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COMMENT

Exceptional Judgments: Revising the Terrorism Exception to the Foreign Sovereign Immunities Act

INTRODUCTION

In 2016, family members of victims of the September 11 terrorist attacks sued Iran in the Southern District of New York for aiding and abetting al Qaeda in the perpetration of those attacks.[1] They proceeded under the terrorism exception to foreign sovereign immunity, which allows plaintiffs to sue foreign nations appearing on the State Department's list of state sponsors of terrorism.[2] When Iran failed to appear in court, a judge awarded the class a default judgment of $1.8 billion in damages.[3] The massive judgment was consistent with other terrorism-exception judgments against Iran;[4] to date, plaintiffs have won at least $50 billion in default judgments of this kind.[5]

1. *In re* Terrorist Attacks on Sept. 11, 2001, No. 03-MDL-1570 (S.D.N.Y. 2016).

2. The exception allows plaintiffs to sue state sponsors of terrorism for damages for "an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act." 28 U.S.C. § 1605A(a)(1) (2012). Iran, despite its known sponsorship of terrorism in the Middle East, has never been implicated, nor even plausibly accused of involvement, in the September 11 attacks.

3. *See* Bryan Koenig, *9/11 Families Get $1.8B Iran Default Judgment Approved*, LAW360 (Nov. 2, 2016, 12:57 PM), http://www.law360.com/articles/858158/9-11-families-get-1-8b-iran-default-judgment-approved [http://perma.cc/WL3C-EUE4].

4. It was inconsistent, however, in one way: the court dismissed plaintiffs' request for punitive damages, although it did so without prejudice and invited further filings on the issue. Magistrate's Report & Recommendation, *In re* Terrorist Attacks on Sept. 11, 2001, No. 03-MDL-1570, 2016 U.S. Dist. LEXIS 142865, at *290 (S.D.N.Y. Oct. 12, 2016); *see also In re* Terrorist Attacks on Sept. 11, 2001, No. 03-MDL-1570, 106 U.S. Dist. LEXIS 151674 (S.D.N.Y. Oct. 31, 2016) (adopting magistrate's report and recommendation).

5. *See* Charlie Savage, *Iran Nuclear Deal Could Be Gateway for Terrorism Legal Claims*, N.Y. TIMES (Mar. 6, 2017), http://www.nytimes.com/2017/03/06/us/politics/terrorism-foreign-governments-lawsuits-iran-nuclear-deal.html [http://perma.cc/3GP2-SL3T]. Iran's recent

These judgments, and more specifically attempts to *enforce* these judgments, have inflamed international tensions. They have complicated the amelioration, to different degrees, of relations between the United States and two particular countries – Iran and Cuba.[6] In 2016, for example, following the Supreme Court's decision in *Bank Markazi* to uphold congressional efforts to facilitate execution of judgments against Iranian property awarded under the terrorism exception,[7] Hassan Rouhani, Iran's president, decried "illegal actions" by the United States and excoriated the United States for jeopardizing the nuclear deal through the attempt to recover the judgments from Iran's central bank.[8] Iran has been subjected to billions of dollars in default judgments for involvement in the September 11 attacks, even though the nation has never been directly implicated.[9] Indeed, the 2016 judgment against Iran was dwarfed by a judgment in 2012, in which the same judge awarded a different group of family members of 9/11 victims nearly $7 billion.[10] Similarly, plaintiffs hold more than $4 billion in default judgments against Cuba, and many of these judgments involve activities that occurred decades ago and bear only a tenuous link to terrorism.[11] A significant

lawsuit against the United States in the International Court of Justice enumerates eighty-nine default judgments that have been leveled against the country since the creation of the terrorism exception. Application Instituting Proceedings (Iran v. United States), app. 2, tbl.2 (June 14, 2016), http://www.icj-cij.org/files/case-related/164/19038.pdf [http://perma.cc/H4M7-M68J].

6. *See infra* discussion in Part II. Iran, Sudan, Syria, and North Korea are currently listed as state sponsors of terrorism; Cuba, Iraq, Libya, and South Yemen have made appearances on the list and have since been removed. *State Sponsors of Terrorism*, U.S. DEP'T ST., http://www.state.gov/j/ct/list/c14151.htm [http://perma.cc/D84H-7CDK].

7. Bank Markazi v. Peterson, 136 S. Ct. 1310 (2016).

8. Sophie Eastaugh, *Iran's President Rouhani Slams US 'Lack of Compliance' with Nuclear Deal*, CNN (Sept. 22, 2016), http://www.cnn.com/2016/09/22/politics/rouhani-iran-attacks-us-over-nuclear-deal/index.html [http://perma.cc/K829-PT92].

9. In *Havlish v. bin Laden*, for example, plaintiffs alleged facts showing that Iran had facilitated the 9/11 hijackers' travel through Iran. *See* Havlish v. bin Laden (In re Terrorist Attacks on September 11, 2001), 2011 U.S. Dist. LEXIS 155899, at 125-134 (S.D.N.Y. Dec. 22, 2011). The support for these allegations derived, in part, from the well-regarded 9/11 Commission Report, although the report also noted that there was "no evidence that Iran or Hezbollah was aware of the planning for what later became the 9/11 attack;" and, on the subject of Iranian assistance to al Qaeda, the report concluded that the "topic requires further investigation by the U.S. government." *See* NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 241 (2011).

10. Havlish v. bin Laden, 30-MDL-1570, 2012 U.S. Dist. LEXIS 143525 (S.D.N.Y Oct. 3, 2012).

11. *See, e.g.*, *Legal Sidebar: Can Creditors Enforce Terrorism Judgments Against Cuba?*, CONG. RES. SERV. (Sept. 29, 2015), http://www.fas.org/sgp/crs/terror/creditors.pdf [http://perma.cc/448U-TBXE].

portion of all of these default judgments is punitive,[12] assessed by judges to punish and deter future actions, but neither country has ever appeared in court to contest the judgments.[13]

The problems created by the enormous default judgments won under the terrorism exception are likely to grow. Judges continue to issue default judgments against Iran and other countries currently listed as state sponsors of terrorism. In one 2013 case, a court issued a judgment totaling more than $25 billion against the Syrian government for its involvement in a 1985 bombing.[14] It is hard to see the logic of the size of these judgments189; they have limited initial deterrent effects and frustrate efforts to work with recalcitrant regimes, if and when those regimes change course.

This Comment suggests a partial solution: limiting damages against defaulting defendants by having the State Department certify that a specific state sponsor has been involved in the act at issue and that the Department believes punitive damages are appropriate. Punitive damages serve little purpose in cases in which the state sponsor does not have a strong link to the action or where the action at issue has little to do with the state's status as a sponsor of terrorism.[15] This Comment argues that the solution lies in involving the executive branch, which has to negotiate sensitive international agreements in the shadow of these default judgments. Specifically, Congress should authorize the State Department to make a determination of the appropriateness of punitive damages in terrorism exception cases. Under this proposal, the State Department would be required to certify particular acts of terror as sponsored by a particular state before courts could award punitive damages.

Our proposal would not affect the terrorism exception's general waiver of sovereign immunity for state sponsors of terrorism, nor would it preclude punitive damages. Instead, our solution would limit the availability of punitive damages to situations in which they are tightly linked to the conduct that harmed

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12. Of the awards against Iran, for example, over $30 billion are punitive. *See* Application Instituting Proceedings (Iran v. United States), *supra* note 5, at app. 2.

13. *See Legal Sidebar*, *supra* note 11 ("[A]ll [judgments] were obtained as default judgments without an entry of appearance by the Cuban government.").

14. Nick Sambides, *Portland Attorney Optimistic He Can Collect $26 Billion Judgment from Syria*, BANGOR DAILY NEWS (Feb. 3, 2013, 2:46 PM), http://bangordailynews.com/2013/02/02/news/portland/portland-attorney-helps-win-25b-judgment-against-syria-for-terrorist-attack [http://perma.cc/X5GV-F2DL] (noting that one of the plaintiff's attorneys is "counsel to five pending cases" against Syria).

15. *See, e.g.*, Weininger v. Castro, No. 03-22920-CA-20, slip op. at 8 (Fla. Cir. Ct. June 15, 2005) (awarding plaintiffs $65 million dollars in punitive damages against Cuba for the shoot-down of a CIA officer's plane during a bombing mission). As discussed in Part II, compensatory damages awarded under the terrorism exception are already often recompensed by acts of Congress.

plaintiffs. Moreover, it would bring determinations of the appropriateness of punitive damages against state sponsors of terrorism into alignment with other existing judicial processes for adjudicating disputes implicating foreign policy concerns.[16] By doing so, our proposal aims to strike a balance between the legitimate need to compensate victims of state-sponsored terrorism, fairness to defendant nations, and the United States's broader foreign policy agenda – of which deterring states from sponsoring terrorism, while essential, is only one element.

