The Flatow Amendment and State-Sponsored Terrorism

Joseph Keller[*]

In the eighteenth and nineteenth centuries, U.S. law recognized virtually absolute immunity for foreign states sued in U.S. courts.[1] However, with the onset of communism in the post World War II era, many foreign governments began to perform functions traditionally private or commercial in nature, such as the operation of an airline or commercial bank.[2] As a result of this political change, a new theory of "restrictive immunity" replaced absolute immunity as the norm in U.S. courts.[3] Congress codified the restrictive theory of sovereign immunity in the Foreign Sovereign Immunities Act (FSIA).[4]

The original FSIA provided sovereign immunity for foreign states and their instrumentalities, with enumerated exceptions including waiver, commercial activity, expropriation of property in violation of international law, disputes over property situated in the United States, and tortious acts or omissions occurring in the United States.[5]

---

[*]Law Clerk, United States District Court for the Eastern District of Virginia; J.D., University of Michigan Law School. The author wishes to thank Professor Rob Howse and David P. Stewart, Assistant Legal Adviser for Diplomatic Law & Litigation at the U.S. State Department, for helpful comments and suggestions.

1. *See* The Schooner Exchange v. M'Faddon, 11 U.S. 116, 137–38 (1812); Berizzi Bros. Co. v. S.S. Pesaro, 271 U.S. 562 (1926).

2. *See* Flatow v. Islamic Republic of Iran, 999 F. Supp. 1, 11 (D.D.C. 1998) (citing S. SUCHARITKUL, STATE IMMUNITIES AND TRADING ACTIVITIES IN INTERNATIONAL LAW (1959); W. Friedmann, *Changing Social Arrangements in State-Trading States and Their Effect on International Law*, 24 LAW & CONTEMP. PROBS. 350 (1959)).

3. Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep't of State, to Acting U.S. Att'y General Philip B. Perlman (May 19, 1952), *reprinted in* 26 DEP'T STATE BULL. 984–85 (1952). The Tate Letter sets forth the restrictive theory of sovereign immunity, whereby sovereigns are not immune for certain private acts.

4. The Foreign Sovereign Immunities Act provides the following:

> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act [enacted Oct. 21, 1976] a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605–1607 of this chapter.

28 U.S.C. § 1604 (1976).

5. Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 1605 (Supp. 2002).

In 1996, in response to the lobbying of victims of terrorism, including the families of victims of Pan Am Flight 103, Congress amended the FSIA[6] by creating a state-sponsored terrorism exception to foreign sovereign immunity ("Antiterrorism Amendment"), stating that a foreign state has no immunity from U.S. courts in any cases:

> (7) not otherwise covered by paragraph (2), in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources (as defined in section 2339A of title 18) for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency, except that the court shall decline to hear a claim under this paragraph—
>
> (A) if the foreign state was not designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371) at the time the act occurred, unless later so designated as a result of such act or the act is related to Case Number 1:00CV03110(EGS) in the United States District Court for the District of Columbia; and
>
> (B) even if the foreign state is or was so designated, if—
>
> (i) the act occurred in the foreign state against which the claim has been brought and the claimant has not afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration; or
>
> (ii) neither the claimant nor the victim was a national of the United States (as that term is defined in section 101(a)(22) of the Immigration and Nationality Act [8 USCS § 1101(a)(22)]) when the act upon which the claim is based occurred.[7]

This new exception to foreign sovereign immunity waived a jurisdictional barrier previously encountered by plaintiffs seeking to sue designated foreign states or their instrumentalities for acts of terrorism.[8]

---

6. § 1605(a)(7).

7. *Id.*

8. *See* Joseph W. Glannon & Jeffrey Atik, *Politics and Personal Jurisdiction: Suing State Sponsors of Terrorism Under the 1996 Amendments To the Foreign Sovereign Immunities Act*, 87 GEO. L.J. 675, 677 (1999).

