

The Empty Pot at the End of the Rainbow: Confronting Hollow-Rights Legislation after Flatow

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NOTE

THE EMPTY POT AT THE END OF THE RAINBOW: CONFRONTING “HOLLOW-RIGHTS LEGISLATION” AFTER *FLATOW*

Jonathan Fischbach[†]

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INTRODUCTION

A conundrum that continues to divide Congress, frustrate American plaintiffs, confuse federal courts, and embarrass the executive branch is the unfulfilled promise of legislation that grants United States domestic courts jurisdiction to hear disputes brought against foreign countries for injuries that occur overseas. As cases brought pursuant to this legislation reach the execution phase, plaintiffs routinely discover that the emotional energy and financial resources they invested to obtain a favorable verdict were inevitably expended in vain.¹ Plaintiffs and judges alike absorb the hard lesson that statutes granting courts jurisdiction to award financial remedies against foreign countries paradoxically fail to empower plaintiffs to satisfy the verdicts they lawfully obtain.²

The most recent legislation to befuddle plaintiffs who seek justice against foreign countries is the Foreign Sovereign Immunities Act (FSIA).³ In 1996, Congress amended the FSIA to allow plaintiffs to sue foreign countries in American courts for noncommercial injuries including acts of torture, murder, and terrorism that are committed overseas, and further authorized federal courts to award punitive damages as well as compensatory damages to victorious plaintiffs.⁴ While this expansion of jurisdiction was highly controversial, trial courts have willingly accepted jurisdiction under the FSIA, and in some cases have awarded plaintiffs verdicts in the hundreds of millions of dollars.⁵ To the consternation of successful litigants, however, courts have refused to interpret the FSIA to provide for the enforcement of these judgments through writs of attachment and execution.⁶

Significantly, the difficulty of satisfying verdicts under the FSIA is confined to noncommercial injury cases brought under the 1996 amendments. In contrast, the process of remedying commercial injuries under the FSIA functions relatively smoothly for several reasons.

¹ See, e.g., *Flatow v. Islamic Republic of Iran*, 76 F. Supp. 2d 16, 27 (D.D.C. 1999) (“[T]he Court regrets that plaintiff’s efforts to satisfy his judgment against Iran have proven futile. Indeed, in light of his lack of success thus far, it appears that plaintiff Flatow’s original judgment against Iran has come to epitomize the phrase ‘Pyrrhic victory.’”).

² See, e.g., Jean-Marie Simon, *The Alien Tort Claims Act: Justice or Show Trials?*, 11 B.U. INT’L L.J. 1 (1993); Jennifer Correale, Comment, *The Torture Victim Protection Act: A Vital Contribution to International Human Rights Enforcement or Just a Nice Gesture?*, 6 PAGE INT’L L. REV. 197 (1994); Christopher W. Haffke, Note, *The Torture Victim Protection Act: More Symbol than Substance*, 43 EMORY L.J. 1467 (1994).

³ 28 U.S.C. §§ 1602–1611 (1994 & Supp. V 1999).

⁴ *Id.* § 1605(a)(7) (Supp. V 1999); see, e.g., *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 12–13, 32–34 (D.D.C. 1998).

⁵ See *Flatow*, 999 F. Supp. at 33 (citing an award of \$137.3 million in punitive damages for a case involving murder of three American aircraft pilots).

⁶ See e.g., *Flatow v. Islamic Republic of Iran*, 76 F. Supp. 2d 16 (D.D.C. 1999).

First, the property at issue in a commercial dispute under the FSIA is always available for attachment to satisfy a judgment.⁷ Second, punitive damages are unavailable for commercial claims brought under the FSIA; thus, the remedies awarded to the prevailing party are merely compensatory and much smaller in magnitude than the verdicts in noncommercial claims.⁸ Finally, foreign countries that are parties to commercial litigation under the FSIA typically have significant business ties to the United States, and defendant countries therefore have financial incentives to comply with the judgments of American courts. For these reasons, even plaintiffs who suffer commercial injuries at the hands of uncooperative defendants have little trouble finding and attaching property of a foreign country defendant that is located within the United States.⁹

The unique nature of the jurisdiction granted by the 1996 amendments portends the difficulty of satisfying judgments in the noncommercial realm.¹⁰ First, the 1996 amendments require that the injury inflicted by the foreign country arises from an act of terrorism or torture.¹¹ Unlike commercial claims, which inherently involve property that could be attached to satisfy a judgment, claims arising from acts of terrorism and torture do not implicate resources that can be readily attached if the plaintiff is victorious at trial. Second, the 1996 amendments grant jurisdiction to adjudicate controversies that arise outside the borders of the United States.¹² In general, plaintiffs cannot enforce American court judgments overseas absent a treaty; plaintiffs seeking to satisfy a verdict under the 1996 amendments are thereby disadvantaged relative to plaintiffs satisfying a commercial injury that occurred within the United States.¹³ Third, judges may use their discretion to award punitive damages on top of compensatory damages under the 1996 amendments, and successful plaintiffs face the daunting task of satisfying verdicts that can total hundreds of millions of dollars. Fourth, jurisdiction under the 1996 amendments is only available if the State Department designates the defendant as a

⁷ See 28 U.S.C. § 1610(a)(2) (1994).

⁸ See *id.* § 1606 (Supp. V 1999); *Letelier v. Republic of Chile*, 502 F. Supp. 259 (D.D.C. 1980).

⁹ See, e.g., *Birch Shipping Corp. v. Embassy of United Republic of Tanzania*, 507 F. Supp. 311 (D.D.C. 1980).

¹⁰ See 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, 216-20 (2000).

¹¹ 28 U.S.C. § 1605(a)(7) (Supp. V 1999).

¹² *Id.*

¹³ See *Terrorism: Victims' Access to Terrorist Assets: Hearing Before the Senate Comm. on the Judiciary*, 106th Cong. at 17 (1999) [hereinafter *Terrorism Hearing*] (statement of Sen. Dianne Feinstein) ("There really is no other option for them. They cannot go to the country at issue and demand payment.").

“state sponsor of terrorism.”¹⁴ Not surprisingly, these defendant countries typically have tenuous diplomatic relations with the United States and thus control few assets within its borders.¹⁵ Finally, any property belonging to a designated rogue nation that could otherwise be attached by plaintiffs is often subject to unilateral executive action that renders the property immune from attachment for diplomatic reasons.¹⁶

This Note is the first attempt to formulate a reasoned solution to these unsatisfying paradoxes posed by the 1996 amendments to the FSIA. Of the few commentators who have examined the problem of unsatisfied judgments under the FSIA,¹⁷ none have undertaken an in-depth analysis of the psychological and political factors that contribute to the current predicament. This Note diverges from prior examinations by piecing together the components of a viable solution through an examination of the individual, political, and institutional forces that create daunting obstacles for plaintiffs, and that compel the impracticality of any radical shift from the status quo.

Initially, this Note contends that the impracticality of satisfying noncommercial FSIA judgments under these conditions reflects myopia on the part of legislators who drafted the execution provisions under the 1996 amendments. An in-depth analysis of *Flatow v. Islamic Republic of Iran*¹⁸ reveals the need to reform the current adjudicative regime that encourages plaintiffs to expend their resources to obtain financial judgments only to encounter insurmountable obstacles to the successful execution of their judgments.

This Note then looks beyond the particular obstacles to execution under the 1996 amendments and addresses the larger question of how best to remedy legislation that confers “hollow rights,” which cannot be vindicated by the judicial system. This Note coins the term “hollow-rights legislation” to refer to laws such as the 1996 amendments that grant courts jurisdictional power to resolve disputes without conferring commensurate authority to satisfy the resulting

¹⁴ 28 U.S.C. § 1605(a)(7)(A).

¹⁵ See Vadnais, *supra* note 10, at 214.

¹⁶ See *Dames & Moore v. Regan*, 453 U.S. 654, 673 (1981).

¹⁷ See Lee M. Caplan, *The Constitution and Jurisdiction over Foreign States: The 1996 Amendment to the Foreign Sovereign Immunities Act in Perspective*, 41 VA. J. INT'L L. 369 (2001); Ethan J. Early, Note, *Flatow v. Islamic Republic of Iran and the Foreign Sovereign Immunities Act: Is Peace of Mind Enough?*, 14 CONN. J. INT'L L. 203 (1999); Richard T. Micco, Comment, *Putting the Terrorist-Sponsoring State in the Dock: Recent Changes in the Foreign Sovereign Immunities Act and the Individual's Recourse Against Foreign Powers*, 14 TEMP. INT'L & COMP. L.J. 109, 137-41 (2000) (arguing that claims brought under the 1996 amendments to the FSIA should be litigated in the International Court of Justice); Vadnais, *supra* note 10, at 221-22 (proposing that plaintiffs initially submit their claims to the executive branch before seeking a remedy in the courts).

¹⁸ 76 F. Supp. 2d 16 (D.D.C. 1999).

judgments. In addition to the FSIA, the two primary examples of hollow-rights legislation are the Torture Victim Protection Act¹⁹ and the Alien Tort Claims Act,²⁰ both of which yield a substantial number of judgments, of which almost none are satisfied.²¹ The controversy surrounding *Flatow* demonstrates that the political forces that give birth to such legislation preclude a simplistic solution such as the repeal of these ill-conceived laws. Indeed, *Flatow* and its progeny suggest that any proposed solution to satisfying judgments under hollow-rights laws must walk a tightrope between institutional politics and individual justice. Cognizant of these limitations, this Note proposes a blueprint for compromise between the federal government and prospective plaintiffs to resolve disputes arising under hollow-rights legislation. This blueprint strives to create a flexible framework for the adjudication of rights by heightening the requirements for jurisdiction and giving the executive branch an incentive to remove obstacles for worthy plaintiffs to satisfy their judgments.

This Note is particularly timely in light of recent events, because in the aftermath of the World Trade Center disaster two developments are certain. First, a significant number of plaintiffs will sue under the FSIA to recover compensatory and punitive damages from nations proven to harbor and support the terrorists responsible for the attack. Second, the same political conditions that led to the creation of the 1996 FSIA amendments will exert tremendous pressure on Congress to pass additional hollow-rights laws to pacify victims of these attacks. With an eye toward both of these trends, this Note proposes a solution for past legislation while delivering an admonition for future laws.

The Note accomplishes these objectives in four sections. Part I sets forth and analyzes the history of the FSIA including the origins of the 1996 amendments. Part II examines the specific roadblocks that plaintiffs encounter by analyzing the post-judgment litigation in *Flatow*. Part III discusses the significant forces that preclude Congress and the President from fashioning meaningful reform under the current legislative scheme. Finally, Part IV proposes that Congress cure the surrounding hollow judgments by amending the FSIA to condition jurisdiction on the pre-judgment availability of an appropriate financial remedy.

¹⁹ Pub. L. No. 102-256, 106 Stat. 73 (1992), reprinted in 28 U.S.C. § 1350 note (1994).

²⁰ 28 U.S.C. § 1350 (1994) ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.").

²¹ See Early, *supra* note 17, at 232.

I

THE FOREIGN SOVEREIGN IMMUNITIES ACT

For over one and a half centuries prior to the FSIA, United States policy was to grant foreign countries absolute immunity from suit in American courts.²² While the judiciary recognized that the Constitution did not obligate the government to grant foreign countries this privilege,²³ the United States voluntarily shielded foreign nations from the jurisdiction of its domestic courts as a matter of diplomatic courtesy.²⁴ Under this policy, federal courts deferred the question of whether to exercise jurisdiction over foreign countries to the executive branch for an ad hoc determination of whether the country should be subject to suit.²⁵ For a long period of time it was unclear exactly what criteria the executive branch employed when exercising this discretion. In 1952, the executive branch finally revealed its formula for determining whether to grant or withhold immunity in the celebrated "Tate letter," which announced the adoption of the restrictive theory of sovereign immunity.²⁶ The restrictive theory dictates that immunity is only available to foreign sovereigns for public acts undertaken in the nation's political or diplomatic capacity, and does not extend to the country's commercial or otherwise private acts.²⁷

Although the Tate letter facially imposed a clear demarcation between the existence and absence of jurisdiction, foreign countries used the "public act" loophole to pressure the executive branch to grant immunity in cases that did not meet the requirements of the restrictive theory.²⁸ In some instances, the State Department responded to diplomatic pressure and refused to indicate whether a court should exercise jurisdiction, leaving judges to address the issue on their own.²⁹ Consequently, decisions on foreign sovereign immunity were often rendered simultaneously by two branches of government on the basis of vague criteria that were poorly understood and not uniformly applied.³⁰

²² See Caplan, *supra* note 17, at 377.