We develop this proposal in three parts. Part I briefly charts the history of sovereign immunity, which is useful in understanding the terrorism exception and its flaws, and describes the terrorism exception itself. Part II outlines complications that have arisen as a result of the enormous default judgments awarded through the terrorism exception and the attempts of plaintiffs to enforce those judgments against countries on the state sponsors of terrorism list. Finally, Part III presents our proposal to address the default judgment problem going forward.

I. THE TERRORISM EXCEPTION TO FOREIGN SOVEREIGN IMMUNITY

A. The Course of Sovereign Immunity

Until the mid-twentieth century, the United States adhered to a policy of absolute foreign sovereign immunity.[17] The policy changed in 1952, when, pursuant to a recommendation by Jack Tate, Acting Legal Advisor to the State Department, courts began to apply a policy of restrictive foreign sovereign immunity so that U.S. companies would be protected in an increasingly globalized economy.[18] As sovereigns increased international commercial activities through their instrumentalities, absolute sovereign immunity was recognized as untenable, because it allowed public commercial concerns to escape liability for private

16. See discussion *infra* Part III of existing State Department practices that might serve as a viable template for the type of process we envision.

17. *See, e.g.*, Clark C. Siewert, Note, *Reciprocal Influence of British and United States Law: Foreign Sovereign Immunity Law from the* Schooner Exchange *to the State Immunity Act of 1978*, 13 VAND. J. TRANSNAT'L L. 761, 765 (1980). The Supreme Court endorsed the concept of absolute foreign sovereign immunity in *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116, 138 (1812) (holding that wrongs committed by foreign sovereigns should be resolved diplomatically).

18. Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep't of State to Philip B. Perlman, Acting U.S. Att'y Gen., U.S. Dep't of Justice (May 19, 1952), *reprinted in* 26 DEP'T ST. BULL. 984-85 (1982).

law violations.[19] The restrictive theory permitted liability against sovereigns for their commercial activities, while continuing to grant immunity for other acts.[20] In the period following the Tate Letter, the State Department asserted the right to make determinations of immunity in certain contexts, particularly in the area of liability for agencies, instrumentalities, and foreign officials.[21] The State Department process, however, was criticized for being inconsistent and susceptible to undue political influence.[22]

As a response to concerns about this process, Congress codified restrictive foreign sovereign immunity in 1976 in the Foreign Sovereign Immunities Act (FSIA).[23] The Act formally transferred the power to make determinations about sovereign immunity from the Executive to the courts.[24] Rather than relying on the Executive to assess how relations between states might be affected, the Act made sovereign immunity determinations a matter of statutory interpretation.[25] The Act allowed for several exceptions to foreign sovereign immunity, including via waiver,[26] for commercial activities,[27] and for expropriation of foreign property taken in violation of international law.[28]

Although the FSIA deprived the Executive of decision-making power over the immunity of nation-states from suit in American courts, the Executive continued to make immunity determinations in cases involving the immunity of foreign officials. While sovereign immunity protects states from suits, official immunity applies to individual government officials, such as current and former heads of state. The Executive has always maintained that the FSIA did not apply to immunity determinations for foreign officials.[29] A unanimous Supreme Court

19. *See, e.g.*, Siewert, *supra* note 17, at 764 ("The absolute doctrine of immunity, which allows the sovereign immunity for almost all acts, is now almost universally viewed as unjust because it enables public merchant ships and traders to avoid the legal duties and responsibilities of the private trader. Under this theory, a sovereign may perform in the same capacity as a private businessman, but if a dispute arises, the sovereign remains immune from suit simply because of his status.").

20. *See* Harold Hongju Koh, *Foreign Official Immunity After* Samantar*: A United States Government Perspective*, 44 VAND. J. TRANSNAT'L L. 1141, 1144 (2011).

21. *Id.*

22. *Id.* at 1144-45.

23. *Id.*; *see also* 28 U.S.C. §§ 1604-1607 (1976).

24. *Id.*; *see also* 28 U.S.C. §§ 1604-1607 (1976).

25. *See* 28 U.S.C. § 1605 (1976) (setting forth statutory criteria for sovereign immunity determinations).

26. 28 U.S.C. § 1605(a)(1) (1976).

27. 28 U.S.C. § 1605(a)(2) (1976).

28. 28 U.S.C. § 1605(a)(3) (1976).

29. Koh, *supra* note 20, at 1145.

echoed this view in 2010 in *Samantar v. Yousuf*, in which the Court held that the FSIA did not reach claims involving official immunity.[30] In the government official context, the State Department is thus entitled to make determinations through "letters of suggestion" as to whether a foreign official ought to be subject to suit in a United States court. Moreover, despite their title, State Department suggestions are essentially dispositive: courts have typically accepted the State Department's determinations of official immunity,[31] deferring to the Executive's perceived superiority in balancing "remedial, substantive, and prudential concerns."[32] The State Department, through the suggestion process, remains engaged in immunity determinations even after the FSIA.

B. The Origin and Mechanics of the Terrorism Exception

In 1996, Congress added to the exceptions to sovereign immunity under the FSIA by creating the "terrorism exception" as part of the Antiterrorism and Effective Death Penalty Act (AEDPA).[33] The exception allows nations on the State Department's list of state sponsors of terrorism to be sued for money damages "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."[34]

Congress created the terrorism exception with three stated goals: (1) to allow victims of terrorism to seek compensation for harms suffered, (2) to punish states that habitually sponsor terrorist groups and actions, and (3) to protect Americans by deterring terrorism.[35] Congress targeted countries designated as

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30. 560 U.S. 305 (2010). In discussing the legislative history of the FSIA, the Court wrote: "We have been given no reason to believe that Congress saw as a problem, or wanted to eliminate, the State Department's role in determinations regarding individual official immunity." *Id.* at 323.

31. *See, e.g.*, Koh, *supra* note 20, at 1143 (explaining that, prior to *Samantar*, "the Department would file 'suggestions of immunity' with the court, invoking considerations of international law and international comity to request sovereign immunity in particular cases, and the U.S. courts generally gave absolute deference to those suggestions").

32. *Id.* at 1147.

33. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221, 110 Stat. 1214, 1241 (codified as amended at 28 U.S.C. § 1605 (2012)).

34. *Id.*

35. *See* 139 CONG. REC. S4924 (daily ed. Apr. 27, 1993) (statement of Sen. Specter); *see also* Sean Hennessy, *In re the Foreign Sovereign Immunities Act: How the 9/11 Litigation Shows the Shortcomings of FSIA as a Tool in the War on Global Terrorism*, 42 GEO. J. INT'L L. 855, 861 (2011); Chad Marzen, *Liability for Terrorism in American Courts: Aiding-and-Abetting Liability Under the FSIA State Sponsor of Terrorism Exception and the Alien Tort Statute*, 25 T.M. COOLEY L. REV. 503, 523 (2008).

state sponsors of terrorism because of specific concerns about the need to sanction countries that use terrorism as a tool of foreign policy.[36] Congress likely employed the State Department's list as a proxy for determining which countries should be subject to liability in order to "avoid inadvertent interference with the conduct of foreign relations."[37] Five months after the initial passage of the terrorism exception, Congress authorized punitive judgments in terrorism exception cases.[38] The amendment limited punitive damages to cases in which U.S. officials would have been liable if they had carried out the act within the United States.[39]

Congress appears to have taken little notice of the possible foreign policy implications of the terrorism exception with respect to the state sponsors themselves. As some commentators noted at the time, the terrorism exception limits the power of the President to conduct foreign relations by allowing private actors to create pressures on foreign states.[40] The legislative history of AEDPA suggests, however, that Congress was attentive to the interests of victims of terrorism to the exclusion of considering the possible deleterious effects of the terrorism exception on foreign policy.[41]

Victims of terrorist acts began to file suit against state sponsors of terrorism almost immediately after the passage of AEDPA. In *Alejandre*, the first case to go to trial under the terrorism exception, family members of victims who had been killed when the Cuban Air Force shot down a plane carrying human rights volunteers brought suit against the Cuban Air Force. The court entered a punitive judgment of $140 million against Cuba, calculating damages at one percent of the Cuban government's annual expenditures on its air force per victim.[42] A few

36. H.R. REP. NO. 104-383, at 62 (1995).

37. *See, e.g.*, Naomi Roht-Arriaza, *The Foreign Sovereign Immunities Act and Human Rights Violations: One Step Forward, Two Steps Back?*, 16 BERKELEY J. INT'L L. 71, 81 (1998).