Five months later, Congress amended the FSIA again with the "Civil Liability for Acts of State Sponsored Terrorism" provision, commonly referred to as the Flatow Amendment.[9] The Flatow Amendment is named after Alisa Flatow, a Brandeis University student killed by a terrorist attack while traveling on a bus in the Gaza Strip when a suicide bomber drove a van full of explosives into the bus.[10] Outraged by his daughter's suffering and determined to seek justice for victims of state-sponsored terrorism, Alisa's father, Stephen Flatow, lobbied Congress to pass the resulting legislation.[11] The Amendment provides punitive damages, previously unavailable under the statutory scheme of the FSIA:

> An official, employee, or agent of a foreign state designated as a state sponsor of terrorism . . . while acting within the scope of his or her office, employment, or agency shall be liable to a United States national or the national's legal representative for personal injury or death caused by acts of that official, employee, or agent for which the courts of the United States may maintain jurisdiction under section 1605(a)(7) of Title 28, United States Code, for money damages which may include economic damages, solatium, pain, and suffering, and punitive damages if the acts were among those described in section 1605(a)(7).[12]

In the years since the enactment of the Flatow Amendment, courts have struggled with the question of whether the Amendment creates a private cause of action against a foreign state itself, or only against an official, employee, or agent of a foreign state.[13] Many courts have found that the Flatow Amendment does provide a cause of action against a foreign state itself.[14] Other courts have determined, correctly in the author's

---

9. Flatow Amendment, Pub. L. No. 104-208, § 589, 110 Stat. 3009–172 (1996) (codified at 28 U.S.C. § 1605 (Supp. 2002)).

10. Flatow v. Islamic Republic of Iran, 999 F. Supp. 1, 7 (D.D.C. 1998).

11. *See* Richard T. Micco, *Putting the Terrorist-Sponsoring State in the Dock: Recent Changes in the Foreign Sovereign Immunities Act and the Individual's Recourse Against Foreign Powers*, 14 TEMP. INT'L & COMP. L.J. 109, 110 (2000).

12. Flatow Amendment, Pub. L. No. 104-208, § 589, 110 Stat. 3009-172 (1996) (cofified at 28 U.S.C. § 1605 (Supp. 2002)).

13. *See* Price v. Socialist People's Libyan Arab Jamahiriya, 294 F.3d 82, 87 (D.C. Cir. 2002); Acree v. Republic of Iraq, 271 F. Supp. 2d 179, 215 (D.D.C. 2003); Campuzano v. Islamic Republic of Iran, 281 F. Supp. 2d 258, 270–71 (D.D.C. 2003); Dammarell v. Islamic Republic of Iran, 281 F. Supp. 2d 105, 191–92 (D.D.C. 2003); Kerr v. Islamic Republic of Iran, 245 F. Supp. 2d 59, 62–63 (D.D.C. 2003); Kilburn v. Iran, 277 F. Supp. 2d 24, 36–37 (D.D.C. 2003); Pugh v. Socialist People's Libyan Arab Jamahiriya, 290 F. Supp. 2d 54, 57 (D.D.C. 2003); Regier v. Islamic Republic of Iran, 281 F. Supp. 2d 87, 96–97 (D.D.C. 2003); Cronin v. Islamic Republic of Iran, 238 F. Supp. 2d 222, 230–31 (D.D.C. 2002); Roeder v. Islamic Republic of Iran, 195 F. Supp. 2d 140, 166 (D.D.C. 2002); Smith v. Islamic Emirate of Afghanistan, 262 F. Supp. 2d 217, 227 (S.D.N.Y. 2003).

14. *See, e.g., Cronin*, 238 F. Supp. 2d at 230–31; *Kilburn*, 277 F. Supp. 2d at 36–37.

view, that the Flatow Amendment only provides a cause of action against officials, employees, or agents of a foreign state.[15]

In its consideration of the Flatow Amendment, the U.S. Court of Appeals for the D.C. Circuit has sought the input of the State Department on the question of whether the FSIA and the Flatow Amendment provide a cause of action against a foreign state.[16] However, the Supreme Court has stated the following: "In 1976, Congress passed the Foreign Sovereign Immunities Act in order to free the Government from the case by case diplomatic pressures, to clarify the governing standards, and to '[assure] litigants that . . . decisions are made on purely legal grounds and under procedures that insure due process.'"[17] Given the Supreme Court's view that one purpose of the FSIA was to limit the role of the State Department in determining questions of foreign sovereign immunity,[18] how much consideration should the courts give to the position of the State Department in cases involving foreign policy considerations? Put differently, what are the limits of the foreign affairs powers of the executive branch and how might the foreign affairs powers of the executive conflict with judicial independence and separation of powers principles? As this article demonstrates, participation of the executive branch in cases interpreting the Flatow Amendment and in other cases with serious foreign policy implications is appropriate and beneficial for both the courts and the government of the United States. Indeed, the participation of the executive branch will bring to the courts unique and valuable expertise in the arena of foreign policy and help clarify the real world concerns underlying terrorism cases against foreign governments.

