobsen was kidnapped in Beirut by the Iranian-sponsored terrorist group Islamic Jihad while he was working as the Chief Executive Officer of the American University of Beirut’s Medical Center. Jacobsen says that it is “irrefutable” that Islamic Jihad was paid millions of dollars by the Iranian government to carry out the kidnapping. *Id.* Upon being released, Jacobsen’s written statement says that his joy was “diminished by the vicious partisan politics of Iran/Contra and the creation of a nightmare.” *Id.* On his return to the United States, Jacobsen says he was “literally dropped on the streets of Washington DC without money, credit cards or identification,” was unable to find a job, lost the opportunity to marry the love of his life, and that “[his] freedom was filled with pain, frustration, discouragement and anger.” *Id.* In a startling example of the frustration of victims which led to enactment of the AEDPA, Jacobsen exclaimed before the subcommittee, “Iran destroyed my life! I want justice! As an American citizen, I should be entitled to my day in court.” *Id.*

44. Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amendments to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(7) (2000)). AEDPA states:

A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case— . . .

(7) . . . in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources (as defined in section 2339A of title 18) for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency, except that the court shall decline to hear a claim under this paragraph—

(a) if the foreign state was not designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371) at the time the act occurred, unless later so designated as a result of such act or the act is related to Case Number 1:00CV03110(EGS) in the United States District Court for the District of Columbia; and

(b) even if the foreign state is or was so designated, if—the act occurred in the foreign state against which the claim has been brought and the claimant has not afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration; or neither the claimant nor the victim was a national of the United States (as that term is defined in section 101(a)(22) of the Immigration and Nationality Act) when the act upon which the claim is based occurred.

Id.

committed on foreign soil against American citizens.⁴⁵ The AEDPA was meant to be “an Act to deter terrorism, provide justice for victims, provide for an effective death penalty, and for other purposes.”⁴⁶ It provided, among other things, for an amendment to the FSIA providing jurisdiction in American courts for actions against foreign states arising out of acts of terrorism.⁴⁷ More specifically, the AEDPA abrogated the sovereign immunity of those states designated by the State Department as sponsors of terrorism⁴⁸ with regard to actions arising out of acts of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if the act or provision of material support was engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.⁴⁹ The AEDPA also required that if the terrorist act occurred within a foreign country, the plaintiff must “afford the terrorist state ‘a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration.’”⁵⁰ Plaintiff-victims were also

45. See Reisman & Hakimi, *supra* note 8, at 565–66, for a description of the events leading up to the enactment of the AEDPA. Reisman and Hakimi explain that the convergence of families from the two terrorist acts of the Oklahoma City Bombing in 1995 and the bombing of PanAm Flight 103 over Lockerbie, Scotland in 1988 led to a political rallying of the forces between the two groups. *Id.* The families of the Oklahoma City victims sought to prevent those responsible for the bombing from using the court system to defer the death penalty for years, and the families of the Lockerbie bombings sought access to the American courts in suits against the foreign government(s) who sponsored the bombing of Flight 103. *Id.*

46. AEDPA preamble. Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified at 28 U.S.C. § 1605(a)(7) (2000)).

47. *Id.*

48. *Patterns of Global Terrorism—2001*, released by the Office of the Coordinator for Counterterrorism, U.S. Dep’t of State, available at <http://www.state.gov/s/ct/rls/pgtrpt/2001/html/10249.htm> (last visited Mar. 2, 2004). The seven states that are currently designated by the State Department as sponsors of terrorism are: Iran, Iraq, Libya, Sudan, Cuba, North Korea, and Syria. *Id.* While the government of Afghanistan may have arguably been the greatest supporter of the terrorists who carried out the attacks of September 11, 2001, it should be noted that because the American government never recognized the Taliban as a legitimate government, Afghanistan was never added to the list. *Id.* The other suspected state sponsor of the September 11 attacks, Saudi Arabia, has never been designated a sponsor of terrorism, perhaps due to the importance of its sometimes tenuous diplomatic relations with the United States. *Id.*

49. Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified at 28 U.S.C. § 1605(a)(7) (2000)).

50. 28 U.S.C. § 1605(a)(7). See also Nanda, *supra* note 30, at 472 (explaining the provisions of the AEDPA); Taylor, *supra* note 7, at 536 (summarizing the requirements of the AEDPA’s terrorism exception to the FSIA as:

First, the case must be one in which “money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support . . . for such an act.” Second, the claimant or victim must be a U.S. national when the act of terrorism occurs. Third, the foreign state must be designated a state sponsor of terrorism by the State Department at the time the act occurs. Finally, if the act of terrorism occurred in the defendant state’s territory, a plaintiff

provided with a civil cause of action for damages arising out of terrorist acts via a contemporary amendment known as the Flatow Amendment.⁵¹ This amendment specifically allows damages for pain and suffering, economic damages, solatium, and even punitive damages.⁵² However, it should be noted that while the AEDPA provided an exception to the sovereign immunity of terrorist states themselves (in addition to their agents and officials), the language of the Flatow Amendment provided a cause of action only against agents and officials of the state.⁵³ While interesting, this has not been a stumbling block for plaintiffs because, until recently,⁵⁴ courts have permitted civil suits against the states themselves under the Flatow Amendment, regardless of the lack of an explicit creation of such a cause of action.⁵⁵

In the first three cases brought under the AEDPA, significant amounts of compensatory and punitive damages were awarded to plaintiffs and their families.⁵⁶ However, enforcing the judgments proved problematic for

must first attempt arbitration in accordance with international rules.)