38. Flatow Amendment, Pub. L. No. 104-208, § 589, 110 Stat. 3009, 3009-172 (1996) (codified at 28 U.S.C. § 1605 (2012)).

39. Roht-Arriaza, *supra* note 37 at 82-83.

40. *See, e.g.*, Molora Vadnais, Comment, *The Terrorism Exception to the Foreign Sovereign Immunities Act: Forward Leaning Legislation or Just Bad Law?*, 5 UCLA J. INT'L L. & FOREIGN AFF. 199, 221 (2000) ("As it is written, the terrorism exception diminishes the President's ability to increase or decrease pressure as necessary to achieve U.S. foreign policy objectives.").

41. *See, e.g.*, Roht-Arriaza, *supra* note 37, at 81-82 ("As a shield against potential interference with U.S. foreign policy goals, furthermore, the restriction to 'terrorist' states may prove less useful where U.S. foreign policy interests change over time. A U.S. decision to normalize relations with a future Iranian or Cuban government may make the existence of huge unexecuted default judgments against the state an embarrassment or an impediment to normalization, notwithstanding the state's one-time inclusion on a list of 'terrorist' states.").

42. Alejandre v. Republic of Cuba, 996 F. Supp. 1239, 1250-53 (S.D. Fla. 1997).

months later, in *Flatow v. Islamic Republic of Iran*, a court awarded punitive damages equal to three times Iran's estimated expenditures on terrorist activity to family members of an American college student killed in a suicide bombing in Israel.[43] In *Flatow*, the Court made this assessment based on the testimony of an expert witness, who stated that "in his opinion, a factor of three times [Iran's] annual expenditure for terrorist activities would be the minimum amount which would affect the conduct of [Iran]."[44] The Court also relied on the same expert witness's testimony to determine the amount Iran spent annually on terrorist activities.[45]

In the decades since the passage of the terrorism exception, courts have continued to award massive judgments. Defendant nations have rarely appeared to contest claims, and litigation has almost always ended in a default judgment against the state sponsor.[46] The exception authorizes courts to enter default judgments against sovereigns, provided that "the claimant establishes his claim or right to relief by evidence satisfactory to the court."[47] Numerous plaintiffs have easily met this standard.[48] Because state sponsors of terrorism rarely defend the claims against them, defendants are deprived of the benefit of pointing out possible misrepresentations of law or fact. Thus, a case against a state sponsor of terrorism is not required to clear the evidentiary or procedural hurdles of a typical tort case.

While plaintiffs have found success in securing judgments under the terrorism exception, enforcing those judgments against foreign sovereigns has proved more challenging. Foreign governments have typically refused to acknowledge the legitimacy of the proceedings and the judgments.[49] With plaintiffs unable to recover the large judgments courts have awarded, Congress has passed a variety of laws allowing victims to get partial payouts of their judgments from the U.S. government. In 2000, Congress passed the Victims of Trafficking and Violence

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

44. *Id.*

45. *Id.*

46. *See, e.g.*, 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, 901-02 (2002).

47. 28 U.S.C. § 1608(e) (2012).

48. *See supra* text accompanying notes 9-14.

49. Executing against foreign assets has proved remarkably difficult, despite multiple congressional efforts to ease attachment. *See, e.g.*, Mark S. Zaid, *The 1996 Terrorism Amendment to the Foreign Sovereign Immunities Act*, 94 ASIL PROC. 150, 150 (2000) ("[S]everal plaintiffs have attained symbolic accountability. Beyond that, their cases have been fleeting victories. Despite three amendments to the FSIA . . . no plaintiff has yet been able to execute a judgment obtained against a foreign state . . . . Efforts are now underway to amend the FSIA for the fourth time in order to create a right *and* a remedy.").

Protection Act (VTVPA), which authorized the U.S. Department of Treasury to create a $400 million fund for victims holding judgments.[50] In 2002, Congress passed the Terrorism Risk Insurance Act (TRIA). In addition to facilitating the attachment of assets of foreign states sued under the exception, this Act mandated that the U.S. government use Iran's frozen assets to pay the compensatory portion of victims' judgments against Iran.[51] Most recently, in 2015, Congress created the Justice for United States Victims of State Sponsored Terrorism Fund, which allows plaintiffs with judgments against state sponsors of terrorism to receive compensatory damages, but not punitive damages.[52] Although these funds help terrorism victims recover compensation, they call into question the effectiveness of the terrorism exception as a measure to deter state sponsors of terror, because the state sponsors themselves so rarely pay the judgments.

Congress passed the terrorism exception to foreign sovereign immunity with the intention of punishing state sponsors of terrorism, deterring them from future acts of terror, and compensating the victims of terrorist acts. By establishing various victims' compensations funds, Congress has ensured that many victims would receive compensation. Again, because state sponsors of terrorism rarely contest the charges or pay the judgments entered against them, the exception likely has little punitive or deterrent effect. The next Part addresses some of the issues that large, unpaid punitive judgments create. Later, this Comment demonstrates how State Department involvement could prevent some of the excesses created by the current structure of terrorism exception law. By involving the State Department in the process, courts could ensure that punitive damages are awarded only in situations when they might actually punish state sponsors of terrorism for terrorist activity and deter future terrorist activities.

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50. Pub. L. No. 106-386, 114 Stat. 1464 (2000); *see* Sean K. Mangan, Note, *Compensation for "Certain" Victims of Terrorism Under Section 2002 of the Victims of Trafficking and Violence Protection Act of 2000: Individual Payments at an Institutional Cost*, 42 VA. J. INT'L L. 1037, 1052-54 (2002).

51. Jeewon Kim, Note, *Making State Sponsors of Terrorism Pay: A Separation of Powers Discourse Under the Foreign Sovereign Immunities Act*, 22 BERKELEY J. INT'L L. 513, 521-23 (2004). Iran, acting through its national bank, challenged the constitutionality of the TRIA on separation of powers grounds in litigation which concluded at the Supreme Court in 2016. Bank Markazi v. Peterson, 136 S. Ct. 1310 (2016). Iran has now challenged the legality of the TRIA, along with other statutes related to the enforcement of judgments under the terrorism exception, under international law at the International Court of Justice. Application Instituting Proceedings (Iran v. United States), app.2, tbl.2 (June 14, 2016), http://www.icj-cij.org/files/case-related/164/19038.pdf [http://perma.cc/H4M7-M68J].

52. 34 U.S.C.A. § 20144 (West 2017) (formerly codified at 42 U.S.C. § 10609 (2012)); *see also United States Victims of State Sponsored Terrorism Fund*, U.S. DEP'T JUST. (Jan. 26, 2017), http://www.justice.gov/criminal-mlars/usvsst [http://perma.cc/3QBV-YNAN] (describing the appointment of a special master to administer the fund).

II. PUNITIVE DAMAGES AND MASSIVE JUDGMENTS UNDER A BROAD EXCEPTION

The purpose of punitive damages is "to punish or deter."[53] While compensatory damages restore the plaintiff to some pre-injury baseline, punitive damages are defendant-facing and meant to force defendants to pay a supercompensatory sum as a consequence of their misdeeds and to disincentivize future injury.[54]

Under the terrorism exception, plaintiffs can seek both compensatory and punitive damages. Plaintiffs can seek a number of different compensatory remedies – including for pain and suffering and for solatium[55] – and those compensatory sums alone can be significant. But while legislation has provided for plaintiffs' enforcement of compensatory damages judgments, punitive damages are typically not covered by the acts.[56] The large punitive components of the total awards thus regularly go unrecovered: plaintiffs currently hold approximately $1.8 billion in punitive damages judgments against Cuba,[57] and more than $30 billion in punitive damages judgments against Iran.[58]

In the context of the terrorism exception, where defendants do not contest the claims against them, there are three issues that punitive damages either create or exacerbate: (1) they threaten delicate foreign policy dynamics; (2) they may not be linked to the acts that they are intended to punish or deter; and (3) they force courts beyond their competency and into the role of foreign policy decisionmakers.

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53. *See, e.g.*, DAN B. DOBBS ET AL., HORNBOOK ON TORTS § 34.4, at 863 (2d ed. 2000).

54. *See, e.g.*, Cass R. Sunstein, Daniel Kahneman & David Schkade, *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071, 2081-82 (citing a typical jury instruction that reads "[i]n determining whether or not you should award punitive damages, you should bear in mind that the purpose of such an award is to punish the wrongdoer and to deter that wrongdoer from repeating such wrongful acts. In addition, such damages are also designed to serve as a warning to others, and to prevent others from committing such wrongful acts").

55. 28 U.S.C. § 1605A(c) (2012).

56. *See, e.g.*, 34 U.S.C.A. § 20144(d)(5)(B) (West 2017) (formerly codified at 42 U.S.C. § 10609(d)(5)(B) (2012)) ("[E]ach applicant shall retain that applicant's creditor rights in any unpaid and outstanding amounts of the judgment, including any prejudgment or post-judgment interest, or punitive damages, awarded by the United States district court pursuant to a judgment.").

57. *Legal Sidebar*, *supra* note 11.