²³ See *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116 (1812).

²⁴ See *id.*

²⁵ See, e.g., *Republic of Mexico v. Hoffman*, 324 U.S. 30, 36 (1945); *Ex parte Republic of Peru*, 318 U.S. 578, 586-90 (1943).

²⁶ Letter from Jack B. Tate, Acting Legal Adviser for the Secretary of State, to Philip B. Perlman, Attorney General (May 19, 1952), reprinted in Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 app. 2, at 711 (1976).

²⁷ H.R. REP. NO. 94-1487, at 7 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6605.

²⁸ Fredric Alan Weber, *The Foreign Sovereign Immunities Act of 1976: Its Origin, Meaning and Effect*, 3 YALE STUD. WORLD PUB. ORD. 1, 14-20 (1976).

²⁹ *Id.* at 12-13.

³⁰ *Id.* at 15-17.

In an effort to defuse the case-by-case diplomatic pressure exerted on the executive branch and eliminate the ambiguity surrounding the exercise of foreign sovereign immunity, Congress passed the FSIA in 1976.³¹ By incorporating the restrictive theory of sovereign immunity embodied within the Tate letter, the FSIA granted foreign states immunity from the jurisdiction of United States courts³² subject to certain exceptions.³³ The three initial exceptions to immunity articulated in the FSIA governed the following: (1) cases in which foreign states expressly or impliedly waived their immunity, (2) injuries arising from commercial activities conducted in the United States or having a domestic effect, and (3) cases of tortious injury occurring within the United States.³⁴ Significantly, Congress intended that these provisions of the FSIA would provide the sole and exclusive basis for jurisdiction over foreign states. As the Supreme Court ruled in *Argentine Republic v. Amerasia Shipping Corp.*, "the text and structure of the FSIA demonstrate Congress' intention that the FSIA be the sole basis for obtaining jurisdiction over a foreign state in our courts."³⁵

The FSIA underwent significant alterations in 1996, primarily in response to several high-profile terrorist acts. On April 24, 1996, President Clinton signed into law the Antiterrorism and Effective Death Penalty Act of 1996,³⁶ which introduced two significant modifications to the FSIA. First, the pre-1996 rule that foreign countries could only be prosecuted for tortious acts committed within the territory of the United States³⁷ was qualified by an exception from immunity for cases "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 . . . for such an act."³⁸ Significantly, only countries formally designated by the State Department as state sponsors of terrorism were amenable to suit under the 1996 amendments.³⁹

The second modification significantly expanded the right of plaintiffs to attach the property of a foreign country to satisfy a judgment under the FSIA. Prior to 1996, the FSIA imposed a strict in rem nexus requirement by allowing plaintiffs to enforce judgments only

³¹ Pub. L. No. 94-583, § 4(a), 90 Stat. 2891, 2891-98 (1976) (codified as amended at 28 U.S.C. §§ 1602-1611 (1994 & Supp. V 1999)).

³² 28 U.S.C. § 1604 (1994).

³³ *Id.* §§ 1605, 1607 (1994 & Supp. V 1999).

³⁴ *Id.* § 1605(a)(1), (a)(2), (a)(5) (1994 & Supp. V 1999).

³⁵ 488 U.S. 428, 434 (1989).

³⁶ Pub. L. No. 104-132, § 221, 110 Stat. 1214, 1241 (1996).

³⁷ *See* 28 U.S.C. § 1605(a)(5) (1994), *amended by* 28 U.S.C. § 1605(a)(5) (Supp. V 1999).

³⁸ *Id.* § 1605(a)(7) (Supp. V 1999).

³⁹ *Id.* § 1605(a)(7)(A).

against the property out of which the claim arose.⁴⁰ Because the 1996 amendments expanded the jurisdiction of federal courts to encompass claims arising from alleged acts of torture and terrorism, prudential considerations compelled Congress to amend the FSIA's execution provisions to allow quasi in rem attachment of any property owned by the sovereign, regardless of whether the property was involved in the act upon which the claim was based.⁴¹

II

EFFORTS TO SATISFY THE JUDGMENT IN *FLATOW*

On April 9, 1995, Alisa Flatow, a United States citizen, was murdered when a suicide bomber drove a van loaded with explosives into a bus traveling from Ashkelon, Israel to the Gaza Strip.⁴² Her father, Stephen Flatow, brought suit against the government of Iran in a federal district court claiming wrongful death, personal injury, and related torts under § 1605(a)(7) of the FSIA.⁴³ Although Iran failed to enter an appearance, Flatow proved that the Palestine Islamic Jihad, which claimed responsibility for the bombing, received approximately \$2 million annually from the defendant.⁴⁴ The court ultimately concluded that the attack on the bus which inflicted fatal injuries to Alisa Flatow "has been demonstrated by the testimony to have been part of an extensive campaign of terror carried out to obtain the political ends of the Islamic Republic of Iran,"⁴⁵ and issued the plaintiff a default judgment for \$20 million in compensatory damages and \$225 million in punitive damages.⁴⁶

First, Flatow tried to attach a financial award that the Iran-U.S. Claims Tribunal ordered the United States to transfer to Iran for failing to fulfill its obligations under the Algiers Accords.⁴⁷ While Flatow and the United States government litigated the validity of the writ on the tribunal award, Flatow also attempted to satisfy his judgment by seeking to attach three Iranian diplomatic properties that were released into the State Department's custody after the two countries terminated diplomatic relations on April 8, 1980.⁴⁸ Finally, Flatow attempted to attach Iran's Foreign Military Sales (FMS) Account,

⁴⁰ *Id.* § 1610(a)(2) (1994).

⁴¹ *Id.* § 1610(a)(6)-(7) (Supp. V 1999).

⁴² Complaint at 4-5, *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1 (D.D.C. 1998) (No. 97-396 (RCL)).

⁴³ *Id.* at 2-3.

⁴⁴ *Id.* at 6-7.

⁴⁵ *Flatow*, 999 F. Supp. at 33.

⁴⁶ *See id.* at 32, 34.

⁴⁷ *See Flatow v. Islamic Republic of Iran*, 74 F. Supp. 2d 18 (D.D.C. 1999).

⁴⁸ *See Flatow v. Islamic Republic of Iran*, 76 F. Supp. 2d 16 (D.D.C. 1999).

which had been established to facilitate Iranian purchases of military equipment and services from U.S. vendors.⁴⁹

A. Impediments to Execution Arising from Domestic and International Law

After the United States district court issued its judgment against Iran, Flatow immediately focused his attention on satisfying his \$245 million verdict. Not surprisingly, however, Flatow's avenues of attachment were limited due to Iran's minimal assets in the United States. As Senators Connie Mack and Frank Lautenberg observed in a letter to their colleagues in the Senate:

Several victims of terrorism have already found some measure of justice through the [Anti-Terrorism Act of 1996].

. . . .

However, none of the victims have been able to collect on the judgements they hold against terrorist states because these rogue nations tend to keep few, if any assets in the United States other than those frozen by the Treasury Department under our sanctions laws.⁵⁰

With few options available, Flatow predictably endeavored to execute his judgment by attaching the defendant's most visible assets within the United States—Iran's embassies and diplomatic properties.⁵¹ On July 7, 1998, the district court issued an order attaching three diplomatic properties of Iran to satisfy Flatow's verdict.⁵² In response to the court order, the United States attempted to quash the writs of attachment, asserting that any attachment of Iran's diplomatic properties would violate two domestic laws: the Foreign Missions Act (FMA),⁵³ and ironically, the FSIA—the statute that permitted the district court to adjudicate Flatow's claim in the first place.⁵⁴

1. *The Foreign Missions Act*

On April 7, 1980, President Carter severed diplomatic relations with Iran and ordered all Iranian diplomatic and consular officials to leave the United States.⁵⁵ To ensure the protection of Iran's assets within the United States, President Carter directed the Secretary of

⁴⁹ See *Flatow v. Islamic Republic of Iran*, C.A. No. 97-396 (RCL), 2000 U.S. Dist. LEXIS 8910 (D.D.C. June 6, 2000).

⁵⁰ Letter from Senators Connie Mack and Frank Lautenberg to Members of the Senate (Oct. 15, 1999) (on file with author).

⁵¹ Order to Issue Writs of Attachment on Judgment, *Flatow v. Islamic Republic of Iran*, 76 F. Supp. 2d 16 (D.D.C. 1999) (No. 97-396 (RCL)).

⁵² *Id.*

⁵³ 22 U.S.C. §§ 4301–4316 (1994 & Supp. V 1999).

⁵⁴ See Statement of Interest of the United States at 2, *Flatow* (No. 97-396 (RCL)).

⁵⁵ Declaration of Patrick F. Kennedy ¶ 6, *Flatow* (No. 97-396 (RCL)).

State to assume custody of Iran's diplomatic properties.⁵⁶ After Congress created the Office of Foreign Missions (OFM) in 1982, the State Department delegated its statutory responsibility to maintain and protect Iran's diplomatic properties to the OFM,⁵⁷ an obligation that continues to this day.⁵⁸

In its motion to quash the writs of attachment on Iran's diplomatic properties, the United States referred the district court to § 4308(f) of the FMA, which explicitly grants mission property in the custody of the State Department immunity from attachment: "Assets of or under the control of the Department of State, wherever situated, which are used by or held for the use of a foreign mission shall not be subject to attachment, execution, injunction, or similar process, whether intermediate or final."⁵⁹ In an effort to circumvent this broad prohibition on attachment, Flatow argued that the State Department had misclassified the three properties as foreign missions because the missions had lost their "diplomatic character" due to the lengthy period of hostility between Iran and the United States, and because the OFM was generating commercial profits by renting the property to private parties.⁶⁰

Although Flatow's arguments were not facially meritless, he was nonetheless unable to overcome the courts' longstanding practice of according broad discretion to the State Department in its management and supervision of foreign missions under the FMA. Recognizing America's strong interest in preserving the integrity of foreign missions, the D.C. Circuit has observed: "When exercising its supervisory function over foreign missions, the State Department acts at the apex of its power. Because it has been accorded express authority from Congress to act in this area, it wields the combined power of both the executive and legislative branches."⁶¹

Pursuant to this general dictate, federal courts have consistently ruled that if the State Department designates property as a diplomatic mission, the FMA provides immunity from attachment even if the property is being used for commercial purposes at the time of judgment. Thus, in *United States v. Central Corp. of Illinois*, a district court nullified the sale of two condominiums that had previously belonged to the Iranian consulate in Chicago but were currently in the custody

⁵⁶ See Diplomatic Relations with Iran, 1 PUB. PAPERS 612 (1980-81).

⁵⁷ Under the FMA, the OFM is required to "protect and preserve" any property of a foreign mission if that mission has ceased conducting diplomatic, consular, or other governmental activities in the United States. 22 U.S.C. § 4305(c)(1) (1994).

⁵⁸ See Statement of Interest of the United States at 5, *Flatow* (No. 97-396 (RCL)).

⁵⁹ 22 U.S.C. § 4308(f) (1994).

⁶⁰ See Plaintiff's Memorandum in Response to the Statement of Interest of the United States at 18-22, *Flatow* (No. 97-396 (RCL)).