This article argues that the Flatow Amendment does not provide a cause of action against a foreign state itself and, further, that judicial consultation of the State Department is appropriate and desirable in cases affecting foreign policy, such as those requiring interpretation of the Flatow Amendment. Part I will analyze early judicial interpretation of the Flatow Amendment, examine and critique the methodology of *Cronin* and its progeny, explain application of the *Charming Betsy* principle to this line of cases, and conclude that the Flatow Amendment provides a cause of action against the officials, employees, or agents of a foreign

15. Cicippio-Puleo v. Islamic Republic of Iran, 353 F.3d 1024, 1032–33 (D.C. Cir. 2004); Acree v. Republic of Iraq, 370 F.3d 41, 59–61 (D.C. Cir. 2004).

16. *Cicippio-Puleo*, 353 F.3d at 1032–33. The D.C. Circuit recently issued a decision in this case holding that the Flatow Amendment does not provide a cause of action against a foreign sovereign and remanded the case to allow plaintiffs to amend their complaint to state a cause of action under some other source of law. *Id.* at 1036.

17. Verlinden v. Central Bank of Nigeria, 461 U.S. 480, 488 (1983) (quoting H.R. REP. NO. 94–1487, at 7 (1976)).

18. *Id.*

state, but not against the foreign state itself. Part II of this paper will examine the constitutional foundations of the foreign relations power and its development in U.S. courts, and will explain the benefits of executive branch participation in cases that interpret the Flatow Amendment and that affect foreign policy.

I. JUDICIAL INTERPRETATION OF THE FLATOW AMENDMENT

On its face, the Flatow Amendment[19] creates a cause of action against an official, employee or agent of a foreign state, but not against the foreign state itself. The slim legislative history of the Flatow Amendment also offers no support for the proposition that the Amendment creates a cause of action against a foreign state.[20] The only language in the legislative history that reflects on the purpose or scope of the Amendment states that the Amendment will expand "the scope of monetary damage awards available to American victims of international terrorism."[21] While this language manifests a Congressional intent to enlarge the scope of available damages for plaintiff victims of state-sponsored terrorism, it does not clarify the category of defendants against whom such awards will be available.

A. Early Interpretation of the Flatow Amendment

Judicial interpretation of the Flatow Amendment has evolved over a period of roughly five years. *Flatow v. Islamic Republic of Iran* was the first decision to address the scope of the Flatow Amendment.[22] As administrator of Alisa Flatow's estate, Steven Flatow brought a wrongful death suit against Iran, its intelligence agency, and several of its officials.[23] The *Flatow* decision did not resolve the question of the scope of the cause of action provided by the Flatow Amendment.[24] It did, however, note that the Flatow Amendment must be interpreted in pari materia along with the Antiterrorism Amendment: "The amendment should be considered to relate back to the enactment of 28 U.S.C. § 1605(a)(7) as if they had been enacted as one provision . . . and the two provisions should be construed together and in reference to one another."[25]

---

19. *See supra* text accompanying note 12.
20. H.R. CONF. REP. NO. 104–863, 104th Cong., at 987 (1996).
21. *Id.*
22. Flatow v. Islamic Republic of Iran, 999 F. Supp. 1 (D.D.C. 1998).
23. *Id.* at 6.
24. *Id.* at 11.
25. *Id.* at 13.