51. Flatow Amendment, also titled the Civil Liability for Acts of State Sponsored Terrorism Act, 28 U.S.C. § 1605 (West Supp. 1997). The Act provides:

An official, employee, or agent of a foreign state designated as a state sponsor of terrorism . . . while acting within the scope of his or her office, employment, or agency shall be liable to a United States national . . . for personal injury or death caused by acts of that official, employee, or agent for which the courts of the United States may maintain jurisdiction under (the AEDPA).

Id.

52. 28 U.S.C. § 1605.

53. *Id.* See Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 96 A.J.I.L. 956, 964 (2002) (noting that the Flatow Amendment is, "by its terms, more narrow than the terrorist-state exception to sovereign immunity; the Flatow amendment confers a right of action only against an 'official, employee, or agent of a foreign state.'").

54. *Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024 (D.C. Cir. 2004). For further discussion of *Cicippio-Puleo*, see *infra* note 99.

55. See, e.g., cases discussed *infra* note 56.

56. *Cicippio v. Islamic Republic of Iran*, 18 F. Supp.2d 62 (D.D.C. 1998) (awarding damages to the three former hostage plaintiffs of \$2.9 million, \$2.7 million, and \$850,000 respectively); *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1 (D.D.C. 1998) (awarding \$1,513,220 in lost wages and funeral expenses for the death of a college student killed in a suicide bombing); *Alejandre v. Republic of Cuba*, 996 F. Supp. 1239 (S.D. Fla. 1997) (awarding economic damages of approximately \$12 million to the estates of three Americans killed on a humanitarian mission when their plane was shot down by the Cuban Air Force). The *Flatow* court also addressed the appropriate measure of punitive damages under the statute and held that three times the state's annual expenditure on terrorism was appropriate, reasoning that:

[b]y creating these rights of action, Congress intended that the Courts impose a substantial financial cost on states which sponsor terrorist groups whose activities kill American citizens. This cost functions both as a direct deterrent, and also as a disabling mechanism: if several large punitive damage awards issue against a foreign state sponsor of terrorism, the state's financial capacity to provide funding will be curtailed.

999 F. Supp. at 33–34.

these plaintiffs.⁵⁷ Because the President's foreign relations power requires that he retain the power to block attachment of the assets of foreign states located within the United States, the plaintiffs who recovered damages under the AEDPA have found that their legal victories are empty ones.⁵⁸ For example, in one of the earliest and most influential cases brought under the AEDPA terrorism exception to the FSIA, the plaintiffs recovered a total judgment of nearly \$248 million against the state of Iran. However, the attachment of such judgment was precluded by the United States because of the President's waiver power.⁵⁹

Under pressure from victims and their families who were disillusioned with the AEDPA and the Flatow Amendment, Congress enacted section 117 of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 ("§ 117"),⁶⁰ which permitted plaintiffs who had recovered under the AEDPA to attach diplomatic and consular properties located within the United States.⁶¹ However, the legislation may

57. For the source of the President's authority to block assets, see The Trading with the Enemy Act, 50 U.S.C. App. § 5(b) (1994); § 620(a) of the Foreign Assistance Act of 1961, 22 U.S.C. § 2370(a) (1994); §§ 202 and 203 of the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-02 (1994). After the President used his waiver power to block attachment, the plaintiffs in these specific cases (*Cicippio*, *Flatow*, and *Alejandre*) were later specially designated as recipients of United States Treasury funds in satisfaction of their judgments under the Victims of Trafficking and Violence Protection Act of 2000. See *infra* note 70. The President has also exercised his authority to freeze or block the assets of foreign states in the interest of foreign relations in other contexts, for example President Carter blocked Iranian assets in 1979. Exec. Order No. 12170, 3 C.F.R. § 457 (1980). See also 182 A.L.R. Fed. 1, § 2b, noting that "[a]s a practical matter, enforcing judgments obtained under the state-sponsored terrorism exception to the Foreign Sovereign Immunities Act has proved (sic) frustrating and futile" (internal citations omitted).

58. 182 A.L.R. Fed. 1, § 2b. For a discussion of the presidential efforts to block recovery under the statute see Sean K. Mangan, *Compensation for "Certain" Victims of Terrorism Under Section 2002 of the Victims of Trafficking and Violence Protection Act of 2000: Individual Payments at an Institutional Cost*, 42 VA. J. INT'L L. 1037, 1038 (2002).

59. *Id.* at 1044, discussing *Flatow*, 999 F. Supp. at 1. The United States government, acting on behalf of the Iranian government, reminded the court that the assets in question had been blocked in response to Iran's aggression against overseas U.S. interests and therefore were property of the United States. *Id.* at 1045. Thus the assets were technically protected by the United States' own sovereign immunity. *Id.* The plaintiff, Mr. Flatow, continued unsuccessfully to seek enforcement of the judgment against Iran, as described in his own words in an editorial published in the Washington Post in 1999. Stephen M. Flatow, Editorial, *In This Case, I Can't be Diplomatic; I Lost a Child to Terrorism; Now I'm Losing U.S. Support*, WASH. POST, Nov. 7, 1999, at B2 [hereinafter Flatow Editorial]. Mr. Flatow was eventually able to recover in 2000 under the Victims of Trafficking and Violence Protection Act. See *infra* note 70.

60. § 117 of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, 112 Stat. 2681, 2681-91 (1998).