58. Application Instituting Proceedings (Iran v. United States), app.2, tbl.2 (2017), http://www.icj-cij.org/files/case-related/164/19038.pdf [http://perma.cc/H4M7-M68J].

A. Punitive Damages Threaten the Normalization of Relations

Even when paid with congressional funds for compensatory damages, plaintiffs with large punitive damage awards won under the terrorism exception have strong incentives to be creative in enforcing the vast punitive portions of their judgments. This begets a unique set of problems. First, the threat of enforcement of outstanding judgments can impede the normalization of relations between the United States and wary nations.

In the wake of the Iran nuclear deal, for instance, the outstanding judgments threaten to frustrate Iran's reintegration into the global economic community.[59] Since Iranian assets in the United States or abroad could be at risk of attachment to satisfy the judgments, the judgments hinder Iranian economic progress.[60] This is far more than just a theoretical risk: the past year alone has seen plaintiff terrorism victims successfully freeze Iranian assets in Luxembourg for further hearings and attempt to execute judgments against Iran by attaching Persian antiquities currently housed in the Field Museum and the Oriental Institute of the University of Chicago.[61] The Supreme Court addressed the latter issue in *Rubin v. Islamic Republic of Iran*, where it decided to reject plaintiff terrorism victims' attempt.[62] Although the decision confirms that the terrorism exception does not create a "free-standing basis" for plaintiffs holding judgments under the terrorism exception to attach property, and therefore limits attachment to property that itself falls under a preexisting immunity exception,[63] it does not completely wall off attachment: plaintiffs may still seek, for example, to attach foreign state

59. *See* Savage, *supra* note 5.

60. *See, e.g.*, Troy C. Homesley III, Note, *"Towards a Strategy of Peace": Protecting the Iran Nuclear Accord Despite $46 Billion in State-Sponsored Terror Judgments*, 95 N.C. L. REV. 795, 824, 829-31 (2017) ("[T]he judgments simultaneously inhibit Iranian integration into the international economy and stunt the infiltration of American soft power.").

61. *Id.*; *see also* Savage, *supra* note 5. Terrorism-exception awards may also have driven the U.S. government's successful efforts to use civil forfeiture to seize a skyscraper in Midtown Manhattan in June 2017—proceeds from the seizure benefit one of the classes of families of 9/11 victims. *See* Vivian Wang, *Manhattan Skyscraper Linked to Iran Can Be Seized by U.S., Jury Finds*, N.Y. TIMES (Jun. 29, 2017), http://www.nytimes.com/2017/06/29/nyregion/650-fifth-avenue-iran-terrorism.html [http://perma.cc/Q7AN-9G4M].

62. Rubin v. Islamic Republic of Iran, No. 16-534, slip op. (S. Ct. Feb. 21, 2018), *aff'g* 830 F.3d 470 (7th Cir. 2016). For a discussion of the Seventh Circuit's opinion below, see Recent Case, Rubin v. Islamic Republic of Iran, *830 F.3d 470 (7th Cir. 2016)*, 130 HARV. L. REV. 761 (2016).

63. *Rubin*, slip op. at 15.

property that is being used for commercial purposes.[64] In the case of the Luxembourg attachment, freezing Iranian funds acted to extend sanctions, as the assets were initially frozen due to U.S.-led sanctions. Since the nuclear accord, Iranian government officials have repeatedly criticized the United States for inadequately lifting sanctions.[65]

As long as the United States continues to certify the nuclear accord,[66] efforts to execute against Iranian assets may aggravate tensions and disincentivize Iranian attempts to engage abroad with the global economy. The $30 billion dollars'-worth of existing punitive damages alone accounts for upwards of a third of the total amount of sanctions relief the U.S. Treasury Department estimated initially that Iran would receive as a result of the nuclear accord.[67] In particular, the potential for award-holders to execute on the judgments—as surely as the potential for snapback sanctions or the ultimate demise of the nuclear deal[68]—stands in the way of Iranian investment in or trade with Europe, which would hold the potential to redouble the gains of sanctions relief.[69] Although any number of factors might be the cause, at least so far, Iranian investment and trade—

64. *Id.*, at 5-7, 9. In fact, the FSIA even instructs the Secretary of State and the Secretary of Treasury to help plaintiffs holding judgments under the terrorism exception identify assets that might be attached. 28 U.S.C. §1610(f)(2)(A)(2012).

65. *See, e.g.*, *Iran's Khamenei Renews Criticism of Nuclear Deal*, REUTERS (Aug. 1, 2016, 11:08 AM), http://www.reuters.com/article/us-iran-nuclear-khamenei/irans-khamenei-renews-criticism-of-nuclear-deal-idUSKCN10C2LH [http://perma.cc/HE6Y-W95T].

66. *See, e.g.*, Mark Landler & David E. Sanger, *Trump Disavows Nuclear Deal, but Doesn't Scrap It*, N.Y. TIMES (Oct. 13, 2017), http://www.nytimes.com/2017/10/13/us/politics/trump-iran-nuclear-deal.html [http://perma.cc/NF55-ZRF2] ("Mr. Trump's scalding critique of the nuclear deal as 'one of the worst and most one-sided transactions the United States has ever entered into' echoed the language he used during his presidential campaign. But he also acknowledged the obstacles to ripping it up.").

67. *See, e.g.*, Rick Gladstone, *Value of Iran Sanctions Relief Is Hard To Measure*, N.Y. TIMES (Aug. 5, 2015), http://www.nytimes.com/2015/08/06/world/middleeast/conflicting-claims-cloud-irans-financial-gain-in-nuclear-deal.html [http://perma.cc/ESM8-YQKA] (noting the range of estimates regarding the total amount of sanctions relief); Jackie Northam, *Lifting Sanctions Will Release $100 Billion to Iran. Then What?*, NPR (Jul. 16, 2015), http://www.npr.org/sections/parallels/2015/07/16/423562391/lifting-sanctions-will-release-100-billion-to-iran-then-what [http://perma.cc/KXR7-LQUX] (citing the U.S. Treasury Department for an estimate that Iran would receive $100 billion in sanctions relief). Iran's total GDP is around $400 billion per year. *Iran Overview*, WORLD BANK (Apr. 1, 2017), http://www.worldbank.org/en/country/iran/overview [http://perma.cc/P6MQ-UCN4].

68. *See* Gardiner Harris, *Tillerson Warns Europe Against Iran Investments*, N.Y. TIMES (Oct. 22, 2017), http://nytimes.com/2017/10/22/world/middleeast/tillerson-iran-europe.html [http://perma.cc/4YZ3-B952].

69. See Northam, *supra* note 67. ("Something that Iran will be interested to do is get access to that money and move it to places where they'd like to invest or do deals . . . . That may mean

and the recovery of the Iranian economy—have not lived up to early expectations.[70]

Meanwhile, similar issues have arisen as relations with Cuba have warmed. Plaintiffs with awards against Cuba under the terrorism exception have proven equally creative in attempting to seek out and execute claims against Cuban assets.[71] As direct contact between Cuba and the United States has increased, the Cuban government has already been compelled to invent ways of avoiding asset seizure—for example, by using leasing agreements to ensure that no government-owned airplanes land in the United States, thus ensuring that Cuban aircraft will not be amenable to attachment.[72] If Congress were eventually to lift the

moving it into different currencies as well. And once they can move it into Europe, for example, they'll be able to engage in different purchases or investment opportunities and seek new partnerships."). In the United States, terrorism-exception judgment holders also recently compelled Boeing to disclose information about its sales agreements with Iran, in an effort to locate attachable Iranian assets. Leibovitch v. Islamic Republic of Iran, 2018 U.S. Dist. LEXIS 31713 (N.D. Ill. 2018).

70. *See, e.g.*, *Iran*, EUROPEAN COMM'N (Apr. 21, 2017), http://ec.europa.eu/trade/policy/countries-and-regions/countries/iran [http://perma.cc/6FTE-FPUL] (noting that, prior to the sanctions regime instituted in the lead up to the nuclear accord, Europe was Iran's number one trading partner and that Europe now has a positive trade balance with Iran); Kambiz Foroohar, *Iran's Economy*, BLOOMBERG (Jan. 9, 2018), http://www.bloomberg.com/quicktake/irans-economy [http://perma.cc/W63E-8HPG] ("Since the nuclear deal, Iran's economy has risen out of recession, but citizens complain that benefits have not filtered down to ordinary people. Almost all the economic growth has been in the oil industry. For other businesses, lack of access to finance has been a major impediment."). *But see* Nils Zimmerman, *German-Iranian Business Ties Growing Again*, DW (Feb. 1, 2018), http://www.dw.com/en/german-iranian-business-ties-growing-again/a-41998948 [http://perma.cc/NP27-26VE].