From this starting point the courts approached the issue rather cautiously.[26] *Roeder v. Islamic Republic of Iran* arose from the well-known hostage-taking crisis at the U.S. Embassy in Tehran.[27] Plaintiffs (former hostages) sought damages from the government of Iran and its Ministry of Foreign Affairs.[28] The district court ultimately dismissed plaintiffs' claims because the U.S. government had previously negotiated the Algiers Accords, an agreement to secure the release of the hostages that included a provision barring U.S. courts from adjudicating any claims asserted by the hostages arising out of their captivity in Iran.[29] The court did, however, address the scope of the cause of action provided by the Flatow Amendment:

> It is mainly this provision on which plaintiffs rest their claim to a private cause of action against Iran. However, the plain text of this appropriations rider does not create a cause of action against a foreign government that sponsors terrorism—it creates a cause of action only against the "official, employee, or agent" of such a state who participates in the terrorist activity.[30]

The court correctly construed the unambiguous text of the Flatow Amendment and, following the *Flatow* court's suggestion, interpreted the Flatow Amendment in pari materia with the Antiterrorism Amendment and the FSIA generally, and then took note of one particularly relevant difference in drafting among those provisions:

> This conclusion is supported further by another provision of the FSIA in which Congress actually recognized the difference between suing a state and suing an official. In the exception for tortious activity within United States borders, the statute waives immunity for lawsuits arising out of "the tortious act or omission of that *foreign state or of any official or employee of that foreign state* while acting within the scope of his office or employment."[31]

As clearly noted by the court, Congress recognizes and is aware of the difference between suing a foreign state itself and suing the agents, employees or officials of a foreign state. Unless Congress intended to exclude foreign states from the scope of the cause of action provided by

---

26. *See* Roeder v. Islamic Republic of Iran, 195 F. Supp. 2d 140 (D.D.C. 2002).

27. *Id.* at 143–44.

28. *Id.*

29. *Id.* at 166. The court also addressed the issue created by Congress's attempt to determine the outcome of the litigation (in favor of plaintiffs) by emergency legislation. *Id.* at 145 (discussing subsection 626(c) of Pub. L. 107–77, 115 Stat. 748 (2001)). The court concluded that the legislation did not abrogate the Algiers Accords. 195 F. Supp. 2d at 166–68.

30. *Roeder*, 195 F. Supp. 2d. at 172.

31. *Id.* 28 U.S.C. § 1605(a)(5) (Supp. 2002) (emphasis added).

the Flatow Amendment, there is no reason, other than sloppy drafting, for Congress to have omitted the language included in § 1605(a)(5). The courts have no mandate to correct a presumed or perceived mistake in legislative drafting by reading a cause of action into a statute that on its face does not provide one.[32] The court correctly perceived this when it stated the following: "When faced with such sparse explanation of statutory text, the Court must be even more vigilant in its refusal to draw inferences, even desirable inferences, that would fill in the gaps in congressional logic."[33]

Nevertheless, the *Roeder* court proceeded to create ambiguity in its opinion when it stated, "The Court agrees that it is *possible* to read these statutory provisions, in the context of legislative history and intent, to provide for a cause of action against Iran."[34] The court escaped making a definitive statement on this issue when it decided that the Antiterrorism Amendment and the Flatow Amendment did not unambiguously abrogate the Algiers Accords (which precluded the plaintiffs' claims).[35]

B. Cronin *and Its Progeny*

With the *Roeder* court having declared the issue ambiguous, the D.C. Circuit continued to struggle with interpretation of the Flatow Amendment.[36] The recent trend in judicial interpretation has been to find that the Flatow Amendment does provide a cause of action against a foreign state.[37] The courts have relied on a variety of factors to justify this conclusion, with Judge Lamberth's opinion in *Cronin v. Islamic Republic of Iran* providing the reasoning most often relied on by other decisions.[38]

Plaintiff John R. Cronin brought a personal injury action against Iran for kidnapping and torture by state-sponsored terrorist groups.[39] The plaintiff, a graduate student in Beirut at the time of the underlying inci-

32. *Roeder*, 195 F. Supp. 2d. at 183.

33. *Id.*

34. *Id.* at 174.

35. *Id.* at 175.

36. *See* Price v. Socialist People's Libyan Arab Jamahiriya, 294 F.3d 82, 89 (D.C. Cir. 2002) (court declined to answer the question).