61. *Id.* In his editorial to the Washington Post, Stephen Flatow mentions the enactment of § 117 and the initial belief of victims that it would provide for at least partial satisfaction of their court judgments by allowing for attachment of "a wider range of (Iranian government) assets." Flatow Editorial, *supra* note 59.

have been a compromise, because Congress retained a presidential waiver provision in § 117, permitting the President to prohibit the attachment of such assets where it is determined to be in the interest of national security.⁶² On the same date that President Clinton signed § 117 into law, he exercised this built-in waiver to provide a blanket prohibition on the attachment of the same diplomatic and consular properties which the AEDPA and § 117 were meant to make available.⁶³

In response to President Clinton's exercise of the § 117 presidential waiver, the House and Senate both introduced bills to limit the President's ability to block attachment of assets, thus making those assets available for use by the courts in the satisfaction of judgments.⁶⁴ Together these provisions made up the Justice for Victims of Terrorism Act.⁶⁵ This Act sought to ensure victim compensation and to strengthen the deterrent power of American courts over foreign states that sponsor terrorism by making enforcement of judgments more possible and more likely.⁶⁶ Faced with significant opposition from the executive branch,⁶⁷ both provisions eventually failed and were not enacted.⁶⁸

62. *Id.*

63. Presidential Determination No. 99-1, 63 Fed. Reg. 59201 (Oct. 21, 1998).

64. Justice for Victims of Terrorism Act, S. 1796, 106th Cong. (1999) (introduced October 26, 1999) [hereinafter S. 1796]; H.R. 3485, 106th Cong. (2000) (passed in the House on July 25, 2000) [hereinafter H.R. 3485].

65. *Id.*

66. *See* Mangan, *supra* note 58, at 1047. The Senate version provided for: (1) execution of judgments by attaching any judgments owed to the foreign state by the United States government via a waiver of American sovereign immunity; (2) a limited presidential waiver which could be exercised only on an asset-by-asset basis, in the interest of national security, where the assets to be attached were intended for the operation or value of a foreign diplomatic mission; and (3) elimination of the "Bancec Rule," which had limited the amount of assets attachable under the AEDPA to those connected to the terrorist act itself. *Id.* at 1048. The House version was substantially the same, except for the addition of provisions increasing the amount of damages plaintiffs could recover and easing the burden of proof for plaintiffs. *Id.* at 1049. Testimony in support of the bills included the comments of both Terry Anderson, who was kidnapped and held hostage in Lebanon by the terrorist group Hezbollah for seven years, and Steven Flatow, the father of suicide bombing victim Alisa Flatow. *Id.* at 1050, *citing Terrorism Victim Compensation Bill: Hearing Before the Subcomm. on Immigration and Claims of the House Comm. on the Judiciary*, 106th Cong. (2000).

67. Letter from Stuart Eizenstat to the House Judiciary Committee, H.R. Rep. 106-733 (2000) (joint testimony of Stuart Eizenstat, Walter Slocombe, and Thomas Pickering). The executive branch, under President Clinton, submitted a letter written from Deputy Secretary of the Treasury Stuart Eizenstat to the House Judiciary Committee in opposition to the legislation, describing five general objections to the provisions it contained: (1) permitting attachment of assets by plaintiffs would eliminate the State Department's ability to block access to those assets by foreign governments; (2) permitting attachment of diplomatic properties would potentially violate international treaty agreements and possibly expose American diplomatic properties to the same kind of attachment; (3) because the legislation proposed to compensate only plaintiffs who had already recovered, current and future plaintiffs would be treated inequitably; (4) garnishment of debts owed to the U.S. would potentially threaten the stability of defense-related transactions between American suppliers and

Again under pressure from victims to limit the executive branch's power and to increase enforceability of court-awarded damages, Congress later introduced more successful bills in another apparent compromise.⁶⁹ These bills were signed into law as the Victims of Trafficking and Violence Protection Act of 2000 ("Victim Protection Act").⁷⁰ This Act provided recovery only for those plaintiffs who had already obtained a final judgment against a state under the AEDPA,⁷¹ and did so not by attachment of assets, but by drawing directly on United States Treasury funds.⁷² Upon signing the Victim Protection Act, the President emphasized that while those plaintiffs who had already obtained judgments deserved satisfaction, the executive branch did not believe that court actions were the proper means of providing compensation to victims of terrorism.⁷³ At

foreign countries; and (5) the attachment of banking assets would create an international perception that banking and investing within the United States is unreliable and threaten attachment of American accounts in banks overseas. *Id.*

68. Mangan, *supra* note 58, at 1047.

69. *See infra* note 70.

70. The Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1541 (2000).

71. The plaintiffs who were able to recover under the Victim Protection Act included Mr. Flatow, whose energetic and assertive battle for damages has been noted throughout this Note. Mr. Flatow recovered \$22 million under the Victim Protection Act, paid out of Treasury funds (specifically, the Iran-U.S. Claims Tribunal) rather than from Iranian assets within the United States. Pamela S. Falk, *Suing Saddam: Victims of Terror Cannot Thaw Iraq's Frozen Assets*, N.Y.L.J. vol. 228, at 4 (Oct. 11, 2002).

72. Section 2002(a)(1)(A) of the Act provides for plaintiffs to collect "110 percent of compensatory damages" if they give up the opportunity to later collect punitive damages arising out of the same action. Alternatively, section 2002(a)(1)(B) provides for plaintiffs to recover "100 percent of compensatory damages," while retaining the option of seeking punitive damages. Victim Protection Act, Pub. L. No. 106-386, § 2002(a)(1)(A)-(B), 114 Stat. 1541 (2000). Because the payments under the Act came directly from Treasury funds, many commentators have noted the lack of deterrent effect. For example as Roger Parloff has noted, "[I]t is hard to believe that Iran will be cowed into moderation by the prospect of having large judgments paid on its behalf by the U.S. Treasury." Roger Parloff, *Deep Freezing Terror's Assets*, AM. LAW., June 2002, at 122.

73. *See* White House Press Release, Oct. 28, 2000, available at 2000 WL 1617316, stating:

The Victims of Trafficking and Violence Protection Act of 2000, signed by [President Clinton], will provide much deserved compensation to American victims of terrorism and their families. This legislation is a measure of the United States Government's commitment to the victims of terrorism, to deter future acts of terrorism, and to defend the United States from its evils.