71. Andrew Lyubarsky, Note, *Clearing the Road to Havana: Settling Legally Questionable Terrorism Judgments To Ensure Normalization of Relations Between the United States and Cuba*, 91 N.Y.U. L. REV. 458, 479 (2016).

72. Lenore T. Adkins, *Cuba May Use Middlemen for Flights to U.S.*, INT'L TRADE DAILY (Jan. 5, 2016) (quoting the representative of a judgment holder saying, "I do believe that there are going to be . . . opportunities presented in the future to be able to collect on these judgments based . . . on seizing Cuban property in the United States . . . . We certainly have our ear to the ground with respect to these issues"). Although *Rubin* likely alleviates Cuban concerns, plaintiffs might still attempt to seize Cuban aircraft on the grounds that they are commercial, if, for example, the flights are being chartered to move either tourists or goods. *See Rubin*, No. 16-534, slip op. at 15.; *see also* 28 U.S.C. § 1610(a) (2012) ("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 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.").

embargo,[73] judgments would hang over efforts by newly-formed Cuban businesses to seek profits in the United States.[74]

The problems with punitive judgments are not only a consequence of their immense scale;[75] rather, the availability of punitive damages creates problems unique to their nature. Punitive damages are an anomalous feature of American law compared to other nations.[76] Civil law countries, for example, generally do not permit punitive damages.[77] Because most of the world's democracies do not award punitive damages, foreign nations often have an "aversion towards punitive damages."[78] Plaintiffs' attempts to enforce a judgment abroad have the potential to aggravate foreign countries. Just as importantly, punitive damages may not be generally recognized in the countries against whom those awards are sought in terrorism cases. Iran, for example, does not allow punitive damages in general, but, to retaliate against the United States and the terrorism exception,

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73. *See, e.g.*, Steven Heifetz & Peter Jeydel, *Time To Finally End the Cuba Embargo*, HILL, (Oct. 27, 2016), http://thehill.com/blogs/congress-blog/foreign-policy/303098-time-to-finally-end-the-cuba-embargo [http://perma.cc/S4B5-98RN] (noting that even the United States abstained in a vote at the United Nations to condemn the U.S. embargo).

74. *See* Ashley Miller & Ted Piccone, *U.S. Takes a Positive "Negative" Approach to Trade with Cuban Entrepreneurs*, BROOKINGS (Feb. 19, 2015), http://www.brookings.edu/opinions/u-s-takes-a-positive-negative-approach-to-trade-with-cuban-entrepreneurs [http://perma.cc/8YV5-V5MX].

75. Compensatory damage awards can also, of course, be massive. *See, e.g.*, Havlish v. bin Laden (In re Terrorist Attacks on Sept. 11, 2001), 2012 U.S. Dist. LEXIS 110673 (S.D.N.Y. Jul. 30, 2012) (awarding plaintiffs more than $1 billion in compensatory damages); Hausler v. Republic of Cuba, No. 02-12475, 2007 WL 6870681 (Fla. Cir. Ct. Jan. 19, 2007) (awarding plaintiffs $100 million in compensatory damages). As discussed in Part II, compensatory damages are usually resolved through U.S. statutory payouts.

76. *See* Jeffrey F. Addicott, *American Punitive Damages vs. Compensatory Damages in Promoting Enforcement in Democratic Nations of Civil Judgements To Deter State-Sponsors of Terrorism*, 5 U. MASS. L. REV. 89, 93-94 (2010) (noting that "punitive damages . . . [have been] rejected by most of the world's democratic legal systems").

77. John Y. Gotanda, *Awarding Punitive Damages in International Commercial Arbitrations in the Wake of* Mastrobuono v. Shearson Lehman Hutton, Inc., 38 HARV. INT'L L.J. 59, 64, 66 app. I-III (1997) (noting also that "[t]he most widespread use of punitive damages is in the United States").

78. *Id.* at 94 ("[A] major stumbling block in terms of effectiveness [of enforcement] rests in the reality that fellow democratic nations in the international community refuse to honor or *domesticate* the monetary judgments of American courts."); *see also* CHRISTINE D. GRAY, JUDICIAL REMEDIES IN INTERNATIONAL LAW 28 (1990) (noting that the lack of punitive damages awarded in arbitral decisions makes punitive damages "not a suitable remedy in international law").

the Iranian legislature allowed punitive damages in a limited class of cases against foreign states.[79]

B. Punitive Damages Are Not Linked to the Acts Intended To Be Punished

In the context of the terrorism exception, punitive judgments are often awarded for actions in which the defendant is only tenuously implicated, if at all. Since the foreign sovereign state sponsors of terrorism rarely appear to contest the claims against them, the cases never reach the merits stage, and the court "may accept as true the plaintiffs' uncontroverted evidence."[80] Because of their failure to contest the facts, foreign sovereigns on the state sponsors of terrorism list can be assessed punitive damages for any terrorist act that they are even alleged to have sponsored. Paradoxically, this means that United States courts assess enormous punitive judgments intended to deter or punish nations for terrorist attacks in which they sometimes were not complicit. The series of judgments issued against Iran for the September 11 terrorist attacks offers an illustration of how a defaulting foreign sovereign can be assessed punitive damages for conduct for which it was not directly at fault.[81]

Similarly, as a result of using the state sponsors of terrorism list to create subject matter jurisdiction against sovereigns, states are often sued for activities wholly apart from the reason that they were originally placed on the list. Cuba, for instance, was placed on the state sponsors of terrorism list in 1982 for its support of various revolutionary movements throughout Central America.[82] Most of the ensuing litigation, however, had little to do with these activities.[83]

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79. Ghasemy Hamed Abbas, Khosravi Farsani Ali & Aghababaee Fahimeh, *Punitive Damages in Iranian Legal System*, 77 JUDICIARY'S L.J. 161 (2013). Libya, which was listed as a state sponsor until 2006, also does not appear to allow punitive damages. *See* Gotanda, *supra* note 77, at 66 app. I. The Cuban Civil Code allows damages for compensation, and the country has authorized suit against the United States on several occasions. *See Laws Lifting Sovereign Immunity: Cuba*, LIBR. CONGRESS (Sept. 21, 2016), http://www.loc.gov/law/help/sovereign-immunity/cuba.php [http://perma.cc/7XM9-A952].

80. *See* Wachsman *ex rel.* Wachsman v. Islamic Republic of Iran, 603 F. Supp. 2d 148, 155 (D.D.C. 2009) (citations omitted).

81. *See supra* Introduction.

82. Lyubarsky, *supra* note 71, at 466.

83. For example, in 2007 a state court in Florida awarded a judgment of over $27 million for intentional torture and sexual battery to a woman who had unwittingly married a Cuban spy charged with infiltrating anti-Castro groups in the United States. *See* Martinez v. Cuba, 149 F. Supp. 3d 469 (S.D.N.Y. 2016); *see also Legal Sidebar*, *supra* note 11; *Cuban Spy's Ex-Wife To Get Nearly $200,000*, CNN (Apr. 29, 2005), http://www.cnn.com/2005/POLITICS/04/29/cuba.wife [http://perma.cc/RR5C-M85Q]. Although the actions attributed to the spy are deplorable and criminal, as well as punishable under traditional tort liability theories, it is not

Moreover, cases have often involved Cuban activities during the Cuban Revolution, when Cuba was not listed as a state sponsor.[84] In one instance, relatives of two American military personnel who were executed during the Bay of Pigs operation received a $100 million award under the terrorism exception.[85]

Although these punitive damages further the general goal of increasing the size of awards against state sponsors of terrorism,[86] their overall deterrence value is shaky, as they do not contain the requisite specificity to properly signify what exactly they are condemning.[87] Because of the time elapsed between the award and the act, the relationship between the act and the reasons for designating the country as a state sponsor, or the uncertainty surrounding the state's complicity or fault in the underlying offense, the explicit deterrent value of punitive judgments in these cases is lacking. For much the same reasons, punitive damages also have a limited expressive deterrent value in these cases[88]: because of the attenuation between the act and the punitive award, they do not effectively "make a clear" example of the state sponsors over the particular harms.[89]

In effect, the unconstrained exception may open up designated states to an unbounded strict liability regime, in which they can be punished for any and all action (or inaction), whether or not it is related to terrorism. Rather than being "reasonably predictable in its severity . . . so that [a] . . . bad man can look ahead with some ability to know what the stakes are in choosing one course of action or another," as one district court quoted the Supreme Court when awarding $300 million in punitive damages against Iran under the terrorism exception,[90] some

clear what awarding punitive damages against Cuba under the terrorism exception accomplishes specifically, as it does not directly contribute to Congress's aim of holding Cuba accountable for its support of revolutionary movements.

84. *See Legal Sidebar*, *supra* note 11.