37. *See* Acree v. Republic of Iraq, 271 F. Supp. 2d 179, 215 (D.D.C. 2003); Campuzano v. Islamic Republic of Iran, 281 F. Supp. 2d 258, 270–71 (D.D.C. 2003); Dammarell v. Islamic Republic of Iran, 281 F. Supp. 2d 105, 191–92 (D.D.C. 2003); Kerr v. Islamic Republic of Iran, 245 F. Supp. 2d 59, 62–63 (D.D.C. 2003); Kilburn v. Iran, 277 F. Supp. 2d 24, 36-37 (D.D.C. 2003); Pugh v. Socialist People's Libyan Arab Jamahiriya, 290 F. Supp. 2d 54, 57 (D.D.C. 2003); Regier v. Islamic Republic of Iran, 281 F. Supp. 2d 87, 96–97 (D.D.C. 2003); Cronin v. Islamic Republic of Iran, 238 F. Supp. 2d 222, 230–31 (D.D.C. 2002); Smith v. Islamic Emirate of Afghanistan, 262 F. Supp. 2d 217, 227 (S.D.N.Y. 2003).

38. *See Cronin*, 238 F. Supp. 2d at 223.

39. *Id.* at 223–24.

dent, alleged that members of a terrorist group, which was organized, funded, trained and controlled by Iran, had kidnapped him at gunpoint from a hospital.[40] The plaintiff claimed to have been beaten, interrogated and threatened, and was near death when released four days later.[41]

The *Cronin* opinion follows the principle of interpretation announced in *Flatow*, considering the Antiterrorism Amendment and the Flatow Amendment together.[42] *Cronin* finds that the Antiterrorism Amendment contains a principle of respondeat superior by which "sovereign immunity of a foreign state will be abrogated if its "official, employee, or agent" provides material resources to the entity that commits the terrorist act."[43] The court then transposed this principle to the Flatow Amendment:

> The Flatow Amendment likewise provides that an "official, employee, or agent" of a foreign state shall be liable if their actions were taken "while acting within the scope of his or her office, employment, or agency[.]" 28 U.S.C. § 1605(a)(7) note. In light of the identical language used in both statutory provisions, the Court finds that the respondeat superior implications of section 1605(a)(7) are equally applicable to the Flatow Amendment.[44]

The court's reasoning is flawed in one crucial respect. It fails to distinguish between a statute that extinguishes sovereign immunity, thereby conferring jurisdiction under limited circumstances, and an enactment that goes a step further and provides a cause of action for plaintiffs. The Flatow Amendment is limited in purpose and scope: While the "employer" in the respondeat superior sense may not enjoy immunity from suit, this does not necessarily mean that a subsequent enactment creating a cause of action only against officials, employees, and agents of that employer also incorporates an implied cause of action against the employer itself. Such a construction ignores the careful omission of the language "foreign state" from the scope of the cause of action created by the Flatow Amendment.

The Antiterrorism Amendment is drafted in two parts: First, the purpose to remove sovereign immunity of foreign states is explicitly stated; second, the conditions whereby immunity shall be removed are listed—which includes when an official, employee or agent commits an offense while acting within the scope of his official duties.[45] The *Cronin*

40. *Id.* at 225–26.
41. *Id.* at 227.
42. *Id.* at 231.
43. *Id.* (quoting 28 U.S.C. § 1605(a)(7)).
44. *Id.*
45. 28 U.S.C. § 1605(a)(7) (Supp. 2002).

court is mistaken in suggesting that this two-step legislative drafting is analogous to the Flatow Amendment, which contains only one step by which it creates a cause of action and provides categories of damages available to plaintiffs.[46]