⁶¹ *Palestine Info. Office v. Shultz*, 853 F.2d 932, 937 (D.C. Cir. 1988).

of the United States.⁶² The court held that although Iran was not currently using the condominiums for a diplomatic purpose, the State Department's designation of the properties as a foreign mission was controlling: "Determinations as to the meaning and applicability of the term foreign mission are committed to the discretion of the Secretary of State. The determination of the Secretary is reviewable by the courts, but is given great deference."⁶³ Significantly, the *Central Corp.* court also interpreted the FMA to preclude the foreign country's creditors from obtaining remuneration from the sale of diplomatic properties: "Even if diplomatic relations have ceased, the Office of Foreign Missions is to hold property of a foreign mission until the Office determines it should sell the property and turn over the proceeds to the foreign country."⁶⁴

While the *Flatow* court found it unnecessary to reach the question of whether the writs of attachment violated the FMA,⁶⁵ the trial judge observed in a footnote that § 1610(a)(4)(B) of the FSIA reinforced the provisions of the FMA by only permitting the attachment of property, "[p]rovided . . . [t]hat such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission."⁶⁶ The district court's denial of *Flatow*'s effort to attach Iran's diplomatic properties makes it difficult to conceive of any circumstances under which a plaintiff could successfully attach diplomatic property. In the rare case when a designated "state sponsor of terrorism" actively conducts diplomatic relations from its embassies and consulates in the United States, a plaintiff would nevertheless be prohibited from interfering with those activities by attaching the diplomatic properties while they are still in use.

Furthermore, *Flatow* illustrates that even after the President terminates diplomatic relations with a foreign country, federal courts will defer to the OFM's discretion when determining whether embassy or consulate property retains its "diplomatic character." Common sense dictates that the OFM will utilize its discretion to maintain custody of the diplomatic properties consistent with its delegated obligations under the FMA, rather than willingly allow plaintiffs to attach the properties in its charge. Finally, even if the OFM decides to sell a country's diplomatic properties, the decision in *Central Corp.* demonstrates that the OFM is obliged to turn over the sale proceeds to the foreign country that previously owned the property under the FMA.⁶⁷ In the end, the courts' interpretation of the FMA grants no recourse

⁶² No. 87 C 5072, 1987 WL 20129, at *2 (N.D. Ill. Nov. 13, 1987).

⁶³ *Id.* (citations omitted).

⁶⁴ *Id.*

⁶⁵ *Flatow*, 76 F. Supp. 2d at 20.

⁶⁶ *Id.* at 20 n.5 (quoting 28 U.S.C. § 1610(a)(4)(B) (1994)).

⁶⁷ *See Cent. Corp.*, 1987 WL 20129, at *2.

to plaintiffs attempting to satisfy a judgment by attaching diplomatic property.

2. *The Foreign Sovereign Immunities Act*

Significantly, the execution provisions of the FSIA are structured to permit the attachment of a foreign country's property as an exception to the general rule of immunity. According to § 1609 of the statute, "the property in the United States of a foreign state shall be immune from attachment[,] arrest and execution except as provided in sections 1610 and 1611."⁶⁸ As noted earlier, the fact that Flatow's judgment did not relate to a "judgment establishing rights in property," but rather was brought under the torture and terrorism provisions of the FSIA significantly restricted his avenues of execution.⁶⁹ Nonetheless, the "commercial activity" exception of § 1610 did provide Flatow with one potential avenue for attachment: "The property in the United States of a foreign state, . . . used for a commercial activity in the United States, shall not be immune from attachment in aid of execution"⁷⁰

For Flatow to attach and execute the diplomatic properties belonging to Iran, however, he had the burden to show that the OFM's management of the properties comprised "commercial activity" within the meaning of § 1610. In *Republic of Argentina v. Weltover, Inc.*,⁷¹ the Supreme Court established the parameters of the "commercial activities" exception:

[W]hen a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are "commercial" within the meaning of the FSIA. . . . [T]he question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in "trade and traffic or commerce."⁷²

The Supreme Court's vague definition of "commercial activities" impeded Flatow's attempts to classify the OFM's management of Iran's diplomatic properties as a commercial activity, even though the trial record indicated that the OFM was leasing the properties to unaf-

⁶⁸ 28 U.S.C. § 1609 (1994).

⁶⁹ See, e.g., *id.* § 1610(a)(3)-(4) (1994) (allowing attachment when the judgment establishes rights in property and either: (1) the property is taken in violation of international law; (2) the property is acquired by succession or gift; or (3) the property is immovable and situated in the United States).

⁷⁰ *Id.* § 1610(a) (1994 & Supp. V 1999).

⁷¹ 504 U.S. 607 (1992).

⁷² *Id.* at 614 (emphasis in original).

filiated third parties and earning significant profits from the enterprise.⁷³ In the aftermath of *Weltover*, however, courts were understandably reluctant to undermine the OFM's authority to shield diplomatic properties from writs of attachment that characterized its property management as commercial.⁷⁴ In granting the United States' motion to quash the writs of attachment in *Flatow*, the district court concluded that custodial activities undertaken by the OFM are inherently noncommercial in nature, as "the United States' taking custody over a foreign state's properties and maintaining them is an inherently sovereign [act], not a commercial act."⁷⁵

The district court's decision is consistent with prior federal court decisions narrowing the scope of the commercial activity exception to protect the integrity of foreign mission property. In *City of Englewood v. Socialist People's Libyan Arab Jamahiriya*,⁷⁶ the Third Circuit refined the test for determining whether property satisfied the commercial activity exception by requiring a "regular course of commercial conduct":

The determinative issue is whether [the property in question] is currently being used in a "regular course of commercial conduct."

The only purpose Libya has in holding the property, so far as this record discloses, is for use by the Chief of its Mission to the United Nations. That is activity directly related to the purposes of the mission, and as a matter of law such use is not commercial activity.⁷⁷

Applying the new definition, the court ruled that Libya's act of purchasing property on the open market did not waive immunity from attachment under the commercial activity exception.⁷⁸ Similarly, in *United States v. County of Arlington*, the Fourth Circuit voided

⁷³ See Plaintiff's Memorandum in Response to the Statement of Interest of the United States at 26, *Flatow v. Islamic Republic of Iran*, 76 F. Supp. 2d 16 (D.D.C. 1999) (No. 97-396 (RCL)).

⁷⁴ See, e.g., *United States v. County of Arlington*, 669 F.2d 925, 934 (4th Cir. 1982). The court explained:

Neither the [FSIA] nor its legislative history specifies what property is or is not "used for purposes of maintaining a diplomatic or consular mission." The views of the [State] Department concerning the scope of this phrase, though not conclusive, are entitled to great weight. . . . It has expertise for determining whether property is used for maintaining a mission. Only if its views are manifestly unreasonable should they be rejected.

Id.

⁷⁵ *Flatow*, 76 F. Supp. 2d at 23. The district court continued: "Put simply, although leasing of property by a private party might be commercial in nature, taking custody over diplomatic property under the authority granted by a federal statute or treaty is decidedly sovereign in nature. Indeed, such 'power[] [is] peculiar to sovereigns.'" *Id.* (alterations in original).

⁷⁶ 773 F.2d 31 (3d Cir. 1985).

⁷⁷ *Id.* at 37.

⁷⁸ *Id.*

all assessments and liens on an apartment building owned by the German government after ruling that the building was exempt from county taxes because it was not operated as a for-profit commercial venture.⁷⁹ The court took judicial notice of the House Report accompanying the FSIA, which demonstrated Congress's general intent to exempt diplomatic properties from the commercial activities exception of § 1610:

"[Section 1610(a)(4)] would deny immunity from execution against property of a foreign state which is used for a commercial activity in the United States and is either acquired by succession or gift or is immovable. Specifically exempted are diplomatic and consular missions and the residence of the chiefs of such missions. This exemption applies to all of the situations encompassed by section [] 1610(a) [E]mbassies and related buildings could not be deemed to be property used for a 'commercial' activity as required by section 1610(a)."⁸⁰

In addition to the court's reluctance to classify the OFM's supervision of diplomatic properties as commercial activity, Flatow was hard-pressed to demonstrate that the Supreme Court's definition of commercial activity in *Weltover* could be satisfied when the foreign country that owned the property did not control its day-to-day management. The *Weltover* Court emphasized that "when a *foreign government* acts, not as regulator of a market, but in the manner of a private player within it, the *foreign sovereign's* actions are 'commercial' within the meaning of the FSIA."⁸¹ When the property of a state sponsor of terrorism reverts to State Department control following the termination of diplomatic relations, it is impossible for that foreign country to manifest intent to commercially use the property. Under these circumstances, the *Flatow* court was unwilling to expand the commercial activity exception to trigger an exception on the basis of a third party's management of the property. As the court explained:

[I]f the FSIA could be applied to foreign state property that is being used by a non-agent third party, it would expand the class of cases arising under the Act beyond those limited, enumerated exceptions to immunity prescribed by Congress, and thus would expose foreign states to far greater liability than was originally contemplated under the Act.⁸²

⁷⁹ 669 F.2d at 934-35.

⁸⁰ *Id.* at 933 (first and last alterations in original) (quoting H.R. REP. NO. 94-1487, at 29 (1976), reprinted in 1976 U.S.C.A.N. 6604, 6628).

⁸¹ *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992) (emphasis added).

⁸² *Flatow v. Islamic Republic of Iran*, 76 F. Supp. 2d 16, 23 (D.D.C. 1999).

3. *The Vienna Convention on Diplomatic Relations*

Flatow's effort to enforce writs of attachment against Iran's diplomatic properties not only illustrates the tension between the FSIA's execution provisions and other domestic laws, but also its potential conflicts with international law. In particular, the United States argued that attachment of Iran's former embassies and consulates would violate the United States' obligations under the Vienna Convention on Diplomatic Relations (VCDR).⁸³ Ratified by the United States in 1972, the primary function of the VCDR⁸⁴ is to facilitate effective diplomatic interaction in the international community by providing for the integrity and security of embassies and consulates.⁸⁵ The provision of the VCDR most pertinent to the *Flatow* litigation was Article 45(a), which expressly requires each nation to protect the diplomatic property of foreign states during periods of diplomatic hostility: "If diplomatic relations are broken off between two States . . . (a) the receiving State must, even in case of armed conflict, respect and protect the premises of the mission, together with its property and archives"⁸⁶

Accordingly, the United States argued that the district court must quash the writ of attachment on Iran's diplomatic properties, which both parties conceded were part of the Iranian embassy within the meaning of the VCDR.⁸⁷ Flatow attempted to sidestep this unfavorable Article 45(a) language by arguing that the United States no longer owed a duty to protect Iran's diplomatic properties under the VCDR.⁸⁸ On November 4, 1979, Iran committed what Flatow characterized as "the most heinous violation of reciprocal diplomatic obligations in modern history" by seizing the American Embassy in Tehran and holding fifty-two American diplomats hostage for 444 days.⁸⁹ Therefore, under governing principles of international law,⁹⁰ the

⁸³ See Statement of Interest of the United States at 13-14, *Flatow* (No. 97-396 (RCL)).

⁸⁴ Vienna Convention on Diplomatic Relations, *done* Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95.

⁸⁵ See *id.*

⁸⁶ *Id.* art. 45(a), 23 U.S.T. at 3248, 500 U.N.T.S. at 122.

⁸⁷ Of the three pieces of property in dispute, one was the former residence of the ambassador and the other two were residences of other high-ranking Iranian diplomats. See Statement of Interest of the United States at 13-14, *Flatow* (No. 97-396 (RCL)). Under the VCDR, an ambassador's residence is explicitly considered part of the embassy premises, and the treaty accords other diplomatic residences the same status and protection as the embassy itself. See Vienna Convention on Diplomatic Relations, *supra* note 84, arts. 1(i), 30, 23 U.S.T. at 3231, 3240, 500 U.N.T.S. at 98, 110.

⁸⁸ See Plaintiff's Memorandum in Response to the Statement of Interest of the United States at 4, *Flatow* (No. 97-396 (RCL)).

⁸⁹ *Id.*

⁹⁰ See Vienna Convention on the Law of Treaties, *adopted* May 23, 1969, art. 60(2)(b), S. EXEC. DOC. NO. L, 92-1, at 11, 27 (1971), 1155 U.N.T.S. 331, 346; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 335(2)(b) (1986).