85. Weininger v. Castro, 462 F. Supp. 2d 457 (S.D.N.Y. 2006).

86. *See* discussion *supra* Part I on the purposes of the terrorism exception. States are designated state sponsors for particular purposes. Additionally, when Congress wants to punish a state broadly for its actions or status as a pariah, it has at its disposal a more traditional means of doing so: sanctions, which have a much surer bite.

87. *See, e.g.*, Murphy v. Islamic Republic of Iran, 740 F. Supp. 2d 51, 80 (paraphrasing the Restatement of Torts that "punitive damages . . . serve to punish and deter the actions for which they awarded").

88. *See, e.g.*, Sunstein et al., *supra* note 54, 2075 ("[P]unitive damages may have a retributive or expressive function, designed to embody social outrage at the actions of serious wrongdoers. They may reflect the 'sense of the community' about the egregious character of defendants' actions.").

89. *See* Addicott, *supra* note 76, at 99.

90. Oveissi v. Islamic Republic of Iran, 879 F. Supp. 2d 44, 56 (D.D.C. 2012) (citation omitted).

awards approach arbitrariness.[91] Instead of signaling – either to the state sponsor or to the world – what types of actions will be punished going forward, and at what cost, they merely reaffirm that the country is in the United States's bad graces. And, instead of altering future behavior, this may lend credence to the protestations of government officials of countries designated as state sponsors that the awards are illegitimate.[92]

C. Punitive Damages Distort the Judicial Role

Third, awarding large punitive damages distorts the proper judicial role. Large punitive-damages awards thrust courts into the role of foreign policy decisionmaker. Despite the general reluctance of courts to intervene in foreign policy disputes,[93] determinations of punitive judgments force them into that position, asking courts to weigh how punitive damages might affect the actions of state sponsors and U.S.-state sponsor relations in the future. In some cases, rather than being tailored to foreign policy objectives, the awards have transparently political motivations, as facilitated by the minimal evidentiary standard.

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91. *See, e.g.*, Theodore B. Olson & Theodore J. Boutrous Jr., *Constitutional Restraints on the Doctrine of Punitive Damages*, 17 PEPP. L. REV. 907, 909 (1990) ("The standardless, open-ended, and arbitrary nature of punitive damage awards has long been a source of concern to the Supreme Court of the United States.").

92. *See supra* note 12 and accompanying text. Waiving sovereign immunity for states as a result of their sponsorship of terrorism is itself a rarity and questionable under international law. *See, e.g.*, John F. Murphy, *Civil Lawsuits as a Legal Response to International Terrorism*, *in* CIVIL LITIGATION AGAINST TERRORISM 76-77 (noting that, at the time, the United States was the only state to allow such an exception and that the legality was a "close[] question whether international law permits civil suits against sovereign states for the sponsorship of terrorist acts taking place outside of the territory of the state whose courts assert jurisdiction over such suits"); *see also* Addicott, *supra* note 76, at 93-94 (acknowledging that while the exception could be effective, it has not been due to the unwillingness of other states to domesticate awards).

93. *See, e.g.*, Jules L. Lobel, *Foreign Policy and the Courts*, 3 U.C. DAVIS J. INT'L L. & POL'Y 171 (1997) ("[In disputes over foreign policy] the courts are less willing than elsewhere to curb the federal political branches . . . and have even developed doctrines of special deference to them." (quoting LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 132 (Clarendon Press 1996) (1972))).

This is particularly clear in the context of Cuba-related terrorism exception litigation in Florida state courts.[94] In cases like these, where judges are elected officials, constituent demands may further lower the exception's already low standard for default judgments of "evidence satisfactory to the court."[95]

Even where there is little concern that judges are responding to the pressures of their electorate, punitive-damages calculations are often beyond the competence of the courts charged with determining them. In general, punitive damages are complicated to assess;[96] to determine punitive damages against a state sponsor, courts are, in effect, asked to determine the amount of money required to punish the state for the prior action and deter the state from acting similarly going forward. Where courts might still be well situated to determine the appropriate compensatory damages by evaluating the harms presented by plaintiffs, defendants' failure to appear means that courts must make complicated punitive assessments solely on their own accord, without the benefit of adversarial testing. In many of the cases involving Iran, for instance, the courts have settled upon a default total of $300 million in punitive damages,[97] an amount which

94. *See* Lyubarsky, *supra* note 71, at 466-68 (discussing how the passage of the TRIA in 2002 led to a "flurry" of litigation against Cuba for events nearly a half-century prior, and describing how most of these cases were brought "in the Circuit Court for the Eleventh Judicial District for Miami-Dade County, located in the heart of the Cuban exile community hostile to the Castro government").

95. 28 U.S.C. § 1608(e) (2012). Although the low evidentiary standard makes both compensatory and punitive damages attainable, compensatory damages are typically reimbursed through statutorily created funds, as discussed *supra* notes 50-52 and accompanying text.

96. *See* A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 870 (1998) ("Trial and appellate courts have struggled for many years to develop coherent principles for addressing the questions of when punitive damages should be awarded, and at what level."). *But see* Sunstein et al., *supra* note 54, at 2079 ("If the basic problem is that people cannot sensibly map their moral judgments onto dollar awards, the legal system should provide a mechanism by which judges or administrators, instead of jurors, can translate the relevant moral judgments into dollar amounts."); Joni Hersch & W. Kip Viscusi, *Punitive Damages: How Judges and Juries Perform* (Harv. Law Sch. John M. Olin Ctr. for Law, Econ. & Bus., Discussion Paper No. 362, 2002), http://www.law.harvard.edu/programs/olin_center/papers/pdf/362.pdf [http://perma.cc/8QMH-HCQW].

97. *See, e.g.*, Oveissi v. Islamic Republic of Iran, 879 F. Supp. 2d 44 (D.D.C. 2012); Wultz v. Islamic Republic of Iran, 864 F. Supp. 2d 24 (D.D.C. 2012); Beer v. Islamic Republic of Iran, 789 F. Supp. 2d 14 (D.D.C. 2011); Acosta v. Islamic Republic of Iran, 574 F. Supp. 2d 15 (D.D.C. 2008); Kirschenbaum v. Islamic Republic of Iran, 572 F. Supp. 2d 200 (D.D.C. 2008); Campuzano v. Islamic Republic of Iran, 281 F. Supp. 2d 258 (D.D.C. 2003); Stern v. Islamic Republic of Iran, 271 F. Supp. 2d 286 (D.D.C. 2003); Cronin v. Islamic Republic of Iran, 238 F. Supp. 2d 222 (D.D.C. 2002); Stethem v. Islamic Republic of Iran, 201 F. Supp. 2d 78 (D.D.C. 2002); Surette v. Islamic Republic of Iran, 231 F. Supp. 2d 260 (D.D.C. 2002); Jenco v. Islamic Republic of Iran, 154 F. Supp. 2d 27 (D.D.C. 2001); Sutherland v. Islamic Republic of Iran, 151 F. Supp. 2d 27 (D.D.C. 2001); Wagner v. Islamic Republic of Iran, 172 F. Supp. 2d 128 (D.D.C. 2001); Anderson v. Islamic Republic of Iran, 90 F. Supp. 2d 107 (D.D.C. 2000); Eisenfeld v.

seems plucked from thin air for its immensity, but is in fact a crude attempt to determine a sum that would deter Iran in the future by mechanically multiplying the amount of money Iran spends annually on terrorism by a set multiplier.[98]

At times, courts have grounded both judgments and punitive-damage assessments in expert testimony. Courts, however, do not independently consult experts—instead they rely on the experts and expert declarations supplied by plaintiffs. Often, plaintiffs use experts who, rightly or wrongly, may have a particular agenda.[99] The one-sided nature of the proceedings means that even with the aid of experts, courts do not have access even to the limited modicum of "truth seeking" an adversarial process might provide.[100]

The Executive is better equipped to evaluate how to apply pressure to foreign nations to advance U.S. foreign policy goals. Courts are, of course, not categorically unfit to assess punitive damages. As we discuss below, our proposal would still allow courts to do so, only in more limited circumstance. But, when determining punitive damages amounts, courts only see evidence asserted by the plaintiffs, and they see deterrence unidimensionally—what amount of money will deter future acts, setting aside the fact that the money may never be paid?

Islamic Republic of Iran, 172 F. Supp. 2d 1 (D.D.C. 2000); Elahi v. Islamic Republic of Iran, 124 F. Supp. 2d 97 (D.D.C. 2000). The chain of $300 million awards raises the prospect that courts are "over-punishing the same conduct through repeated awards with little deterrent effect." Murphy v. Islamic Republic of Iran, 740 F. Supp. 2d 51, 81 (D.D.C. 2010).

98. *See, e.g.*, *Murphy*, 740 F. Supp. 2d at 80 ("Two numbers are at issue: the multiplicand—the amount of Iran's annual expenditures on terrorist activities—and the multiplier—the factor by which the multiplicand should be multiplied to yield the desired deterrent effect.").