The *Cronin* court engaged in a teleological argument, insisting that the purpose of the Antiterrorism Amendment and the Flatow Amendment together must be to provide a cause of action against a foreign state: "Instead of using the acts of officials, employees, and agents to support liability against the foreign state, the same language would be used in the Flatow Amendment to deny victims of state-sponsored terrorism a cause of action against the responsible foreign state."[47] This statement makes several unfounded assumptions. First, it assumes that if the Flatow Amendment does not provide a cause of action against a foreign state, the Amendment acts somehow to "deny" a cause of action against a foreign state. This is technically incorrect because the Flatow Amendment does not *prohibit* any cause of action against a foreign state; indeed, a cause of action may yet exist in federal or state common law.[48] Second, the language at issue, as used in the Antiterrorism Amendment, does not provide for "liability" against the foreign state, it only removes a jurisdictional barrier to liability. The legislative history of the Antiterrorism Amendment confirms this purpose: "This subtitle provides that nations designated as state sponsors of terrorism under section 6(j) of the Export Administration Act of 1979 will be amenable to suit in U.S. courts for terrorist acts. It permits U.S. federal courts to hear claims . . . ."[49] This legislative history reveals that the Antiterrorism Amendment merely opens the doors of the federal courts but does not provide a cause of action. In contrast, the Flatow Amendment creates the "liability" by its own specific terms, which do not explicitly extend to the foreign state.

A more accurate description of the relationship between the Antiterrorism Amendment and the Flatow Amendment defines the Flatow Amendment as intended by Congress to supplement the Antiterrorism Amendment by enlarging the scope of available damages for plaintiffs under the Antiterrorism Amendment to include punitive damages as well as economic damages, solatium, and pain and suffering. These damages are available only against a specified category of defendants, and the courts should not infer that Congress intended to provide punitive dam-

---

46. *See* Micco, *supra* note 11.

47. *Cronin*, 238 F. Supp. 2d at 232.

48. In fact, amici asserted this in the *Cicippio-Puleo* case, 353 F.3d 1024, 1036 (D.C. Cir. 2004), and it is a slippery issue subject to much debate. *See also* Kilburn v. Iran, 277 F. Supp. 2d 24, 36 (D.D.C. 2003); Bettis v. Islamic Republic of Iran, 315 F.3d 325, 332 (D.C. Cir. 2003).

49. H.R. CONF. REP. NO. 104–518, at 112 (1996).

ages against foreign states. Such an enactment could have adverse impacts on foreign relations and complicate the diplomatic efforts of the executive branch to deal with difficult issues involving foreign state governments.[50] Therefore, it seems imprudent for courts to attach punitive damage liability to foreign states without any legislative history or textual support in the Flatow Amendment itself to support that construction.

The *Cronin* court's next reason, that the legislative histories of the Antiterrorism Amendment and the Flatow Amendment support a cause of action against a foreign state, is similarly flawed. Although the court's reading of the legislative history is accurate, it fails to explain why the courts should infer a cause of action where the legislative text fails to create one. As just mentioned, the legislative history of the Antiterrorism Amendment confirms its solely jurisdictional purpose.[51] The *Cronin* court thought differently: "The stated purposes of the Antiterrorism Act [are] to deter terrorist acts against U.S. nationals by foreign sovereigns or their agents and to provide for justice for victims of such terrorism."[52] It is entirely plausible that Congress intended to deter terrorist acts against U.S. nationals and to provide justice to victims by removing a jurisdictional barrier with the Antiterrorism Amendment, and then followed up by providing a cause of action (the Flatow Amendment) that allowed punitive damages only against officials, employees, or agents of a foreign state. Intent to provide deterrence and compensation is not incongruous with intent to limit the scope of that compensation as applied to foreign states; courts need not maximize damage awards for plaintiffs against all defendants in order to fully realize congressional intent. It is not unreasonable for Congress to weigh the benefits of providing punitive damages to plaintiffs against the potentially adverse consequences on foreign relations that may follow from including foreign states in the category of defendants against whom such judgments would be available. Viewed in this light, the Flatow Amendment reflects a sensitive legislative compromise among two important but competing concerns.

The *Cronin* court then cites the Flatow Amendment's legislative history to note the purpose of increasing the scope of damages available to victims of state-sponsored terrorism.[53] Again, there is no reason to infer from this intent that the category of defendants against whom punitive damages are available extends beyond those defendants specifically

50. Cicippio-Puleo v. Islamic Republic of Iran, 353 F.3d at 1031 (quoting Brief of Amicus Curiae United States at 5).

51. *See supra* notes 19–21 and accompanying text.

52. *Cronin*, 238 F. Supp. 2d at 232 (citing Elahi v. Islamic Republic of Iran, 124 F. Supp. 2d 97, 106 (D.D.C. 2000)).