United States could (and should) respond to Iran's breach by suspending its treaty obligations to Iran. Consequently, Flatow asserted that enforcement of the writs of attachment on Iran's diplomatic properties *would* be consistent with international law.⁹¹

In response, the United States convincingly argued that the VCDR anticipates the possibility of a material breach and specifically provides for the continuing enforcement of the treaty's provisions in Article 45(a), which confers precise obligations on the host country when controversial events cause the termination of diplomatic relations.⁹² Under the government's theory, President Carter's decision to suspend diplomatic relations with Iran did not extinguish America's obligations under the VCDR, but instead triggered its particular obligation to protect and maintain Iran's diplomatic properties under Article 45(a).⁹³

More significantly, the government also asserted that the district court has no constitutional authority to declare that the United States was authorized to disregard its obligations under the VCDR in response to Iran's alleged material breach.⁹⁴ This position has significant support. As the Supreme Court articulated in *United States v. Curtiss-Wright Export Corp.*,⁹⁵ the executive branch has the sole discretion to determine whether the United States remains bound to a multilateral treaty:

"The nature of foreign negotiations requires caution The necessity of such caution and secrecy was one cogent reason for vesting the power of making treaties in the President, with the advice and consent of the Senate"

The marked difference between foreign affairs and domestic affairs in this respect is recognized by both houses of Congress⁹⁶

Similarly, the *Restatement (Third) of Foreign Relations* observes that the exclusive authority to declare the existence of a material breach and to administer the United States' response is entrusted to the executive branch.⁹⁷ Accordingly, the role of the federal judiciary with respect to

⁹¹ See Plaintiff's Memorandum in Response to the Statement of Interest of the United States at 5-6, *Flatow* (No. 97-396 (RCL)).

⁹² See Reply Memorandum in Support of Motion to Quash at 19-20, *Flatow* (No. 97-396 (RCL)).

⁹³ See Statement of Interest of the United States at 13-14, *Flatow* (No. 97-396 (RCL)).

⁹⁴ See Reply Memorandum in Support of Motion to Quash at 21, *Flatow* (No. 97-396 (RCL)).

⁹⁵ 299 U.S. 304 (1936).

⁹⁶ *Id.* at 320-21 (quoting Letter from George Washington to the House of Representatives (Mar. 30, 1776), in I JAMES D. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1798-1908, at 194, 194-95 (1908)).

⁹⁷ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 335 cmt. b (1986).

international treaties is simply to interpret them according to their terms unless they violate the Constitution.⁹⁸

Although the district court did not predicate its decision to quash the writs of attachment on Article 45(a) of the VCDR, the looming conflict between the execution provisions of the FSIA and the United States' international obligations provokes troubling questions for plaintiffs like Flatow. Independent of the normative significance of the United States' ratification of the VCDR, there are important prudential considerations that militate against allowing plaintiffs to attach the properties of foreign countries that are expressly protected under multilateral treaties. First, a permissive approach to enforcing writs of attachment could provoke retaliation against American diplomatic properties overseas. As the government observed during the post-judgment phase of the *Flatow* litigation:

In order effectively to hold other countries to their obligations under the VCDR, the United States must adhere to its own obligations. Allowing the attachment of the diplomatic property at issue in this case could set a precedent, jeopardizing the ability of the United States to protect its missions abroad from similar acts by foreign governments.⁹⁹

Allowing plaintiffs to attach diplomatic properties in violation of international law also threatens to discourage state sponsors of terrorism from resuming normal diplomatic relations with the United States. In *Flatow*, the government argued that "deprivation of an embassy at the behest of a private litigant . . . could encourage a judgment debtor state to break off . . . diplomatic relations with the United States. Such a foreseeable consequence . . . would seriously impinge on the President's diplomatic authority."¹⁰⁰ The government's contention was particularly germane to Flatow's verdict against Iran; after the U.S. embassy hostage crisis in Iran in 1981, the United States and Iran signed the Algiers Accords, a bilateral treaty that created a tribunal in which nationals of one country could bring claims against the

⁹⁸ The Supreme Court agrees:

The treaty is therefore a law made by the proper authority, and the courts of justice have no right to annul or disregard any of its provisions, unless they violate the Constitution of the United States. It is their duty to interpret it and administer it according to its terms.

Doe v. Braden, 57 U.S. (16 How.) 635, 657 (1853).

⁹⁹ Statement of Interest of the United States at 15, *Flatow* (No. 97-396 (RCL)); see also *The Foreign Sovereign Immunities Act: Hearing on S. 825 Before the Subcomm. on Courts & Admin. Practice of the Senate Comm. on the Judiciary*, 103d Cong. 15 (1994) (prepared statement of Jamison S. Borek) ("In cases involving deliberate governmental wrongdoing, moreover, domestic measures directed against state property could involve particular sensitivity, given the potential for retaliation and disruption of relations.").

¹⁰⁰ United States' Post-Hearing Supplemental Memorandum of Points and Authorities at 16, *Flatow* (No. 97-396 (RCL)).

government of the other country for arbitration.¹⁰¹ Under the terms of the Algiers Accords, decisions of the tribunal are binding on Iran and the United States, and tribunal awards are enforceable in the courts of either country.¹⁰²

Given both countries' efforts to repair their diplomatic relationship following the Iran hostage crisis, judicial enforcement of writs of attachment against Iranian property might be perceived as an unwarranted act of hostility and meddling that could unravel the Algiers Accords and discourage other hostile nations from making diplomatic overtures to the United States. Under such circumstances, it is not at all surprising that the VCDR has been interpreted to deprive domestic plaintiffs of their opportunity to satisfy judgments under the FSIA.

B. The Barrier of Executive Discretion

Notwithstanding the roadblocks presented by domestic law and the United States' treaty obligations, the most daunting obstacle to the satisfaction of judgments under the FSIA is the President's discretion to waive the FSIA's immunity exceptions. The FSIA empowers the President to waive a plaintiff's right to attach foreign assets, even when doing so presents no conflict with domestic or international law. The legislative and judicial branches are understandably reluctant to interfere with the President's authority to use the domestic resources of state sponsors of terrorism as a "bargaining chip" in diplomatic negotiations.¹⁰³

1. *Blocked Assets*

Under the International Emergency Economic Powers Act (IEEPA),¹⁰⁴ the President is empowered to "compel, nullify, . . . or prohibit, any . . . transfer . . . with respect to, or transactions involving, any property" subject to the jurisdiction of the United States, in which any foreign country has any interest.¹⁰⁵ On November 14, 1979, President Carter invoked his IEEPA powers to declare a national emergency after concluding that the policies and actions of the Iranian government created an "unusual and extraordinary threat to the na-

¹⁰¹ See Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, Jan. 19, 1981, U.S.-Iran, DEP'T ST. BULL., Feb. 1981, at 3 [hereinafter Algiers Accords].

¹⁰² *Id.* art. IV, DEP'T ST. BULL., Feb. 1981, at 4.

¹⁰³ See *Dames & Moore v. Regan*, 453 U.S. 654, 673-74 (1981).

¹⁰⁴ 50 U.S.C. §§ 1701-1706 (1994 & Supp. V 1999).

¹⁰⁵ *Id.* § 1702(a)(1)(B) (1994). Under the IEEPA, the President's authority "may be exercised to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat." *Id.* § 1701(a).

tional security, foreign policy and economy of the United States."¹⁰⁶ President Carter's executive order blocked all property and interests in property of the Iranian government that were within the United States at the time, and that subsequently came within the jurisdiction of the United States.¹⁰⁷ Significantly, every American president has renewed this executive order since 1979.¹⁰⁸ After issuing the executive order, President Carter authorized the Treasury Department to implement regulations that nullified and voided any "attachment, judgment, decree, lien, execution, garnishment, or other judicial process"¹⁰⁹ with respect to property of Iran, and provided that "licenses [or] authorizations" bestowing rights to Iranian property could be "amended modified, or revoked at any time."¹¹⁰

The practical significance of a blocking order is that the courts perceive it as a strong signal of the President's intent to exert federal control over a foreign state's property. Recognizing Congress's transfer of authority to the President under the IEEPA, courts have traditionally held that presidential decisions nullifying attachments on property are "supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it."¹¹¹ The power of this judicial presumption is augmented by the federal judiciary's expansive reading of the IEEPA as superseding all individual interests in foreign assets without limitation.¹¹² Consequently, courts are unsympathetic to plaintiffs who argue that Congress did not intend the IEEPA to preempt their attempts to satisfy judgments through writs of attachment on blocked properties. The Supreme Court emphatically rejected this argument in *Dames & Moore v. Regan*:

¹⁰⁶ Exec. Order No. 12,170, 3 C.F.R. 457 (1980), *reprinted in* 50 U.S.C. § 1701 note (1994).

¹⁰⁷ *See id.*

¹⁰⁸ Most recently, President Bush renewed the order in November 2001. *See* Continuation of Iran Emergency, 66 Fed. Reg. 56,966 (Nov. 13, 2001).

¹⁰⁹ 31 C.F.R. § 535.203(e) (2001).

¹¹⁰ *Id.* § 501.803.

¹¹¹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

¹¹² *See* *Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Auth.*, 651 F.2d 800, 807 (1st Cir. 1981). The court explained:

[Appellee] argues that IEEPA does not supply the President with power to override judicial remedies, such as attachments and injunctions, or to extinguish "interests" in foreign assets held by United States citizens. But we can find no such limitation in IEEPA's terms. The language of IEEPA is sweeping and unqualified. It provides broadly that the President may void or nullify the "exercising [by any person of] any right, power or privilege with respect to . . . any property in which any foreign country has any interest"

Id. (emphasis and alterations in original) (quoting 50 U.S.C. § 1702(a)(1)(B)).

This Court has previously recognized that the congressional purpose in authorizing blocking orders is “to put control of foreign assets in the hands of the President” Such orders permit the President to maintain the foreign assets at his disposal for use in negotiating the resolution of a declared national emergency. The frozen assets serve as a “bargaining chip” to be used by the President when dealing with a hostile country. Accordingly, it is difficult to accept petitioner’s argument because the practical effect of it is to allow individual claimants throughout the country to minimize or wholly eliminate this “bargaining chip” through attachments, garnishments, or similar encumbrances on property. Neither the purpose the statute was enacted to serve nor its plain language supports such a result.¹¹³

In light of this precedent, courts predictably interpret the FSIA’s execution provisions to relegate plaintiffs’ claims to a subservient status relative to the federal government’s interests. As the *Dames & Moore* Court elaborated:

Petitioner . . . asserts that Congress divested the President of the authority to settle claims when it enacted the [FSIA]. . . .

We disagree. . . .

. . . The FSIA was thus designed to remove one particular barrier to suit, namely sovereign immunity, and cannot be fairly read as *prohibiting* the President from settling claims of United States nationals against foreign governments.¹¹⁴

Frustrated by the judicial presumption that the IEEPA universally trumps plaintiffs’ FSIA rights, Congress amended the FSIA during the *Flatow* litigation to grant plaintiffs a statutory right to attach foreign assets blocked by the executive branch. The newly created § 1610(f)(1)(A) of the FSIA was passed as a rider provision to the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, and provides as follows:

Notwithstanding any other provision of law, including but not limited to section 208(f) of the Foreign Missions Act, and except as provided in subparagraph (B), any property with respect to which financial transactions are prohibited or regulated pursuant to section 5(b) of the Trading with the Enemy Act, section 620(a) of the Foreign Assistance Act of 1961, sections 202 and 203 of the International Emergency Economic Powers Act or any other proclamation . . . shall be subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state . . . claiming such property is not immune under section 1605(a)(7).¹¹⁵

¹¹³ *Dames & Moore v. Regan*, 453 U.S. 654, 673–74 (1981) (citation omitted).

¹¹⁴ *Id.* at 684–85 (emphasis in original).

¹¹⁵ Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105–277, division A, sec. 101(h), tit. 1, sec. 117(a), § 1610(f)(1)(A), 112 Stat.