The struggle to defeat terrorism is not helped, however, by putting into effect provisions that would permit individuals who win court judgments against nations on the State Department's terrorist list to attach diplomatic and certain other properties. Attachment of diplomatic properties runs counter to other provisions of U.S. law and in some instances our treaty obligations and could result in retaliation, placing our embassies and citizens overseas at grave risk. It also would undermine our ability to use blocked properties as leverage in foreign policy disputes . . .

Under the law, the President can waive the attachment provision to protect the national security interest of the United States. President Clinton has signed the Victims of Trafficking

the same time, the President exercised what limited waiver power he was still allowed under the new legislation, affirming the executive branch's commitment to retaining control over foreign assets.⁷⁴ The White House was concerned that the use of civil actions against nation-states otherwise entitled to sovereign immunity would undermine the effectiveness of other laws and limit the ability of the United States to comply with treaty obligations.⁷⁵ In addition, the White House asserted that permitting plaintiffs to attach diplomatic assets would preclude the American government from using those assets as leverage in negotiations and diplomacy.⁷⁶

The issue of tort compensation for plaintiff-victims came into focus again in 2002 after the increased awareness of the American people to the risks of terrorism.⁷⁷ In response to a resurgence in public pressure, Congress enacted the Terrorism Risk Insurance (Protection) Act of 2002 ("Terrorism Risk Insurance Act").⁷⁸ The Terrorism Risk Insurance Act provides assistance to the insurance industry in order to make terrorism insurance more widely available, and includes provisions consolidating lawsuits arising out of acts of terrorism into a single suit for each act of terrorism.⁷⁹ Similar to the Senate and House provisions proposed as part of the Justice for Victims of Terrorism Act, which had failed in 1999,⁸⁰ the

and Violence Protection Act of 2000 and, in the interests of protecting America's security, has exercised the waiver authority that was first used in 1998.

Id.

74. *Id.*

75. *Id.*

76. *Id.* For example, President Carter exercised his power to use assets as leverage in securing the release of American hostages held in Iran when the United States entered into the Algiers Accords on January 19, 1980, settling various claims between the two nations, and additionally agreeing to "bar and preclude the prosecution against Iran of any . . . claim of . . . a United States national arising out of the [the hostage-taking]." *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 232 (D.C. Cir. 2003) (citing Declaration of the Democratic and Popular Republic of Algeria, General Principles, ¶ 11. Iran-United States: Settlement of the Hostage Crisis, 20 I.L.M. 223, 227 (1981)). The *Roeder* Court noted that the power to abrogate the terms of the Algiers Accord belongs only to the political branches, and that "[t]he political considerations that must be balanced prior to such a decision are beyond both the expertise and the mandate of this Court." *Id.* Were there suits outstanding against Iran at the time of the Algiers Accords, it would have been vital for President Carter to be able to block the use of those assets for satisfaction of judgments and instead use them to secure the hostages' release. *Id.*

77. For an account of public pressure on Congress regarding terrorism legislation in 2002, see Marcia Coyle, *Helping the Victims*, 26 NAT'L L.J., No. 14, Nov. 25, 2005, at A1.

78. Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, 116 Stat. 2322 (2002), (codified in 15 U.S.C. § 1610 note, 28 U.S.C. §§ 1606, 1610 (2003)).

79. *Id.* § 107. Section 107, titled litigation management, provides for a federal cause of action against those who commit acts of terrorism (the Act does not explicitly provide a cause of action against the governments of states who sponsor terrorism), and requires that suits brought under the act be consolidated in federal district court by the judicial panel on multidistrict litigation.

80. For a discussion of the ill-fated Justice for Victims of Terrorism Act, see *supra* notes 64–67

Terrorism Risk Insurance Act limited the President's waiver power to those cases in which an asset-by-asset determination is made that the waiver is "necessary in the general national security interest."⁸¹ Even then, the Terrorism Risk Insurance Act prohibits the President from using the waiver to protect any properties not specifically subject to the Vienna Convention.⁸² Thus the current state of the law has reduced the President's influence over damages levied against foreign states for sponsorship of terrorism to an asset-by-asset limitation on specific diplomatic properties in which prohibiting attachment is first determined to be necessary for national security.⁸³ The White House has expressed frustration with the "piecemeal legislative approach that addresses some victims and not others," and has suggested that Congress should develop a plan which preserves the "prerogatives of the President in the area of foreign affairs" by providing compensation to all victims, drawn from alternative funds other than blocked assets.⁸⁴

At the explicit request of the State Department,⁸⁵ the Senate recently considered legislation titled "The Benefits for Victims of International Terrorism Act of 2003" that would provide no-fault compensation for victims of terrorism, similar to that advocated by the executive branch.⁸⁶

and accompanying text.

81. Terrorism Risk Insurance Act, *supra* note 78, § 201(b).

82. Terrorism Risk Insurance Act, *supra* note 78. *See also* Taylor, *supra* note 7 at 543.

83. Terrorism Risk Insurance Act, *supra* note 78, § 201(b).

84. Statement by the President, White House Office of Communications, Office of the Press Secretary, Sept. 30, 2002, *available at* 2002 WL 31161653, stating that

[w]hile U.S. victims of international terrorism are deserving of compensation in accordance with the law, the continued piecemeal legislative approach that addresses some victims and not others is neither equitable nor practicable. The Congress should develop a comprehensive (sic) proposal that provides compensation for all victims . . . Such a proposal should not draw upon blocked assets to fund victim compensation, so as to preserve the prerogative of the President in the area of foreign affairs.

Id.