99. In *Murphy*, for example, the court cited declarations supplied by plaintiffs from Patrick Clawson and Michael Ledeen. A few years later, Clawson made remarks in which he appeared to endorse the possibility of initiating war with Iran. *See False Flag AKA 'Crisis Initiation' with Patrick Clawson*, YOUTUBE (Jul. 6, 2015), http://www.youtube.com/watch?v=TzSjPDaSNMQ. Ledeen, cited as "a consultant to the Department of Defense," is a prominent Iran hawk. *See, e.g.*, Peter Beinart, *Enemies List*, N.Y. TIMES (Sep. 9, 2007), http://www.nytimes.com/2007/09/09/books/review/Beinart-t.html [http://perma.cc/2T5B-92VG] ("Ledeen's effort to lay virtually every attack by Muslims against Americans at Tehran's feet takes him into rather bizarre territory."). More generally, it is important to note that entire terrorism exception cases may have political agendas and not solely be based around plaintiffs' harms: attorneys representing plaintiff judgment holders in at least one case, for example, also represent United Against Nuclear Iran, which seeks to "ensure the economic and diplomatic isolation of the Iranian regime." *See About Us*, UNITED AGAINST NUCLEAR IRAN, http://www.unitedagainstnuclearіran.com/about [http://perma.cc/CF4B-DXV4]; Jonathan Stempel, *Lawsuit vs Anti-Iran Group Is Dismissed over U.S. State Secrets*, REUTERS (Mar. 23, 2015), http://www.reuters.com/article/us-usa-secrets-iran/lawsuit-vs-anti-iran-group-is-dismissed-over-u-s-state-secrets-idUSKBN0MJ24H20150323 [http://perma.cc/95X4-NZE7] (noting that Lee Wolosky is an attorney for United Against Nuclear Iran).

100. *See, e.g.*, Keith A. Findley, *Adversarial Inquisitions: Rethinking the Search for the Truth*, 56 N.Y. L. SCH. L. REV. 911 (2011).

The Executive, however, not only may consider evidence from a variety of different perspectives, but also, in terms of objectives, may weigh the full range of means through which it might deter future state action, as well as any other potential competing foreign policy priorities, including strategically seeking rapprochement with state sponsors.

III. TAILORING PUNITIVE DAMAGES

This Part proposes a modification to the current terrorism exception that would restore punitive damages to their proper role of deterrence and punishment and mitigate the effects of the terrorism exception on the Executive's ability to conduct foreign policy. Congress should amend the terrorism exception to grant the executive branch the authority to determine whether punitive damages are appropriate in response to individual acts of terror. Executed properly, the terrorism exception both helps terrorism victims and punishes habitual state sponsors of terrorism.[101] This proposal will allow the exception to fulfill these goals, while limiting the complications articulated above.

First, the State Department should keep a new list of "state sponsored *acts* of terrorism." This list would allow for more nuance in evaluating the appropriateness of punitive damages than the current list of state sponsors of terrorism. Instead of granting a blanket right to sue for punitive damages when a nation appears on the list of state sponsors, a list of specific acts of terrorism would ensure that a defaulting nation is only assessed punitive damages for acts in which it is actually implicated. Plaintiff-victims of these acts of terror would be eligible to receive punitive damages, since the State Department would have already made the determination that the foreign sovereigns were involved in the activity. On the other hand, plaintiff-victims bringing suit against a state sponsor of terrorism for an act not on the list of state sponsored acts of terrorism would be eligible

101. Where a victims' compensation fund only compensates victims for their harms, the terrorism exception allows plaintiffs "to have their day in court," has the potential to put the cost of the harm on an actor responsible for the harm, and helps to establish norms against supporting terrorism. In this, the terrorism exception – properly construed – has the potential to replicate the goals of the Alien Tort Claims Act. However, many scholars have proposed alternative compensation regimes. *See, e.g.*, Kelly A. Atherton, *Compensating Victims Under the "Terrorism-Exception" of the Foreign Sovereign Immunities Act: A State-Sponsored Victim's Compensation Fund*, 12 WILLAMETTE J. INT'L L. & DISP. RESOL. 158 (2004); Betsy J. Grey, *Homeland Security and Federal Relief: A Proposal for a Permanent Compensation System for Domestic Terrorist Victims*, 9 N.Y.U. J. LEGIS. & PUB. POL'Y 663 (2006); Ilana Arnowitz Drescher, Note, *Seeking Justice for America's Forgotten Victims: Reforming the Foreign Sovereign Immunities Act Terrorism Exception*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 791 (2012); Kaitlin Halsell, Note, *Whole Again? Statutory Compensation Schemes as a Tort Alternative in the Aftermath of Terror Attacks*, 30 TEMP. INT'L & COMP. L.J. 289 (2016).

only for compensatory damages, which, as discussed above, are often paid by the U.S. government.[102] Because compensatory damages compensate the victims for the harms they suffered, they would remain in place when foreign sovereigns fail to appear to contest the plaintiffs' claims.

Our proposal would constrain the terrorism exception, while adhering to all of the purposes for which Congress created it. For example, the 1983 Beirut attacks that killed 241 United States soldiers have long been recognized as Iranian-sponsored.[103] The State Department thus could plausibly certify these attacks as state-sponsored terrorist attacks, licensing injured plaintiffs to recover punitive damages for their losses. On the other hand, the September 11 attacks would be less likely to get State Department certification.[104] Even without certification, plaintiffs in that case would still be able to seek compensatory damages but would no longer be able to receive the punitive damages that sanction Iran for a terrorist attack in which it did not participate.

Only two of Congress's three aims in enacting the terrorism exception are apposite in the case of punitive damages: punishment and deterrence. In keeping with this reality, the State Department would be able to determine whether or not a punitive award would be a useful tool in the deterrence of further terrorist acts in accordance with the United States's broader foreign policy aims. As a result, courts would be freed from the burden of placing punitive awards on countries in order to deter them from behavior for which they might be innocent.

Endowing the Executive with this kind of authority is not novel: moving toward State Department determinations of deterrence would mirror the process in cases involving determinations of the official immunity of individual defendants.[105] Under the post-*Samantar* process, the Office of the Legal Adviser offers to "meet with counsel on both sides, ask[s] them to provide factual information and make their arguments . . . and invite[s] counsel to contribute written materials."[106] Historically, the United States's treatment of official immunity has followed a similar trajectory to sovereign immunity. Like sovereign immunity, official immunity saw a period of absolute immunity, followed by a period of

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102. *See supra* notes 50-52 and accompanying text.

103. *See* DEP'T OF DEF., REPORT OF THE DOD COMMISSION ON BEIRUT INTERNATIONAL AIRPORT TERRORIST ACT, OCTOBER 23, 1983 (Dec. 20, 1983), http://fas.org/irp/threat/beirut-1983.pdf [http://perma.cc/7Z6A-MAWH].

104. *See* NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., *supra* note 9, at 241 ("We have found no evidence that Iran or Hezbollah was aware of the planning for what later became the 9/11 attack.").

105. For a description of the emerging process for determining official immunity in the wake of *Samantar*, see Koh, *supra* note 20, at 1149-61.

106. *Id.* at 1159.

"restrictive theory" of foreign official immunity by "executive suggestion."[107] But, while the FSIA transferred the authority to determine sovereign immunity back to the judicial branch, the State Department continued to assert that it had final authority over official immunity determinations.[108]

As discussed above, the Executive Branch's position was vindicated in the 2010 case *Samantar v. Yousuf*.[109] *Samantar* established that courts must show deference to State Department assessments of the merit of affording immunity to a particular individual. The Supreme Court held that these State Department determinations were part of the common law of foreign official immunity.[110] In doing so, *Samantar* recognized the superior position of the Executive in making determinations touching upon national security and foreign policy concerns: unlike the courts, the State Department is well equipped to consider the specific foreign policy effects that could arise from granting or withholding immunity.[111]

The State Department already has processes that mirror what this Comment envisions for certifications of terrorist acts for the purposes of punitive damages. For example, under section 219 of the Immigration and Nationality Act, the Secretary of State has the authority to label organizations as Foreign Terrorist Organizations (FTOs).[112] Although the FTO-designation process is not without its detractors,[113] it offers a useful model. The designation allows the U.S. government to freeze the organization's assets, prevent members from entering the

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107. For a description of government official immunity, see *Id.* at 1142-46. For a discussion of the phases of sovereign immunity, see *supra* Part I.

108. Koh, *supra* note 20, at 1145 ("From the beginning, the Executive Branch saw the FSIA . . . as applying only to foreign states, not to foreign officials, and continued to assert that State Department immunity determinations were required in cases involving foreign officials." (footnote omitted)).

109. *See supra* text accompanying notes 30-32.