Despite this effort, however, Congress was unwilling to fully divest the executive branch of its discretion originally granted by the IEPA. Thus, the legislature felt compelled to also include an executive waiver provision that grants the President the authority to waive this exception to immunity from attachment "in the interest of national security."¹¹⁶ In practical terms, this provision completely eviscerated the pro-plaintiff provisions in the amended FSIA: the amended FSIA altered the status quo only insofar as the President was required to take the affirmative step of invoking the executive waiver to thwart plaintiffs' efforts to attach blocked assets.¹¹⁷ Predictably, on the same day that President Clinton signed the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 into law, he formally exercised the waiver provision to waive the rights of plaintiffs to attach blocked assets under the new legislation.¹¹⁸

Caught in the middle of this legislative and executive wrangling was Stephen Flatow, who in the meantime was attempting to satisfy his judgment by obtaining a writ to attach Iran's Foreign Military Sales (FMS) accounts, and all related accounts.¹¹⁹ Originally created by the Arms Export Control Act,¹²⁰ the FMS program established sales accounts for foreign countries authorized to purchase military products and services from the United States Department of Defense.¹²¹ Funds received from eligible countries are deposited into their FMS accounts, and the Secretary of Treasury withdraws funds from the relevant account after transferring arms or military services to the participating country.¹²²

When President Carter froze Iran's FMS account assets pursuant to his executive order on November 4, 1979,¹²³ there was a \$400 mil-

2681, 2681-491 (1998) (codified at 28 U.S.C. § 1610(f)(1)(A) (Supp. V 1999)) (citations omitted).

¹¹⁶ *Id.* sec. 117(d), 112 Stat. at 2681-492, reprinted in 28 U.S.C. § 1610 note (Supp. V 1999) (Waiver of Exception to Immunity from Attachment or Execution).

¹¹⁷ See S. Jason Baletsa, Comment, *The Cost of Closure: A Reexamination of the Theory and Practice of the 1996 Amendments to the Foreign Sovereign Immunities Act*, 148 U. PA. L. REV. 1247, 1294-95 (2000) ("It is axiomatic that the attachment of property of a designated state sponsor of terrorism will always threaten national security. . . . If such a nation were not a threat to national security, it would not have been so designated as a terrorist state.").

¹¹⁸ Determination No. 99-1, 63 Fed. Reg. 59,201 (Nov. 2, 1998), reprinted in 28 U.S.C. § 1610 note (Supp. V 1999). President Clinton justified his decision to exercise the executive waiver by stating that: "I hereby determine that the requirements of section 117 . . . would impede the ability of the President to conduct foreign policy in the interest of national security and would, in particular, impede the effectiveness of such prohibitions and regulations upon financial transactions" *Id.*

¹¹⁹ *Flatow v. Islamic Republic of Iran*, C.A. No. 97-396 (RCL), 2000 U.S. Dist. LEXIS 8910 (D.D.C. June 6, 2000).

¹²⁰ 22 U.S.C. §§ 2751-2799aa-2 (1994 & Supp. V 1999).

¹²¹ *Flatow*, 2000 U.S. Dist. LEXIS 8910, at * 4.

¹²² *Id.*

¹²³ See *supra* notes 106-08 and accompanying text.

lion balance in the account.¹²⁴ After Flatow's earlier writ of attachment for "'all credits held by the United States to the benefit of [Iran],' including U.S. Treasury funds owed to Iran in accordance with an award of the Iran-United States Claims Tribunal" was quashed by the district court on grounds of sovereign immunity,¹²⁵ he made a final attempt to satisfy his judgment by filing another writ of attachment for these FMS funds.¹²⁶ However, the court invoked its prior ruling to foreclose this avenue of execution as well, ruling that sovereign immunity similarly barred the attachment of the FMS funds.¹²⁷

The United States had initially raised the defense of sovereign immunity in litigating the viability of Flatow's writ to attach blocked assets in the United States Treasury (i.e., the tribunal award).¹²⁸ Specifically, the government had asserted that in light of President Clinton's exercise of the executive waiver, the court could not have enforced Flatow's writ on Iran's tribunal award absent an explicit waiver of sovereign immunity authorizing the attachment of funds in the United States Treasury.¹²⁹ As the federal district court observed, however, Congress can only waive the sovereign immunity of the United States through unambiguous statutory language, and not by implication.¹³⁰ Citing a Seventh Circuit opinion, the court noted that "'the principle of governmental immunity is simple: anyone who seeks money from the Treasury needs a statute authorizing that relief.'"¹³¹ Without explicit consent, "'[i]t is axiomatic that the doctrine of sovereign immunity prevents a judgment creditor from attaching federal property.'"¹³² Indeed, the United States pointed to the Supreme Court's observation in *Lane v. Pena* that "[a] waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text and will not be implied. Moreover, a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign."¹³³

¹²⁴ *Flatow*, 2000 U.S. Dist. LEXIS 8910, at *5-*6.

¹²⁵ *Flatow v. Islamic Republic of Iran*, 74 F. Supp. 2d 18, 20-26 (D.D.C. 1999).

¹²⁶ *Flatow v. Islamic Republic of Iran*, C.A. No. 97-396 (RCL), 2000 U.S. Dist. LEXIS 8910, at *3-*4 (D.D.C. June 6, 2000).

¹²⁷ *Id.* at *6-*9.

¹²⁸ *Flatow*, 74 F. Supp. 2d at 20.

¹²⁹ See Reply Memorandum of the United States in Support of Motion to Quash Writ of Attachment and Expedited Disposition at 3-5, *Flatow v. Islamic Republic of Iran*, 74 F. Supp. 2d 18 (D.D.C. 1999) (No. 97-396 (RCL)).

¹³⁰ *Flatow*, 74 F. Supp. 2d at 22.

¹³¹ *Id.* (quoting *Automatic Sprinkler Corp. v. Darla Envtl. Specialists*, 53 F.3d 181, 182 (7th Cir. 1995)).

¹³² *Id.* (alteration in original) (quoting *Neukirchen v. Wood County Head Start, Inc.*, 53 F.3d 809, 811 (7th Cir. 1995)).

¹³³ 518 U.S. 187, 192 (1996) (citations omitted); accord *United States v. Williams*, 514 U.S. 527, 531 (1995); *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 37 (1992) ("[T]he

As recently as 1999, the Supreme Court reinforced these principles in *Department of the Army v. Blue Fox, Inc.*: "[O]ur precedent establish[es] that sovereign immunity bars creditors from attaching or garnishing funds in the Treasury or enforcing liens against property owned by the United States,"¹³⁴ holding that the "respondent's action to enforce an equitable lien falls outside of [the statutory] waiver of sovereign immunity."¹³⁵ Ultimately the district court had agreed, ruling to quash the writ of attachment on the block assets within the United States Treasury, observing:

[I]t is undisputed that the funds plaintiff seeks to attach are held in the U.S. Treasury. . . . Thus, controlling authority requires this Court to find that the Treasury funds at issue here are U.S. property and that the writ of attachment constitutes a suit against the United States, which is barred by sovereign immunity.¹³⁶

2. *The Algiers Accords*

As noted above, the Algiers Accords established the Iran-U.S. Claims Tribunal in which the nationals of one country can bring claims against the government of the other country for arbitration.¹³⁷ Under its terms, decisions of the tribunal are binding, and awards are enforceable in the courts of either country.¹³⁸ In February 1993, Iran sued the United States in the tribunal claiming that it violated the Algiers Accords when the Second Circuit Court of Appeals, in *Iran Air Industries v. Avco Corp.*,¹³⁹ did not enforce a prior tribunal award.¹⁴⁰ After conducting a trial, the tribunal ruled in favor of Iran and awarded it \$5,042,481.65 in damages.¹⁴¹

After receiving notice of the pending judgment against the United States, Flatow attempted to attach these damage payments owed by the United States to satisfy his own judgment.¹⁴² Citing § 1610(f)(1)(A) of the FSIA, Flatow argued that the award of the Iran-U.S. Claims Tribunal constituted property belonging to Iran under the Iranian Assets Control Regulations,¹⁴³ and was thus subject to at-

'unequivocal expression' of elimination of sovereign immunity that we insist upon is an expression in statutory text."); *Lehman v. Nakshain*, 453 U.S. 156, 161 (1981).

¹³⁴ 525 U.S. 255, 264 (1999) (citation omitted).

¹³⁵ *Id.* at 263.

¹³⁶ *Flatow v. Islamic Republic of Iran*, 74 F. Supp. 2d 18, 22 (D.D.C. 1999).

¹³⁷ See *Algiers Accords*, *supra* note 101.

¹³⁸ *Id.* art IV, DEP'T ST. BULL., Feb. 1981, at 4.

¹³⁹ 980 F.2d 141 (2d Cir. 1992).

¹⁴⁰ See *Islamic Republic of Iran v. United States*, Case No. A/27, Award No. 586-A27-FT (Iran-U.S. Cl. Trib., June 5, 1998), available at 1998 WL 1157733.

¹⁴¹ *Id.* para. 83(b).

¹⁴² See *Flatow v. Islamic Republic of Iran*, 74 F. Supp. 2d 18, 20 (D.D.C. 1999).

¹⁴³ 31 C.F.R. § 535.311 (2001).

tachment under the newly amended FSIA.¹⁴⁴ After President Clinton waived the exception to immunity for blocked assets, however, the government argued that the plaintiff could not legally attach the tribunal award. The United States' theory was that the funds which the United States was ordered to pay to Iran technically were held in the Treasury until the actual transfer to Iran, giving the United States a possessory interest in the funds.¹⁴⁵ As the Supreme Court stated in *Buchanan v. Alexander*: "So long as money remains in the hands of a disbursing officer, it is as much the money of the United States, as if it had not been drawn from the treasury."¹⁴⁶ Significantly, the D.C. Court of Appeals reiterated in *Arizona v. Bowsher* that "[w]hen the United States sets aside money for the payment of specific debts, it does not thereby lose its property interest in that money."¹⁴⁷ Therefore, absent a specific waiver of sovereign immunity, the *Flatow* court was powerless to enforce its writ of attachment on the judgment of the Claims Tribunal.¹⁴⁸ In the end, Flatow's inability to identify a valid waiver of sovereign immunity doomed his efforts to attach both Iran's FMS account and the judgment of the Iran-U.S. Claims Tribunal.

Flatow's futile effort to circumvent President Clinton's executive waiver illustrates the impotence of Congress's modifications to the attachment provisions of the FSIA. The President's authority to assert dominion over monies owed to foreign governments that are held in the United States Treasury leaves no avenue for plaintiffs to enforce writs of attachment. Funds held in the Treasury pending transfer are unattachable as a matter of law because FSIA plaintiffs cannot identify a legally cognizable waiver of sovereign immunity that would authorize attachment. Furthermore, once the funds are officially transferred, plaintiffs have no recourse to satisfy their judgments under the laws of the foreign sovereign. Thus the Catch-22 imposed by the executive waiver provision completely forecloses plaintiffs from obtaining relief unless the President willingly forgoes the waiver privilege granted by the statute. As discussed below, however, strong incentives exist for the President to invoke the executive waiver provision rather than allow plaintiffs to attach foreign assets.

III

ENTRENCHMENT OF THE STATUS QUO

As demonstrated above, the infirmities of hollow-rights legislation derive from the nature of their goal: to remedy noncommercial inju-

¹⁴⁴ See *Flatow*, 74 F. Supp. 2d at 22.

¹⁴⁵ See *id.* at 22-23.

¹⁴⁶ 45 U.S. (4 How.) 20, 20-21 (1846).

¹⁴⁷ 935 F.2d 332, 334 (D.C. Cir. 1991).

¹⁴⁸ See *Flatow*, 74 F. Supp. 2d at 22.

ries that implicate foreign actors. A fundamental component of this Note's blueprint for modifying the FSIA and other hollow-rights laws is the inability of Congress and the President to reform the execution and attachment process given the tradition of judicial deference to those two branches in the sphere of international relations. Indeed, the statutory modifications proposed in Part IV would be unnecessary if any one of three initiatives were implemented to resolve the difficulties of satisfying verdicts under the 1996 amendments. First, plaintiffs could voluntarily agree to settle their judgments through a no-fault compensation scheme administered by the executive branch. Second, Congress could eliminate the incidence of unsatisfiable judgments by decisively acting to either repeal the grant of jurisdiction in the 1996 amendments, or remove the President's discretion to waive the exception to immunity for blocked assets. Finally, in the absence of cooperation from either plaintiffs or Congress, the President could voluntarily agree to forgo the exercise of the waiver provision.