85. In a letter to the Senate Foreign Relations Committee, Paul V. Kelly, Assistant Secretary of Legislative Affairs, U.S. State Department, stated that the legislation was based on three guiding principles: (1) equal benefits for victims from all socioeconomic levels, (2) receipt of compensation as quickly as possible, and (3) placing compensation benefits on par with those offered to public safety officers' families if killed in the line of duty. Letter from Paul V. Kelly to the Senate Foreign Relations Committee (June 5, 2003) (published at 149 Cong. Rec. S7981-01). The letter also emphasized the State Department's preference for a no-fault scheme drawing on Treasury funds rather than reliance on civil suits for compensation, and reiterated the executive branch's concern for presidential foreign relations power, stating, "[i]n contrast to a mechanism that uses blocked assets and rewards those that can secure judgements [sic] before such assets are exhausted, a fund based on the above principles would provide compensation for all victims fairly and equitably. It also *preserves the President's prerogatives in the area of foreign affairs.*" *Id.* (emphasis added).

86. The Benefits for Victims of International Terrorism Act of 2003, S. 1275, 108th Cong. (1st Sess. 2003). The bill was introduced in the Senate at the request of the State Department on June 17,

This legislation, if passed, would be a constructive step toward a better compensation scheme. However, it would still be insufficient in that it includes few limitations on the ability of victims to bring civil suits against foreign governments and therefore would not eliminate the problems created by allowing private suits against foreign governments, as articulated in this Note.⁸⁷

III. A NO-FAULT COMPENSATION MODEL—THE SEPTEMBER 11TH VICTIM COMPENSATION FUND OF 2001

On September 22, 2001, Congress enacted a hastily-drawn statute providing compensation and reparations to the victims and industries affected by the terrorist attacks of September 11, 2001.⁸⁸ After several minor revisions according to the needs and desires of the victims' families, this statute provides compensation for victims without any required showing of fault.⁸⁹ To receive no-fault compensation under the statute, victims are required only to prove injury and to waive any right to a cause of action against all defendants, with the exception of the terrorists themselves and their organizations.⁹⁰ Although there has been no litigation as to whether actions against state sponsors are waived under the statute, the waiver appears to have been intended as protection for American industries and facilities such as the Port Authority and the airlines,⁹¹ and therefore is not likely to prevent suits under the AEDPA. Compensation under the statute includes both economic and non-economic damages, but does differ from fault-based tort law in that it retains the common law collateral-source rule requiring that any compensation from other insurance or pension sources be deducted from the damages awarded.⁹²

2003 and was passed to the Senate Committee on Foreign Relations, who held hearings on it on July 17, 2003. As of October 2004, no further progress has been made.

87. *Id.* The only reference made in the bill to civil suits under the AEDPA is a requirement in section 112(c)(2) precluding victims from both maintaining a civil suit and receiving compensation under the proposed legislation. *Id.* § 112(c)(2).

88. The Air Transportation Safety and System Stabilization Act, also titled the September 11th Victim Compensation Fund of 2001, Pub. L. No. 107-42, Title IV, 115 Stat. 237 (2001) [hereinafter September 11th Victim Compensation Fund].

89. *Id.*

90. *Id.*

91. Kenneth P. Nolan & Jeanne M. O'Grady, A Year Later—The September 11th Victim Compensation Fund, available at http://www.speiserkrause.com/publications/compensation_fund.pdf (last visited Mar. 2, 2004) [hereinafter Nolan & O'Grady].

92. September 11th Victim Compensation Fund, *supra* note 88. The retention of the collateral-source rule is rumored to have been a concession in exchange for removing a cap on attorney's fees for plaintiff's lawyers representing victims. See Nolan & O'Grady, *supra* note 91.

Non-economic damages are set at an even amount for all plaintiffs.⁹³ This set amount was intended to solve the potential irregularity in allowing thousands of jurors to sit on thousands of victims' cases and award widely differing amounts of damages for pain and suffering.⁹⁴

IV. ANALYSIS

This Note examines the efficacy and advisability of providing a civil cause of action against the governments of foreign states that sponsor terrorist acts against American citizens, and of then excepting suits brought under that cause of action from the sovereign immunity to which other governments are entitled. The problems with this policy are numerous,⁹⁵ but the most egregious fall into three broad categories. First, the availability of a civil cause of action misleads American plaintiffs into expecting ready enforcement of damages, but instead they find frustration and an inability to recover the damages they have been awarded.⁹⁶ Second, because the United States Treasury has repeatedly been forced to absorb the un-enforced judgments, few foreign states have felt the sting of the court judgments and thus have not been punished or deterred.⁹⁷ Finally, placing the foreign relations power with the judicial branch has resulted in improper separation of powers and has crippled the President's ability to exercise his foreign relations power.⁹⁸

93. September 11th Victim Compensation Fund, *supra* note 88.

94. Final Rule, Statement by the Special Master, Department of Justice Office of the Attorney General, Mar. 13, 2002, 67 C.F.R. § 49 (2002). Stating,

The September 11th Victim Compensation Fund is a unique federal program created by Congress in recognition of the special tragic circumstances these victims and their families confront. The Fund provides an alternative to the significant risk, expense, and delay inherent in civil litigation by offering victims and their families an opportunity to receive *swift, inexpensive, and predictable resolution of claims*. The Fund provides an unprecedented level of federal financial assistance for surviving victims and the families of deceased victims.

Id. (emphasis added). The Final Rule, published on March 13, 2002, also clarified the amount of non-economic damages set for each victim's family at a presumed value of \$100,000 for each spouse and dependent, in addition to \$250,000 presumed for every victim: "[t]his means that a family of a victim who was survived by a spouse and two minor children would be entitled to a presumed non-economic award of over half a million dollars before collateral-source offsets." *Id.*

95. Taylor, *supra* note 7, at 537 (asserting that "the terrorism exception (to the AEDPA) has resulted in a litigation quagmire that frustrates plaintiffs, leaves many terrorist victims without an effective remedy, costs taxpayers millions, and significantly, leaves terrorists undeterred.").