110. Samantar v. Yousuf, 560 U.S. 305, 313 (2010); *see also* Curtis A. Bradley & Laurence R. Helfer, *International Law and the U.S. Common Law of Foreign Official Immunity*, 2010 SUP. CT. REV. 213, 219-20.

111. *See Samantar*, 560 U.S. at 323 ("The FSIA was adopted . . . to address a modern world where foreign state enterprises are every day participants in commercial activities, and to assure litigants that decisions regarding claims against states and their enterprises are made on purely legal grounds. We have been given no reason to believe that Congress saw as a problem, or wanted to eliminate, the State Department's role in determinations regarding individual official immunity." (quotations omitted) (citations omitted)); *see also* Koh, *supra* note 20, at 1147-52.

112. 8 U.S.C. § 1189 (2012).

113. *See, e.g.*, Randolph N. Jonakait, *A Double Due Process Denial: The Crime of Providing Material Support or Resources to Designated Foreign Terrorist Organizations*, 48 N.Y. L. SCH. L. REV. 125 (2003); Michael German & Faiza Patel, *What Does It Mean To Designate the Muslim Brotherhood a Foreign Terrorist Organization*, JUSTSECURITY (Jan. 26, 2017); http://www.justsecurity.org

United States, and prosecute individuals accused of providing material support to the organizations.[114] Designations are published in the Federal Register. Before making a designation, the State Department must establish an administrative record, which may be based on both open source and classified information, that demonstrates that the organization engages in terrorist activity that threatens the United States.[115] Importantly, the need to create a record grounded in facts about the organization protects against concerns that a determination is politically motivated.[116] And, as an added check, FTOs are authorized to ask the D.C. Circuit to review the designation.[117]

The State Department employs other designations that have outcomes that look punitive. For example, under the Foreign Narcotics Kingpin Designation Act (FNKDA), the President is empowered to block "all property and interests in property, subject to U.S. jurisdiction, owned or controlled by significant foreign narcotics traffickers."[118] This power enables the State Department to compel disgorgement of the illegal gains of drug traffickers. The President—again through the State Department—can take immediate action, subject to judicial review. Like the proposal advocated here, the kingpin designation process allows the State Department to make a determination that subjects a party to damages in excess of compensation.

A similar review process for determining whether to certify a terrorist action as the result of sponsorship by one of the state sponsors would do much to limit concerns that the designation would result in unchecked executive discretion. As in the FTO designation process, litigants could seek judicial review of the State Department's designation decisions in the courts of appeals. Because defendant nations almost never appear in the first place, it seems unlikely that they would appear to contest the designation of any individual act as an act of state-sponsored terrorism. On the other hand, plaintiff-victims of terrorism could seek to

/36826/designate-muslim-brotherhood-foreign-terrorist-organization [http://perma.cc/6SG6-XJ27].

114. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-629, COMBATING TERRORISM: FOREIGN TERRORIST ORGANIZATION DESIGNATION PROCESS AND U.S. AGENCY ENFORCEMENT ACTIONS (2015), http://www.gao.gov/assets/680/671028.pdf [http://perma.cc/5J6T-LLWN].

115. 8 U.S.C. § 1189 (2012).

116. *See, e.g.*, Benjamin Wittes, *Should the Muslim Brotherhood Be Designated a Terrorist Organization?*, LAWFARE (Jan. 27, 2017, 10:26 AM), http://www.lawfareblog.com/should-muslim-brotherhood-be-designated-terrorist-organization [http://perma.cc/R3ZF-8E2J] (noting the ways in which the statutory requirement for a fact-based assessment prevents President Trump from forcing the State Department to add the Muslim Brotherhood to the list).

117. 8 U.S.C. § 1189 (2012).

118. Sumeet H. Chugani & Xingjian Zhao, *The Kingpin Act vs. California's Compassionate Use Act: The Dubious Battle Between State and Federal Drug Laws*, 15 U.D.C. L. REV. 47, 54 (2011).

produce evidence that undesignated acts of state-sponsored terrorism were in fact sponsored by a nation on the list of state sponsors of terror.

One might object that this level of Executive involvement is an impermissible intrusion into judicial functions. However, a congressionally authorized process for State Department determinations about the appropriateness of punitive damages under the terrorism exception would be unlikely to raise separation-of-powers concerns, for at least three reasons. First, the political branches have already created the cause of action and the remedy, and so can modify it as they see fit. Second, courts' jurisdiction over foreign sovereigns in the terrorism exception context already depends upon the State Department's determination that the state is a state sponsor of terrorism. Third, the longstanding practice of State Department determinations of official immunity has not raised separation-of-powers concerns.

The terrorism exception already creates the cause of action and defines available remedies.[119] Because the political branches created the cause of action and the remedy, this proposal does not raise concerns that Congress would, in effect, be attempting to change common-law tort principles. In *Bank Markazi*, for example, the Court acknowledged the "political branches' authority over foreign sovereign immunity" in the course of upholding the Iran Threat Reduction and Syria Human Rights Act of 2012.[120] Similarly, with regards to the terrorism exception itself, Congress enjoys the power to alter the remedial scheme that it created as a part of a particular waiver of sovereign immunity.

Further, the jurisdiction of U.S. courts over foreign sovereigns under the terrorism exception already depends on the State Department's designation of the foreign sovereign as a state sponsor of terrorism. It is, of course, the State Department's choice in the first place to add a country to the state sponsors of terrorism list. Thus, the State Department already makes the jurisdictional determination whether or not a state is amenable to suit in U.S. courts for terrorist acts. The State Department's power to grant or preclude blanket sovereign immunity already constitutes a large concession of judicial power, and it has not raised separation-of-powers concerns since its implementation twenty years ago. Within the context of the already existing terrorism exception, the proposal advanced here represents a smaller encroachment of the executive into the judicial sphere.

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119. 28 U.S.C. § 1605A(c) (2012) ("Private Right of Action . . . . In any such action, damages may include economic damages, solatium, pain and suffering, and punitive damages.").

120. Bank Markazi v. Peterson, 136 S. Ct. 1310, 1329 (2016) ("[I]t remains Congress' prerogative to alter a foreign state's immunity and to render the alteration dispositive of judicial proceedings in progress. . . . By altering the law governing the attachment of particular property belonging to Iran, Congress acted comfortably within the political branches' authority over foreign sovereign immunity and foreign-state assets." (citation omitted)).

Finally, the State Department has long made determinations of official immunity without separation-of-powers concerns. As discussed above, this practice received the sanction of the Supreme Court in 2010 in the case of *Samantar v. Yousuf*.[121] Given that similar processes already exist in the areas of foreign official immunity and foreign terrorism organization and narcotics kingpin designation, the legitimacy of involving the State Department in determinations of punitive damages eligibility is less problematic.

Creating a certification process would not eliminate complications arising due to existing punitive damage judgments,[122] but it would effectively limit problems that might arise going forward. Rather than having the Executive hand courts the blanket ability to assess punitive damages, this proposal would follow the good sense shown by the Supreme Court in *Samantar*, by allowing the State Department to make the political and factual assessment about what specific acts of terrorism should be met with an effort to deter and punish through punitive damages.

The proposal outlined here would have several benefits. It would ensure that plaintiffs can continue to receive punitive judgments when the evidence suggests that the state sponsor of terrorism was implicated in the act that injured them. At the same time, it would ensure that punitive judgments are used only in situations when they would serve their purpose of deterring and punishing foreign states. When the State Department has not certified that the nation state was actually involved in the terrorist action, punitive damages would no longer be assessed. Our proposal also would alleviate the difficulties of normalizing relations with nations previously listed on the state sponsors of terrorism list, by holding them accountable for punitive damages only in cases where they were implicated.

CONCLUSION

This Comment has argued that the broad discretion afforded to courts in entering default judgments under the terrorism exception to the Foreign Sovereign Immunities Act leads to judicial attempts to punish actors that frustrate broader foreign policy goals. Moreover, it does so for actions with which the de-

121. *See supra* text accompanying note 110; *see also* Kim, *supra* note 51.

122. Others have considered an array of options to resolve existing judgments. *See, e.g.*, Daveed Gartenstein Ross, Note, *Resolving Outstanding Judgments Under the Terrorism Exception to the Foreign Sovereign Immunities Act*, 77 N.Y.U. L. REV. 496, 498 (2002) (arguing that the best means to do so is through adjudication by an international tribunal analogous to the Iran Claims Tribunal).

fendant-state might have had little or nothing to do. By allowing the State Department to make determinations of when sovereigns ought to be liable for punitive damages, the accumulation of default judgments could be limited to make the judgments more suitable and less disruptive to U.S. policy aims. At the same time, this solution would balance the interests of plaintiff–victims and defendant–nations by limiting punitive damages to instances in which the nations were factually implicated in the terrorist attacks for which they were sued.

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