However, the fallout from the *Flatow* case demonstrates that none of these solutions are tenable for all litigants. Stephen Flatow and the federal government's failure to reach a cooperative equilibrium under the current statutory scheme signals the need for legislative change. A precise understanding of the individual and institutional forces that preclude implementation of these three initiatives is critical to understanding the inherent limitations of hollow-rights legislation, and frames the context for the reforms proposed in Part IV.

A. Plaintiffs Will Not Voluntarily Settle Their Judgments with the United States Government

In the aftermath of the President's decision to invoke the executive waiver provision, rumors circulated that the executive branch had offered Flatow a settlement according to which the President would finance a portion of Flatow's judgment from a victim's compensation fund administered by the Justice Department.¹⁴⁹ According to the *Legal Times*: "[T]he [A]dministration has offered to pay part of Flatow's judgment, possibly from the Justice Department's victims' rights or judgment funds. . . . Flatow has refused the offer because it would not 'serve as a deterrent against future conduct' by the Iranians."¹⁵⁰

Flatow's refusal to accept a partial settlement financed by American taxpayers reflects the undesirability of compromise solutions engineered by the executive branch that leave the resources of the defendant country intact. Plaintiffs who have lost loved ones to terrorist acts, suffered the agony of a trial, and done battle with their own

¹⁴⁹ Carrie Johnson, *Victim's Father, White House at Odds*, LEGAL TIMES, Nov. 22, 1999, at 3.

¹⁵⁰ *Id.*

President are unlikely to agree to a settlement at the eleventh hour simply to guarantee themselves some measure of financial compensation for their loss. Rather, plaintiffs have substantial motivation to fight for the day when the financial impact of satisfying a judgment in the hundreds of millions of dollars inflicts on the defendant country adequate retribution for the act that created the cause of action and deters it from funding similar acts of terrorism in the future.¹⁵¹ As one Senator remarked:

The Treasury Department has suggested using the Crime Victims Fund to satisfy these court judgments, but that proposal misses the point. Foreign countries that sponsor terrorism should have to pay a price for the toll that terrorist attacks take on families like the Flatows Making terrorist states pay that price will help deter them from engaging in terrorism in the future.¹⁵²

The existence and depth of these sentiments impose an important constraint on meaningful reform by eliminating any proposal that relies on the financial resources of the executive branch to placate plaintiffs under the FSIA. Ignoring these concerns, Congress passed the Victims of Trafficking and Violence Protection Act (VTVPA) in October 2000,¹⁵³ which offers incentives for plaintiffs with judgments to forgo punitive damages and attachment of foreign property in return for the satisfaction of their compensatory claims by the United States government.¹⁵⁴

Indeed, Congress sought to reconcile the seemingly incompatible objectives of compensation and retribution by incorporating a subrogation clause into the VTVPA that holds Iran liable for any funds paid in satisfaction of outstanding judgments against it.¹⁵⁵ In this manner Congress hoped to have it both ways by immediately compensating plaintiffs out of the United States Treasury, while offering ironclad assurances that Iran would be pressured to reimburse the United States for these payments. In fact, the language of the VTVPA goes so far as to stake the United States' diplomatic relationship with Iran on the repayment of these damage awards: "It is the sense of the Congress that the President should not normalize relations between the

¹⁵¹ See Micco, *supra* note 17, at 142 (stating that "[t]he primary goal of . . . plaintiffs is to have a court render . . . a judgment publicly with the prospect of inflicting financial retribution upon the offending state and its agent").

¹⁵² *Terrorism Hearing*, *supra* note 13, at 16 (statement of Sen. Frank R. Lautenberg).

¹⁵³ Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 2002, 114 Stat. 1464, 1541-43, *amending* 28 U.S.C. §§ 1606, 1610 note (1994 & Supp. V 1999).

¹⁵⁴ See Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 95 AM. J. INT'L L. 132, 137-39 (2001).

¹⁵⁵ Victims of Trafficking and Violence Protection Act of 2000, § 2002(c), 114 Stat. at 1543.

United States and Iran until the claims subrogated have been dealt with to the satisfaction of the United States."¹⁵⁶

B. Congress Will Neither Remove nor Guarantee the Rights of Plaintiffs to Execute Judgments Under the FSIA

In the effort to combat terrorist attacks against American citizens overseas, one might naturally assume that Congress and the President would have incentives to cooperate in order to present a unified stance against state sponsors of terrorism. Significantly, the events following the district court's judgment in *Flatow* starkly illustrate the conflicting institutional forces that have driven a rift between the legislative and executive branches over how to deter extraterritorial acts of terrorism against American citizens. These forces predominantly result from the substantially different roles played by Congress and the President in the democratic system. As political scholar James Q. Wilson points out, the elected representatives in Congress are primarily concerned with advocating the interests of their constituents.¹⁵⁷ Furthermore, Wilson observes that most voters who compose a senator or representative's constituency are concerned with the "here and now": "What happens now or in the near future is more important to most people than what happens in the distant future."¹⁵⁸ Therefore, Congress's legislative approach to deterring acts of terrorism, as articulated in the 1996 FSIA amendments, understandably seeks to deter, and yet to compensate individual victims of terrorism and their families with substantial judicial verdicts rendered and satisfied in an efficient manner.

In contrast, as the representative of a single national constituency, the President is more insulated from individual concerns, and thus more likely to seek a solution to terrorism that does not vindicate the interests of one particular plaintiff at the expense of other American terrorist victims and the public interest. Furthermore, as the constitutionally delegated head of state, the President is more inclined to seek solutions to terrorism through diplomacy and negotiation than through an expansion of jurisdiction to hear claims arising from acts of terrorism committed overseas.

The collision of these institutional forces has been exacerbated by the 1996 FSIA amendments for two reasons. First, the conflict between the President and Congress occurs within the confines of a strict zero-sum game. The scant availability of resources owned by

¹⁵⁶ *Id.* § 2002(d), 114 Stat. at 1543.

¹⁵⁷ JAMES Q. WILSON, *AMERICAN GOVERNMENT* 281 (4th ed. 1989) ("The way by which people get elected to Congress . . . produces legislators who are closely tied to local concerns . . .").

¹⁵⁸ *Id.* at 443.

state sponsors of terrorism forces the federal government to choose between satisfying substantial plaintiff verdicts, and using foreign-owned property as a bargaining tool in negotiations. Second, Congress has tempered its populist approach to deterring terrorism by endowing the executive branch with the discretion to override individual plaintiff interests in times of national emergency.

As discussed earlier, the resulting tug-of-war between Congress and the President could potentially be resolved in one of three ways. First, Congress could on its own initiative repeal the grant of jurisdiction under the 1996 amendments. Second, Congress could remove the President's discretion to void writs of attachment on blocked assets by repealing the executive waiver provision or explicitly waiving the United States' sovereign immunity. Finally, the President could voluntarily forbear from exercising his statutory authority to invoke the executive waiver provision.

1. *Congress Will Not Repeal the Grant of Jurisdiction Under the 1996 Amendments*

When Congress introduced the 1996 amendments to the FSIA in the Anti-Terrorism and Effective Death Penalty Act of 1996, the rhetoric surrounding the amendments signaled the legislature's intent to place a prohibitive price tag on targeting American citizens for violent acts overseas. As New Jersey Congressman Jim Saxton argued:

Terrorists operate around this world, and there is seldom a price to pay. I thought in 1996, when we passed this law, we took a step in the right direction This is a tool for us to use as a civilized society to prevent acts of terrorism by letting would-be terrorists know that there is a price to pay.¹⁵⁹

However, by couching the 1996 amendments as a necessary step in the process of curbing terrorism, Congress left itself with no political recourse for repealing the legislation in the event that plaintiffs were unable to satisfy their judgments under the FSIA. Not only would it be difficult to repeal the legislation in a way that would be palatable to the American public, but Congress also has no incentive to do so because legislators have successfully deflected the blame for the rash of unsatisfied judgments to the executive branch. As a New York Congressman exclaimed while excoriating the White House:

[T]he Flatow family has gotten a judgment against the government of Iran, which sponsors terrorism. It is absolutely obscene that we would be in a position of taking the side of Iran. . . .

. . . .

¹⁵⁹ 144 CONG. REC. H5712 (daily ed. July 16, 1998) (statement of Rep. Saxton).

It is ludicrous that the State Department had opposed [the attachment of Iranian assets]. Iran must pay a price for the continuing support of terrorism.¹⁶⁰

Indeed, in a public relations victory for Congress, Flatow himself publicly criticized President Clinton for waiving the exception to immunity for blocked assets: "If President Clinton wants me to trust that his administration is tough on terrorists . . . [his] action is not the way to get there from here,"¹⁶¹

2. *Congress Will Not Remove the President's Discretion to Waive the Exception for Immunity*

While Congress is unlikely to repeal the grant of jurisdiction under the 1996 amendments, it is similarly reluctant to eliminate the President's discretion to waive the rights of plaintiffs to blocked assets. A sentiment frequently expressed in the wake of the September 11, 2001 attacks on the World Trade Center is that the President should have the authority to transfer foreign assets back to state sponsors of terrorism in exchange for a guarantee not to target American citizens, or in exchange for intelligence on terrorist networks in neighboring countries. Some senators and representatives recognized that the removal of all barriers to the attachment and execution of foreign assets would not only leave the President with no leverage to negotiate with foreign countries, but could provoke retaliation against American assets overseas. The cumulative weight of these arguments will likely scuttle proposals for an absolute removal of the President's discretion. As one Senator observed in 1999:

[W]hen you deal with these terrorist countries, whoever they are, and as much hatred as we develop for them, for the acts that they have committed against innocent people, we do have to trust in some form a government's judgment in how you resolve conflict

....

....

. . . [A]s much as I despise things that are going on in Iran, I would rather have them stop making atomic and nuclear weapons and join the family of civilized nations. So if there is a bargaining chip that can be used, we have to decide how the chip is played.¹⁶²

Citing specific examples of successful presidential negotiations, other Congressmen have been more outspoken when opposing legislation that would deprive the President of instrumental assets that bring hostile countries to the bargaining table:

¹⁶⁰ *Id.* at H7267 (daily ed. Aug. 5, 1998) (statement of Rep. Engel).

¹⁶¹ *Terror Victim's Kin Criticizes Clinton Waiver*, WASH. POST, Oct. 26, 1998, at A15 (first two alterations in original).

¹⁶² *Terrorism Hearing*, *supra* note 13, at 19 (statement of Sen. Frank R. Lautenberg).

[T]his amendment would substantially undermine the President's ability to use such assets as leverage when economic sanctions are being used to modify the behavior of a foreign state or in negotiations with that state. It said, for instance, that if private claims were allowed to execute judgments ahead of these assets, the President would be deprived of their use as leverage to gain concessions from [foreign states] in the negotiating process¹⁶³

In the final analysis, the self-imposed limbo caused by Congress's unwillingness to either remove courts' authority to adjudicate claims arising from terrorist acts occurring overseas, or to remove all obstacles to the attachment and execution of assets belonging to state sponsors of terrorism, places additional constraints on any proposal for reform. Under the assumption that plaintiffs will continue to have a right of action in United States courts, a solution to the problem of unsatisfied judgments necessarily implicates the President's willingness to relax executive control over blocked assets of foreign countries. However, as discussed below, it is unlikely that the President will ever completely disavow the use of the executive waiver provision.

C. The President Will Not Voluntarily Forgo the Use of the Executive Waiver Provision

As the formal head of state and the elected representative of a single national constituency, a President has strong incentives to avail herself of the maximum authority granted by Congress to protect foreign assets from attachment by plaintiffs. First, any President with limited assets for diplomatic leverage will be reluctant to allow these assets to be attached by FSIA plaintiffs to satisfy a judgment. Stuart Eizenstat, the Deputy Secretary of the Treasury, underscored the importance of presidential control of blocked assets in testimony before Congress:

In the case of Vietnam, the leverage provided by approximately \$350 million in blocked assets . . . played an important role in persuading Vietnam's leadership to address important U.S. concerns in the normalization process. These concerns included full accounting of POWs and MIAs from the Vietnam War, [as well as] accepting responsibility for over \$200 million in U.S. claims

In addition, blocked assets have helped us to secure equitable settlements of claims of U.S. nationals against such countries as Romania, Bulgaria, and Cambodia in the context of normalization of relations.¹⁶⁴

¹⁶³ 144 CONG. REC. H5711 (daily ed. July 16, 1998) (statement of Rep. Obey).