96. See *infra* text accompanying notes 98–105.

97. See *infra* text accompanying notes 106–10.

98. See *infra* text accompanying notes 111–15.

A. *False Hopes of Compensation*

The terrorism exception to the FSIA contained in the AEDPA and the Flatow Amendment establishing a civil cause of action⁹⁹ against state sponsors of terrorism combine to swindle plaintiffs by presenting a route to recovery that is deceptively similar to that in everyday American tort law.¹⁰⁰ Plaintiffs are led to expect that a suit against an uncooperative foreign nation whose relations with the United States may be tenuous at best will be administered and enforced just like a common civil suit in an American court.¹⁰¹ Instead, many of the plaintiffs who have successfully brought suits under the AEDPA are still waiting for execution of their judgments.¹⁰² In the midst of the battle between the judicial branch and the

99. Recently, the Court of Appeals for the D.C. Circuit called into question whether the AEDPA in conjunction with the Flatow Amendment did in fact create a private federal cause of action against foreign governments. *Cicippio-Puleo*, 353 F.3d 1024. The case was brought against the government of Iran by the children and siblings of Joseph Cicippio, who was held hostage by Hezbollah from 1986 until 1991, seeking damages based on emotional distress and loss of solatium. *Id.* at 1026. The *Cicippio-Puleo* court considered congressional intent in enacting the Flatow Amendment, and held that the cause of action established in that amendment applied only to officials, employees, and agents of a foreign state in their individual capacities and remanded the case in order to permit the plaintiffs to amend their complaint. *Id.* at 1033. The court warned that a waiver of immunity, while undoubtedly included in the AEDPA, does not establish a cause of action on its own, and further that the Flatow Amendment does not explicitly mention the liability of foreign states themselves. *Id.* In an amicus brief filed by the Department of Justice for the State Department, the government asserted that “[creating a cause of action against a foreign government itself] could have serious adverse consequences for the conduct of foreign relations by the Executive Branch, and . . . should be recognized only if Congress has acted clearly in that direction.” *Id.* at 1031, citing *Br. for the United States as Amicus Curiae* at 5. In this author’s opinion, this ruling may have significant consequences on the future of civil causes of action against the governments of states sponsoring terrorism, and if appealed could give the executive branch the opportunity to argue its side of the issue to the Supreme Court.

100. In a 1999 editorial to the Washington Post, Stephen Flatow described his reaction to the passing of the AEDPA: “This law would be my tool, I thought. *I would use the institutions of a just society to seek justice.*” Flatow Editorial, *supra* note 59 (emphasis added). Mr. Flatow clearly believed, and continues to believe, that he should be able to impose the American system of tort law on the government of Iran and achieve quick results and compensation similar to that afforded plaintiffs bringing civil suits in the United States. In the same editorial, Mr. Flatow described his continued search for enforcement of the judgments he recovered as “efforts to make the Iranians pay the price prescribed by U.S. Law.” *Id.*

101. See Reisman & Hakimi, *supra* note 8, at 561 (pointing out that with the enactment of the AEDPA and the Flatow amendment, “U.S. plaintiffs now could receive awards of damages—and, potentially, very high awards . . . [T]he only problem was that Congress did not provide a means by which to satisfy those awards.”). *Id.* at 568.

102. For example, for information about the results of lawsuits brought by the surviving hostages from the Iranian Hostage Crisis see <http://www.bartleby.com/65/ir/Iranhost.html> (last visited Mar. 2, 2004):

In 2000 former hostages and their survivors sued Iran under the 1996 Antiterrorism Act, which permits U.S. citizens to sue foreign governments in cases of state-sponsored terrorism. The following year they won the lawsuit by default when Iran did not offer a defense. The

executive and legislative branches, the plaintiff-victims seeking recovery under the AEDPA have become dehumanized pawns, unable to actually recover any compensation and left only with a “moral victory.”¹⁰³ Because the executive branch justifiably opposes execution of the judgments, placing the interests of the country as a whole over the satisfaction of judgments which would benefit only a few citizens, the judgments are reduced to mere words, perhaps emotionally cathartic but devoid of any financial compensation.¹⁰⁴ The vast majority of judgments have remained un-enforced and appear to be unenforceable.¹⁰⁵ The victims are left without monetary compensation or any physical manifestation of their victories, and with substantial legal fees incurred from prosecuting the actions.¹⁰⁶

B. Ineffective Deterrence

The failure of the cases brought under the AEDPA to achieve any form of compensation for the plaintiffs is closely tied to the failure of the same cases to deter defendants.¹⁰⁷ Deterrence was one of the main purposes of the Act, which was “enacted explicitly with the intent to alter the conduct of foreign states, particularly towards U.S. nationals traveling abroad.”¹⁰⁸ Without execution of judgments, the defendant states have felt no

U.S. State Dept. sought dismissal of the suit, arguing it would hinder its ability to negotiate international agreements, and a federal judge dismissed the plaintiffs’ suit for damages in 2002, ruling that the agreement that resulted in their release barred awarding any damages.

Id.

103. Reisman & Hakimi, *supra* note 8, at 570 (describing the award of damages in *Alejandro v. Republic of Cuba* and stating that “because the 1996 legislation did not provide a means to satisfy judicial awards, the award in *Alejandro* . . . was a moral, rather than an economic, victory.”).

104. *Id.*

105. *Id.* at 573 (“The plaintiffs may have felt vindicated, but, if the defendant states had assets in the United States, the executive did not allow enforcement. The awards thus remained unenforced, and, it seemed, unenforceable.”).

106. *Id.* (concluding that the AEDPA verdicts “had an eerie, autistic national character; their effects remained largely within the United States and were never tested against international law—because, from the standpoint of international law, in the absence of execution or judgment, nothing was happening.”).

107. Because the defendant states rarely appeared in court to defend these cases and have not been forced to satisfy judgments against them, the civil cause of action against a terrorist state acts as a paper tiger with no real consequences and no deterrent effect. As noted by one commentator, “it is hard to believe that Iran will be cowed into moderation by the prospect of having large judgments paid on its behalf by the U.S. Treasury—which is what is happening at the moment.” Roger Parloff, *Cathartic Suits Against Terrorists are Impractical*, FULTON COUNTY DAILY REP., June 26, 2002.

108. *Flatow*, 999 F. Supp. at 12, *discussed in* Taylor, *supra* note 7, at 537 (stating that the effect of the AEDPA’s terrorism exception was to “erode traditional diplomatic protections without providing a workable system of compensation and deterrence.”).

punishment or loss owing to their actions, even with exorbitant punitive damage awards.¹⁰⁹ In exercising the necessary amount of discretion over enforcement of judgments, the President has consistently resisted attaching the assets of defendant nations that are located within the United States and releasing them to plaintiffs.¹¹⁰ Where these damages *have* been paid, it has been at the expense of the American government, as in the case of those plaintiffs whose judgments were paid by funds from the United States Treasury as a result of the Victims of Trafficking and Violence Protection Act of 2000.¹¹¹ The statute does not serve its original function where the American government bears the brunt of the courts' punitive damage awards, intended to punish and deter foreign states from future acts of terrorism.

C. Violation of the Separation of Powers Doctrine

The Framers of the Constitution intended for the foreign relations powers to be limited to the political branches of government: the legislature and the executive.¹¹² Courts have held that the AEDPA's intermingling of decision-making across the three branches of government does not explicitly render the law unconstitutional.¹¹³ However, this intermingling limits the ability of all three branches to perform their normal functions.¹¹⁴ The judiciary is unable to reach all possible defendants—there have been and will likely continue to be nations that sponsor terrorism but are, for one reason or another, not designated by the State

109. *Flatow*, 999 F. Supp. at 12. The *Flatow* opinion, written by Judge Lamberth of the D.C. District Court, strongly supported the deterrence goals of the AEDPA, holding that punitive damages in the amount of three times the state's annual expenditure on the financing of terrorism would be sufficient to deter any future acts of terrorism. *Id.* The court awarded \$225 million in punitive damages to Alisa Flatow's surviving family, advocating very severe measures of damages and stating that the act of terrorism "extended to the very limits of any human being's capacity to inflict pain and suffering upon another." *Id.*

110. *See supra* notes 58–59, 63, 67–68, 73–76.

111. *See supra* notes 63–66.

112. Joseph W. Glannon & Jeffrey Atik, *Politics and Personal Jurisdiction: Suing State Sponsors of Terrorism Under the 1996 Amendments to the Foreign Sovereign Immunities Act*, 87 GEO. L.J. 675, 706 (1999) (noting that the questions reserved for the political branches include the issue of "when foreign sovereigns should answer in the courts of the United States.").

113. *See, e.g.*, 182 A.L.R. Fed. 1, § 2(a) (2003) (citing *Price v. Socialist People's Libyan Arab Jamahiriya*, 110 F. Supp. 2d 10 (D.D.C. 2000), rev'd in part on other grounds, 294 F.3d 82 (D.C. Cir. 2002), and saying that "[c]onstitutional claims based on . . . inter-mingling of legislative and executive decision-making (based on the statute's limitation of only states that have been designated by the executive branch as state sponsors of terrorism) . . . have likewise been rejected.").

114. 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, 120 (2003).

Department as state sponsors of terrorism.¹¹⁵ The State Department, in turn, cannot fully carry out its diplomatic negotiations when property and assets that were once bargaining chips are claimed instead by plaintiff-victims.¹¹⁶

The repeatedly considered legislation limiting the President's ability to waive the attachment of assets has been criticized by some commentators because it fails to fully abrogate the presidential waiver.¹¹⁷ However, this legislation is instead deserving of criticism because it abrogates too much presidential authority, too greatly weakening the executive branch's power over foreign relations.¹¹⁸ With such legislation in place, the executive branch's hands are tied, making it impossible to fully exercise the foreign relations power when subject to the prerogatives and demands of the courts and plaintiff-victims.¹¹⁹

In addition, some commentators have argued that the United States, if it should choose to permit attachment and recovery of the assets of foreign nations, should expect similar laws to be enacted across the world with regard to American assets. As one commentator noted,

[s]ince there are many states that would consider the United States a state sponsor of terrorism, the United States should expect to be haled into diverse foreign domestic courts by victims of 'terrorists' funded and supplied by the United States, and should, collaterally, expect to see its foreign assets attached to satisfy judgments.¹²⁰

As predicted, Iran recently passed a reciprocal law permitting its citizens to maintain suits within Iranian domestic courts against the United States for acts of terrorism and has awarded \$115 million to its first plaintiff, Hossein Alikhani.¹²¹ Gary Sick, who has served on the National

115. *Id.* Sealing writes, "[p]erhaps the most obvious flaw in the exception is that the primary sponsor of the terrorists was not even denominated a 'State Sponsor of Terrorism' at the time of the attack." Presumably referring to Afghanistan as the primary sponsor, the author noted that Afghanistan could be added to the list as a result of the attacks, but "this creates other problems." *Id.* at 120 n.3. In addition, a suit is currently pending against the government of Saudi Arabia for damages resulting from the September 11th attacks, but Saudi Arabia has not been designated a state sponsor of terrorism by the State Department and therefore its amenability to suit within the American courts will be called into question. Coyle, *supra* note 11, at A1.

116. *See supra* note 84 and accompanying text.