¹⁶⁴ *Terrorism Hearing*, *supra* note 13, at 35 (prepared statement of Stuart E. Eizenstat, Deputy Secretary of the Treasury).

Second, the President's position differs from Congress's in that he cannot solely concern himself with the here-and-now interests of domestic constituents, but must also safeguard the long-term interests of American foreign policy by fostering long-term relationships with foreign countries. To that end, the President must be sensitive to the welfare of American citizens living in foreign countries, the manner in which American foreign policy is administered and viewed overseas, and the reputation of the United States in the international community. Thus, if attachment of foreign assets in the United States could provoke a reciprocal response against United States citizens or assets overseas, the President is in the best position to take remedial actions in the United States to protect Americans living abroad. After invoking the executive waiver provision, the White House justified the President's actions in a press release: "If the U.S. permitted attachment of diplomatic properties, then other countries could retaliate, placing our embassies and citizens overseas at grave risk. Our ability to use foreign properties as leverage in foreign policy disputes would also be undermined."¹⁶⁵

Finally, as the elected representative of a single national constituency, the President has stronger institutional incentives than Congress to safeguard the interests of American terrorist victims who suffered injuries before the introduction of the 1996 amendments to the FSIA, as well as the interests of victims who have not yet obtained a judgment. Given the limited availability of resources belonging to state sponsors of terrorism within America's borders, the President is likely to invoke the executive waiver provision to prevent the arbitrary distribution of foreign assets to plaintiffs on a "first-come, first-serve" basis. According to Eizenstat:

[The legislation] would benefit one small group of Americans over a far larger group of Americans. Those with judgments in court since the FSIA amendments of 1996 would benefit over others, many of whom have waited decades to be compensated by Cuba and Iran for both the loss of property and the loss of the lives of their loved ones, and would leave no assets for their claims and others that may follow.¹⁶⁶

One congressman used Cuba to illustrate the importance of allowing executive discretion to waive the exception to immunity for blocked assets: "[W]ith respect to Cuba[,] there are 5,911 claims totaling \$1.9 billion, but there are only \$148.3 million in Cuban government assets

¹⁶⁵ Press Release, White House Office of the Press Secretary, Waiver of Law Allowing Judicial Attachment of Diplomatic Properties (Oct. 21, 1998), available at <http://www.fas.org/irp/news/1998/10/981021-wh2.htm>.

¹⁶⁶ *Terrorism Hearing*, *supra* note 13, at 34 (prepared statement of Stuart E. Eizenstat, Deputy Secretary of the Treasury).

available to justify those claims. This proposal would contribute to a first-come, first-serve approach, which would not be equitable to those people who are left out."¹⁶⁷

A second class of plaintiffs who would suffer from a liberal attachment policy under the 1996 amendments are American terrorist victims who pursue claims against state sponsors of terrorism in alternative forums. For example, American plaintiffs with judgments from the Iran-U.S. Claims Tribunal would be relegated to the same position as Flatow if the attachment of Iranian assets in the United States provoked Iran to withdraw from the Algiers Accords. In fact, as the government observed during *Flatow*, the district court's very willingness to entertain Flatow's attachment of a tribunal award owed to Iran undermined the legitimacy of American claims currently before the tribunal:

The delay of payment occasioned by the outstanding writ of attachment now threatens to undermine the position of the United States before the Tribunal, and has now formally been raised by Iran as an issue in [a case raised by the United States against Iran] . . . based on Iran's violation of the Algiers Accords.¹⁶⁸

In conclusion, it should come as no surprise that a President employing a utilitarian approach to disbursing the limited assets of FSIA defendants would be loathe to allow a small subsection of plaintiffs to execute judgments that swallow the limited assets belonging to state sponsors of terrorism. President Clinton's decision to exercise the executive waiver provision implicitly recognized that those assets could either be divided more equitably among a larger number of plaintiffs, or reserved for use in negotiations with state sponsors of terrorism. Thus, in formulating a proposal for reform, the President's strong incentives to protect the immunity of blocked assets impose the significant constraint that a workable solution cannot depend on the President's willingness to forgo the use of the executive waiver provision.

IV

A PROPOSAL FOR REFORM

Even before the introduction of the 1996 amendments, courts recognized the tension between the jurisdictional grant and remedial authority provided by the FSIA. As the Third Circuit noted in *City of Englewood v. Socialist People's Libyan Arab Jamahiriya*:

¹⁶⁷ 144 CONG. REC. H5711 (daily ed. July 16, 1998) (statement of Rep. Obey).

¹⁶⁸ Renewed Request of the United States for Expedited Consideration of Motion to Quash at 2, *Flatow v. Islamic Republic of Iran*, 74 F. Supp. 2d 8 (D.D.C. 1999) (No. 97-396 (RCL)).

The exceptions to the immunity from execution are not precisely equivalent to the exceptions to immunity from adjudication. The latter permits adjudication of actions based upon commercial activity in the United States and of disputes over title to property without regard to commercial activity. Section 1610(a), however, permits execution on property of a foreign state only if it is used for commercial activity in the United States, and then only in the instances listed in that subsection.¹⁶⁹

Because of the unique nature of the jurisdictional grant under the 1996 amendments, the flaws in the FSIA's execution provisions have had a more profound impact on plaintiffs seeking to satisfy judgments for noncommercial injuries.¹⁷⁰ The futility of the execution process under the 1996 amendments not only takes a substantial financial and emotional toll on plaintiffs, but also diminishes the public's perception of the executive branch¹⁷¹ and creates friction between Congress and the President.¹⁷²

These adverse consequences primarily accrue once the plaintiff has invoked the judicial system and secured a judgment. From the plaintiff's perspective, substantial financial and emotional resources are expended through negotiating the turbulent process of initiating a lawsuit, obtaining a judgment, and struggling with the executive branch to execute the judgment. Furthermore, institutional friction between Congress and the President largely concerns the treatment of plaintiffs who have already obtained judgments. Whenever a court issues an order stating that a plaintiff has been wronged and is legally entitled to damages, that order adopts independent normative significance. The moral imperative to enforce a court-ordered judgment implicates not only abstract principles of justice, but also the integrity of the judicial system and the legitimacy of legislation purporting to create meaningful rights for terrorist victims. Invoking *Flatow*, one Congressman argued: "[W]e are saying simply that a judgment has been declared and these people have the right to exercise that judgment, which they won based on the right to sue, which we in the Congress gave them."¹⁷³ Such rhetoric demonstrates that tensions arising from the 1996 amendments to the FSIA increase exponentially with regard to the post-judgment phase of cases like *Flatow*.

¹⁶⁹ 773 F.2d 31, 36 (3d Cir. 1985).

¹⁷⁰ As a *Washington Post* editorial stated: "Congress never should have passed, nor President Clinton signed, a law that could only offer Mr. Flatow justice by depriving the administration of control over important instruments of foreign policy." Editorial, *Lawsuits and Terrorism*, WASH. POST, Dec. 26, 1999, at B6.

¹⁷¹ *Terror Victim's Kin Criticizes Clinton Waiver*, *supra* note 161 (quoting Stephen Flatow as saying that "[p]rotecting Iranian assets of any type is equivalent to the FBI director saying he's tough on gangsters but needs to be sensitive to the Mob").

¹⁷² 144 CONG. REC. H7267-68 (daily ed. Aug. 5, 1998).

¹⁷³ *Id.* at H5712 (daily ed. July 16, 1998) (statement of Rep. Engel).

Thus, any effective proposal for reforming hollow-rights legislation like the FSIA must incorporate four distinct elements. First, plaintiffs must have the means to attach the assets of the defendants themselves, and cannot rely on settlement proposals administered by the executive branch. Second, the proposal must squarely confront Congress's reluctance to fix the outcome of plaintiffs' judgment executions by either eliminating the grant of jurisdiction under the 1996 amendments or removing the President's discretion to waive the exception to immunity for blocked assets. Third, any proposal must circumvent the strong presidential incentives to prevent any attachment of foreign assets as running counter to the national interest. Finally, a proposal for reform should address these concerns at the jurisdictional level before plaintiffs invest significant financial and emotional resources in obtaining the moral trappings that accompany a verdict and judgment.

Significantly, these criteria demonstrate the impracticality of solutions proposed by other commentators. Vadnais's proposal to eliminate the punitive damages provisions of the FSIA and facilitate the submission of claims directly to the executive branch¹⁷⁴ fails to account for Congress's insistence upon maintaining credibility with the American public, as well as the need for a solution that functions at the jurisdictional stage. Similarly, Micco's suggestion to transfer claims arising from terrorist activities to the International Court of Justice¹⁷⁵ is untenable due to the unwillingness of American citizens to accept a repeal of the jurisdiction granted by the 1996 amendments.¹⁷⁶ Particularly in the wake of the World Trade Center tragedy, any withdrawal of jurisdiction that adversely impacts terrorist victims is politically unfeasible.

In light of the parameters established above, this Note proposes to resolve the conflicts arising under hollow-rights legislation in general, and the FSIA in particular, by amending such legislation to require that funds be available to satisfy the judgment requested by the plaintiff as a condition of jurisdiction under § 1605(a)(7). Ideally, the plaintiff could satisfy this jurisdictional requirement by locating unblocked assets belonging to the defendant country that are being used

¹⁷⁴ See Vadnais, *supra* note 10, at 226–27.

¹⁷⁵ See Micco, *supra* note 17, at 137–41.

¹⁷⁶ As Stephen Flatow remarked during an interview on *60 Minutes*:

[A] sovereign country has the right to launch Tomahawk missiles at another country to protect its rights . . . I don't have \$60 million to launch those kinds of missiles. But now I have something that's purely American. . . . I have American jurisdiction over the people who sponsored the terrorist attack which killed Alisa.

60 Minutes: In Memory of Alisa (CBS television broadcast, Oct. 4, 1998), available at LEXIS, News, Transcripts, CBS News Transcripts.

for a commercial purpose within the United States.¹⁷⁷ If such commercial assets are unavailable, the plaintiff could petition the executive branch for a license to attach blocked assets of a specified value in the event that the court finds for the plaintiff on the merits. Under these circumstances, the district court would be required to limit the amount of the judgment to the value of assets specified in the license. If no blocked or commercial assets are available, then the court should rule that the plaintiff has failed to meet the jurisdictional requirement and thus may not litigate his claim.

The suggestion that the jurisdiction of the courts should be calibrated to the ability of the judiciary to furnish and enforce a remedy is not new. As early as 1864, Chief Justice Taney asserted in *Gordon v. United States* that the power of a court to hear a case under Article III of the United States Constitution depends on the court's ability to enforce the judgment it provides:

The award of execution is a part, and an essential part of every judgment passed by a court exercising judicial power. It is no judgment, in the legal sense of the term, without it. Without such an award the judgment would be inoperative and nugatory, leaving the aggrieved party without a remedy. It would be merely an opinion, which would remain a dead letter, and without any operation upon the rights of the parties, unless Congress should at some future time sanction it, and pass a law authorizing the court to carry its opinion into effect. Such is not the judicial power confided to this Court¹⁷⁸

Similarly, in *District of Columbia v. Eslin*, the plaintiff appealed from the Court of Claims to the Supreme Court pursuant to an Act of Congress that extended the jurisdiction of the Court of Claims to contracts entered into by the Board of Works of the District of Columbia.¹⁷⁹ While Eslin's appeal was pending, Congress repealed the grant of jurisdiction, stating that "all proceedings pending [under the repealed act] shall be vacated, and no judgment heretofore rendered in pursuance of said act shall be paid."¹⁸⁰ In response, the Supreme Court immediately dismissed the appeal, citing its inability to provide an appropriate remedy: "As no judgment now rendered by this court would have the sanction that attends the exercise of judicial power, in its legal or constitutional sense, the present appeal must be dismissed for want of jurisdiction and without any determination of the rights of the parties."¹⁸¹ Concededly, *Flatow* and its progeny are distinguishable

¹⁷⁷ See 28 U.S.C. § 1610(a) (1994 & Supp. V 1999).