117. *See* Reisman & Hakimi, *supra* note 8, at 573–75.

118. *See supra* notes 112–23 and accompanying text.

119. *See supra* notes 112–22 and accompanying text.

120. Sealing, *supra* note 114, at 122. The author further noted that "[i]n fact, Iran has passed legislation allowing Iranian victims of United States 'interference' to sue the United States in Iranian Courts." *Id.*

121. Michael Theodolou, *Tehran Court Rules Against US; Case Decided Last Week Could Lead*

Security Council under three presidents, noted that the Iranian suit was prompted by the American courts awarding high amounts of damages against Iranians, saying “[i]f [the United States can] play that game, others can play that game too.”¹²² Commentators also note that the exorbitant damages awarded in American courts are seen as particularly egregious internationally, where the standards of compensation are much lower and punitive damages are rarely awarded.¹²³

D. Call for Alternative Compensation

Because of the failure of the AEDPA terrorism exception to provide adequate compensation to plaintiff-victims of international terrorism, its inadequacy as a deterrent measure, and its improper effects on the separation of powers doctrine limiting the political branches’ constitutionally-granted foreign relations powers, civil suits against state sponsors of terrorism should no longer be available to victims of terrorism.¹²⁴ Instead, further debate is needed to find alternative means of providing compensation to the victims of international terrorism. A bill titled “The Benefits for Victims of International Terrorism Act of 2003,”¹²⁵ recently considered by the Senate, constitutes a promising step towards developing more suitable compensation, but does not go so far as to abrogate civil suits.¹²⁶ The ideal system would provide easily obtained compensation, avoiding the hassle and pain of protracted lawsuits for victims, while limiting the expense and strain on the legal system caused

to More Suits, CHRISTIAN SCIENCE MONITOR, Feb. 3, 2003, at 6. Alikhani’s suit arises out of his arrest in the Bahamas in 1992 and subsequent four-month-long detention. *Id.* Alikhani, an Iranian citizen who resides in Cyprus, was in the Bahamas when he was accused of violating sanctions against Libya. *Id.* He first attempted to bring his suit in an American district court in Florida, seeking damages of \$360 million, but the case was dismissed when the court held that he had agreed not to seek reparations as a condition of his release. *Id.* Alikhani’s American attorney predicts that the Iranian judgment could spark a trend of suits in Iranian courts against the U.S. government, such as suits against the United States for supporting Iraq in the Iran/Iraq war, during which chemical weapons were used against the Iranians. *Id.*

122. *Id.*

123. Reisman & Hakimi, *supra* note 8, at 581 (noting that international and domestic American law differ greatly on the standards of damages and compensation, and that the United States government is likely aware of the danger of introducing high damages to the international legal scene, particularly if the American government will be potentially found liable to foreign individuals in foreign courts, such as Alikhani).

124. As one editorialist argued regarding Mr. Flatow, a plaintiff who has recovered damages and was at the time arguing for attachment of assets to satisfy that judgment: “Mr. Flatow may choose to be undiplomatic, but he has no right to exercise foreign policy on my account.” Bradley J. Hernlem, Letters to the Editor, Op-Ed, *Scapgoats for Terrorism*, WASH. POST, Nov. 18, 1999, at A40.

125. S. 1275, 108th Cong. (2004); *see also infra* note 128.

126. *Id.*

by thousands of lawsuits. Without plaintiff-victims seeking attachment of assets, the executive and legislative branches would be able to use frozen assets to their greatest potential as diplomatic leverage in order to deter future acts of terrorism and could continue to use military force or sanctions as necessary. Lastly, the political branches could maintain foreign relations as a separate endeavor, free from the demands of the American tort system.

V. CONCLUSION

The competing interests of the judiciary, in compensating plaintiff-victims, and the legislative and executive branches, in maintaining control over the foreign relations of the United States, have rendered the AEDPA terrorism exception to foreign sovereign immunity a useless dead-end avenue for plaintiffs seeking damages for acts of international terrorism from the nations that sponsor them. The conflict between tort law and foreign relations has: (1) created a false hope for plaintiffs seeking compensation through civil action, (2) failed to deter terrorist action, and (3) tied the hands of the political branches with regard to the diplomatic relations of the United States. This problem is likely to become increasingly critical today, in a time when the political atmosphere of the world is tenuous and the international opinion of the United States is a highly polarized concern.¹²⁷ The very existence of a publicly declared *War on Terror* serves as a reminder that acts of terrorism continue to be a very real possibility. Continued reliance on civil liability as a means of compensation from state sponsors of terrorism is both inadequate for plaintiff-victims and potentially harmful to American diplomatic relations.¹²⁸

Therefore, the cause of action and exception to sovereign immunity contained in the AEDPA, the Flatow amendment, and successive amendments should be abrogated. Congress should consider alternative means of compensation, such as the fund established for victims of the September 11, 2001 attacks, in seeking to establish a flexible but regularly-funded federal compensation program. With such a program in

127. See generally, Neely Tucker, *Pain and Suffering: Relatives of Terrorist Victims Race Each Other to Court, but Justice and Money are Both Hard to Find*, WASH. POST, Apr. 6, 2003, at F1.

128. Several scholars and commentators have perceived the use of civil suits under the AEDPA as particularly dangerous in the current political climate. As Daveed Gartenstein-Ross explained in his critical note on the AEDPA, after the attacks of September 11, 2001, "the war against terrorism will be fought on both military and diplomatic fronts, and the terrorism exception could disrupt important, but already sensitive, relations." Gartenstein-Ross, *supra* note 26, at 888.

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place, victims could be compensated quickly and efficiently, and the goal of deterring terrorist acts could be accomplished by the executive and legislative branches through the use of military force, sanctions, or diplomacy.

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