¹⁷⁸ 117 U.S. app. 697, 702 (1864).

¹⁷⁹ 183 U.S. 62, 62 (1901).

¹⁸⁰ *Id.* at 64 (emphasis omitted) (quoting Act of Mar. 3, 1897, ch. 387, 29 Stat. 665, 669).

¹⁸¹ *Id.* at 66 (emphasis omitted).

from *Gordon* and *Eslin* in that there is no statutory bar to the execution of judgment under the 1996 amendments. Nevertheless, this Note asserts that the de facto impossibility of overcoming the discretionary policy decisions of Congress and the President to satisfy hollow-rights judgments as a matter of course warrants a modification of the jurisdiction to adjudicate such claims.

The practical effect of this Note's proposal for reform is to transform the purely judicial remedy envisioned by the 1996 FSIA amendments into a two-step remedial process incorporating both the executive branch and the courts. Assuming that unblocked assets dedicated to commercial activities are unavailable, the President would be required to intervene at the jurisdictional stage to determine whether to allow prospective plaintiffs to attach blocked assets to satisfy an eventual judgment. While critics of this proposal could argue that this degree of presidential influence over the jurisdiction of the courts creates constitutional complications, § 1605(a)(7) of the FSIA already grants the executive branch significant control over the jurisdiction of the courts. As the Libyan government argued in a subsequent case brought under the 1996 amendments:

As implemented by the Secretary of State, § 1605(a)(7) . . . permits civil suits against a small group of "state sponsors of terrorism" for injury or death resulting from the commission of any of the five offenses listed in the section. The Secretary of State need give no reason for selecting a state for special treatment in the courts of the United States. The Secretary's decision constitutes a nonreviewable, political decision of the highest order, yet it is the linchpin of the court's jurisdiction under § 1605(a)(7).¹⁸²

While the district court did not comment specifically on Libya's constitutional objection, the court's denial of Libya's motion to dismiss¹⁸³ indicates that Congress's Article III powers to control the jurisdiction of the federal judiciary may be channeled through the executive branch to a limited degree.

Furthermore, the idea of executive involvement in cases brought under the FSIA is not a new one, and was in fact intended by Congress under the VTVPA:

The Committee's intent is that the President will review each case when the court issues a final judgment to determine whether to use the national security waiver, whether to help the plaintiffs collect from a foreign state's non-blocked assets in the United States[,] whether to allow the courts to attach and execute against blocked

¹⁸² Memorandum of Points and Authorities in Support of Defendant's Motion to Dismiss at 14, *Price v. Socialist People's Libyan Arab Jamahiriya*, 110 F. Supp. 2d 10 (D.D.C. 2000) (No. Civ.A. 97-975 (RCL)).

¹⁸³ See *Price*, 110 F. Supp. 2d at 12-14.

assets, or whether to use existing authorities to vest and pay those assets as damages to the victims of terrorism.¹⁸⁴

While the solution proposed in this Note incorporates the idea of executive review, it offers advantages over the VTVPA by conducting this review at the jurisdictional stage, thereby removing the uncertainties of execution before plaintiffs and the courts expend their scarce resources. Furthermore, by establishing a bright-line jurisdictional rule, Congress symbolically shares responsibility for engineering optimal plaintiff outcomes, rather than shifting the onus onto the President to absorb the fallout from Congress's ill-conceived legislative initiative.

In practice, granting the President increased input into jurisdiction under the 1996 amendments is advantageous for several reasons. Broadly speaking, the proposal advocated by this Note creates a middle ground for presidents who are sympathetic to the claims of terrorist victims but are unwilling to throw open the floodgates of attachment of foreign assets. By allowing the executive branch to license the attachment of foreign assets on a case-by-case basis, this solution reduces institutional tension and improves the public's perception of the executive branch through selective grants of jurisdiction to worthy would-be plaintiffs. Thus, plaintiffs like Stephen Flatow, whose daughter was murdered in a terrorist attack, will likely fulfill the jurisdictional requirements more easily than, for example, a plaintiff claiming that he was temporarily subjected to physical, mental, and verbal abuse in a Libyan prison.¹⁸⁵ Most significantly, the President can employ his discretionary authority to balance the administration's response to terrorism between compensation for American victims on the one hand, and diplomatic negotiation using foreign assets for leverage on the other.

The importance of establishing the executive branch as the nerve center of hollow-rights reform cannot be overstated. Left to its own devices, Congress imposed a haphazard compensation scheme through the VTVPA that arbitrarily differentiated among judgment-holding plaintiffs.¹⁸⁶ The legislature selectively compensated high-profile litigants such as Stephen Flatow and celebrated newspaper reporter Terry Anderson¹⁸⁷ through a labyrinth of obscurely drafted clauses bearing an eerie resemblance to corporate tax shelter provisions.¹⁸⁸ Meanwhile, in a sobering demonstration of special interest

¹⁸⁴ H.R. CONF. REP. NO. 106-939, at 118 (2000).

¹⁸⁵ Plaintiff's Complaint paras. 4-7, at 2-3, *Price* (No. 97-975 (RCL)).

¹⁸⁶ See Robert Schlesinger, *Victims of Terrorism Fight to Get Assets of Terror Sponsors*, BOSTON GLOBE, Oct. 10, 2001, at A12.

¹⁸⁷ See Neely Tucker, *12 Americans Win Judgment Against Iraq over Captivity*, WASH. POST, Dec. 8, 2001, at A5.

¹⁸⁸ The VTVPA defines one class of "persons covered" as "a person who . . . filed a suit under such section 1605(a)(7) [of the FSIA] on February 17, 1999, December 13,

politics, plaintiffs who lacked “‘a high-powered lobbyist or a high-power attorney to fight like the devil’”¹⁸⁹ were left with unsatisfied judgments.¹⁹⁰ Congress exacerbated its error by tying the normalization of diplomatic relations with Iran to the reimbursement of damage awards paid out of the United States Treasury,¹⁹¹ a demand that may haunt legislators as the United States seeks Iran’s cooperation in the aftermath of the September 11 attacks on the World Trade Center. In the end, Congress’s clumsy efforts to circumvent executive use of the waiver provision demonstrate the need for an internally consistent system of claim review supervised by the executive branch. In light of the fallout from the VTPA’s ad hoc invasion of the United States Treasury for particular plaintiffs, it is imperative to stem the tide of potential judgments at the jurisdictional stage as would-be plaintiffs clamor to enter the judgment pipeline following the World Trade Center disaster.

A significant collateral benefit of this approach is that it creates a more powerful incentive than the VTPA for plaintiffs to forgo their right to seek punitive damages. Under the statutory modification proposed by this Note, plaintiffs seeking only compensatory damages can more easily make the necessary showing of available assets than a plaintiff who demands significant punitive damages. Thus, the new statutory regime would facilitate a more equitable distribution of scarce foreign assets among larger numbers of plaintiffs rather than allocate large punitive damages to plaintiffs on a first-come, first-serve basis.

One possible objection to this proposal is that the suggested jurisdictional adjustment may eliminate a forum for plaintiffs pursuing a judgment to vindicate their sense of moral outrage, rather than as a vehicle for recovering actual monetary damages. Arguably the courthouse doors should open as widely for plaintiffs using the courtroom as a soapbox to vent their fury at state sponsors of terrorism as they do for plaintiffs with an executive license to attach assets. However, while this conception of the judicial system as an emotional outlet for injured parties finds support in the common law,¹⁹² prudential considerations obviously limit the capacity of courts to dispense therapy

1999, January 28, 2000, March 15, 2000, or July 27, 2000.” Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 2002(a)(2), 114 Stat. 1464, 1542.

¹⁸⁹ Schlesinger, *supra* note 186 (quoting New Hampshire Congressman Robert C. Smith).

¹⁹⁰ *Id.* For example, Congress allocated funds to satisfy judgments obtained by the families of Sara Duker and Matthew Eisenfeld, who were killed in a 1996 suicide attack on an Israeli bus. The family of Ira Weinstein, an American citizen who was killed on the same bus, also obtained a judgment but received no compensation from Congress. *See id.*

¹⁹¹ *See supra* note 154 and accompanying text.

¹⁹² *See, e.g.,* Chambers v. Balt. & Ohio R.R., 207 U.S. 142, 148 (1907).

along with justice. A legislature properly exercising its custodial role with respect to the judiciary should identify classes of disputes in which the therapeutic objective is likely to diverge from the more important remedial function, and withhold jurisdiction accordingly.¹⁹³ Yet when Congress capriciously responds to contemporary events by passing hollow-rights laws that conflate these two purposes, it should restore integrity to the federal government by modifying the initial grant of jurisdiction to make reasoned distinctions among plaintiffs. Insofar as the executive license system provides a reasonably objective measure of the relative worthiness of plaintiffs' claims, this strategy offers the most palatable compromise.

CONCLUSION

Flatow v. Republic of Iran illustrates the inverse of Justice Holmes's famous aphorism: bad law makes hard cases.¹⁹⁴ Thus, the larger question implicated by this Note's analysis of *Flatow* is how best to restore equilibrium to the judicial system when hollow-rights legislation creates new classes of plaintiffs without providing sufficient remedial measures for enforcing their judgments. Resolving this problem is made infinitely more complex by the institutional forces and public expectations that preclude Congress from retracting its legislative mistake, especially when the effect of that mistake is to provide additional legal rights to a litigious population.

One goal of this Note is to illustrate that no branch of the federal government is single-handedly capable of adequately resolving the conundrums posed by *Flatow*. The judiciary is authorized to provide plaintiffs with judgments, but is limited in its ability to enforce those judgments against the will of the executive branch. Congress is empowered to either repeal the grant of jurisdiction under the 1996 amendments, or to eliminate the power of the President to obstruct the execution of judgments; however, the ideological schizophrenia that typically characterizes legislative behavior precludes lawmakers from eliminating a popular grant of jurisdiction or undermining the President's ability to exert dominion over foreign assets in the interests of national security. Finally, while presidential stonewalling of plaintiffs like *Flatow* may be a viable solution in the short term, the institutional divisions and loss of esteem that inevitably result from

¹⁹³ See *id.* ("The right to sue and defend in the courts is the alternative of force But, subject to the restrictions of the Federal Constitution, the State may determine the limits of the jurisdiction of its courts, and the character of the controversies which shall be heard in them.").

¹⁹⁴ Cf. *N. Sec. Co. v. United States*, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting) ("Great cases like hard cases make bad law.").

these tactics demonstrate the dangers of transitioning this practice into a long-term strategy.

These realities, coupled with the symbolic importance of granting plaintiffs meaningful and direct recourse against terrorist countries, form the pillars of the reforms proposed by this Note. By mandating a pre-trial finding that sufficient assets exist to satisfy a potential judgment in all cases arising under empty-rights legislation, this proposal ensures that plaintiffs will not needlessly expend financial resources and emotional energy, and encourages the executive branch to compromise with Congress by facilitating the attachment of blocked assets under limited circumstances. This proposal also imposes the collateral benefit of transforming the original punitive theme of the 1996 amendments into a more equitable compensatory regime. Finally, this Note's proposal for reform allows Congress to save face by functioning behind the scenes at the jurisdictional level to increase opportunities for plaintiff compensation, while leaving the nominal structure of the 1996 amendments fully intact.

Unfortunately, the benefits of this approach come at a price. By granting the executive branch significant control over the jurisdiction of domestic courts, the proposed solution presents troubling implications for the separation of powers. On a more practical level, the process of selectively licensing plaintiffs to attach foreign assets may create tension between plaintiffs, and expose the executive branch to accusations of favoritism and "playing politics" in its licensing decisions. Nonetheless, this approach for reform presents significant advantages over the status quo, and takes a significant step towards mitigating the legislative damage wrought by Congress's hollow promises in the 1990s.