53. *Id.*

named in the text of the Flatow Amendment. The court compounds its mistake by stating the following:

> [T]he purposes of the legislation would clearly be advanced by victims having a cause of action against the responsible foreign state. Indeed, to construe the Flatow Amendment as not conferring a private cause of action against foreign states would mean that what Congress gave with one hand in section 1605(a)(7) it immediately took away with the other in the Flatow Amendment.[54]

The court incorrectly assumes that Congress somehow "gave" a cause of action against foreign states with the Antiterrorism Amendment, which is merely a jurisdictional provision. Congress did not take anything away from victims of international terrorism with the passage of the Flatow Amendment; in fact, by adding punitive damages, Congress expanded victims' rights and opportunities. The enlargement of available remedies is one purpose of the legislation, while another purpose might be to *limit* the category of defendants against whom punitive damages will be available.

Next, the *Cronin* court insists that "relevant statutory provisions enacted after the Flatow Amendment also support the conclusion that the Amendment gives victims of state-sponsored acts of terrorism a cause of action against the responsible foreign state."[55] The court cites to the Victims of Trafficking and Violence Protection Act of 2000, which provides plaintiffs an avenue to recover damage awards against a foreign state from the United States government.[56] The court then reasons, "It is inconceivable that Congress would enable plaintiffs who obtained judgments against foreign states like Iran to recover the damage awards from the United States if the plaintiffs did not have a cause of action against the foreign state in the first place."[57]

Close analysis reveals the weaknesses in this argument. Even if plaintiffs do have a cause of action against a foreign state, the Flatow Amendment is not necessarily the source of that cause of action. Furthermore, it is speculative to draw conclusions about the congressional intent behind the Flatow Amendment by referring to legislation enacted four years later by a different Congress.

The *Cronin* court's analysis of the legislative history behind the Victims of Trafficking and Violence Protection Act of 2000 ("Victim's Protection Act") is similarly unpersuasive:

---

54. *Id.*
55. *Id.*
56. *Id.* (citing P.L. No. 106–386, § 7101, 114 Stat. 1464 (2000)).
57. *Id.*

> Moreover, the legislative history of the Victims Protection Act indicates that Congress presumes the 1996 changes to the FSIA confer[] a private right of action against foreign states. See, e.g., H.R. Conf. Rep. 939, 106th C[ong.], 2000 (stating that the 1996 amendments allowed "American citizens injured or killed in acts of terrorism (or their survivors) to bring a lawsuit against the terrorist state responsible for that act."); 146 Cong. Rec. S10164-02 (stating that the 1996 amendments "gave American victims of state-sponsored terrorism the right to sue the responsible state.").[58]

This legislative history merely restates the obvious fact that the 1996 changes to the FSIA remove a jurisdictional barrier, thereby eliminating the immunity of foreign states for acts of state-sponsored terrorism. Even if one reads this language to reveal a Congressional understanding that a cause of action against a foreign state exists, this does not necessarily mean that the Flatow Amendment and the Antiterrorism Amendment provide a specific cause of action against a foreign state. Under the Flatow Amendment, plaintiffs may only sue defendants in their individual capacity. Furthermore, this legislative history is not law, and even if one reads it as persuasive evidence of congressional intent, that is only so for the specific law enacted, the Victims Protection Act.[59] The court relies on legislative history from a subsequent statute because the language that should properly govern its interpretation, namely the text of the Flatow Amendment itself, does not support the result the court desires.

The *Cronin* court refers to a 1998 amendment to the FSIA (later repealed) that provided for punitive damages against a foreign state as further proof that Congress intended to provide a cause of action against a foreign state through the Flatow Amendment.[60] The court states that it would be "implausible" for Congress to provide punitive damages against a foreign state if a cause of action against a foreign state did not exist in the first place.[61] Contrary to the court's conclusion, however, if the Flatow Amendment does provide a cause of action against a foreign state, then there would have been no need for the 1998 amendment because punitive damages would already be available against a foreign state as provided for in the Flatow Amendment. Therefore, what seems implausible is the idea that the Flatow Amendment *does* provide a cause

---

58. *Id.* at 232–33.

59. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106–386, § 2002, 114 Stat. 1464 (2000).

60. Cronin v. Islamic Republic of Iran, 238 F. Supp. 2d 222, 233 (D.D.C. 2002) (citing Pub. L. 105–277, 112 Stat. 2681–491 (1998) ("[A] foreign state except an agency or instrumentality thereof shall not be liable for punitive damages, except any action under section 1605(a)(7)[.]")).

61. *Id.*

of action against a foreign state. If that were the case, the 1998 amendment would be wholly superfluous because the Flatow Amendment would have already amended § 1606.[62]

Other courts have expanded upon the *Cronin* court's reasoning to reach the same conclusion regarding interpretation of the Flatow Amendment.[63] In *Kilburn v. Islamic Republic of Iran*, plaintiff Blake Kilburn, the brother and only surviving family member of Peter Kilburn, brought suit against Iran, the Iranian Ministry of Information and Security, Libya, and the Libyan External Security Organization for hostage taking, torture, and extrajudicial killing in violation of international law.[64] The plaintiff alleged that his brother, an American citizen working as a librarian at the American University of Beirut, was the victim of a kidnapping and assassination operation.[65] The plaintiff's common law claims included wrongful death, battery, assault, false imprisonment, slave trafficking, and intentional infliction of emotional distress.

The *Kilburn* court enumerated six factors for finding that the Flatow Amendment provided a cause of action against a foreign state.[66] In addition to the *Cronin* court's reasoning, the *Kilburn* decision cited to the overwhelming consensus in previous cases that found a cause of action against a foreign state.[67]

While the opinions of other courts have some persuasive value, they are not dispositive, as the Supreme Court has never passed on the issue and the courts in the D.C. Circuit may choose to deviate from previous opinions if they are incorrectly decided.[68] Furthermore, as noted by the *Roeder* court, many of these decisions were rendered against absent defendants, without the benefit of the adversarial process to put pressure on the plaintiffs' interpretation of the Flatow Amendment.[69] The *Kilburn* court's citation to a congruent decision in the Second Circuit adds little substance to this argument.[70]

---

62. Foreign Sovereign Immunities Act, 28 U.S.C. § 1606 (Supp. 2002). This section provides that foreign states not entitled to immunity under § 1605 or § 1607 "shall not be liable for punitive damages." Compare the Flatow Amendment: "damages which may include economic damages, solatium, pain, and suffering, and punitive damages if the acts were among those described in section 1605(a)(7)." Flatow Amendment, Pub. L. No. 104-208, § 589, 110 Stat. 3009–172 (1996) (codified at 28 U.S.C. § 1605 (Supp. 2002)).

63. *See, e.g.*, Kilburn v. Iran, 277 F. Supp. 2d 24, 36–37 (D.D.C. 2003).

64. *Id.* at 26.

65. *Id.* at 27.

66. *Id.* at 38–41.

67. *Id.* at 39–40 (citing Cronin v. Islamic Republic of Iran, 238 F. Supp. 2d 222, 231–32 (D.D.C. 2002)).

68. *See* Cicippio-Puleo v. Islamic Republic of Iran, 353 F.3d 1024, 1031 (D.C. Cir. 2004).

69. Roeder v. Islamic Republic of Iran, 195 F. Supp. 2d 140, 173 (D.D.C. 2002).

70. *Kilburn*, 277 F. Supp. 2d at 41 (citing Smith v. Islamic Emirate of Afghanistan, 262 F. Supp. 2d 217, 228 (S.D.N.Y. 2003)).

The *Kilburn* court advanced an additional theory based on the absence of the United States' participation in FSIA cases that involved foreign states:

> [T]he United States has not intervened in FSIA actions against foreign states and attempted to dismiss them on the grounds that the FSIA does not provide a cause of action against foreign states. Nor has the United States filed a statement of interest to that effect in any pending action, even though it is authorized by statute to do so.[71]

The absence of participation by the United States in these cases is of minor significance. Silence does not necessarily mean acquiescence, especially given the United States' involvement in the *Roeder* case, where it took the position that the Flatow Amendment does not provide a cause of action against a foreign state.[72] The *Kilburn* court's interpretation of the government's nonparticipation is pure speculation. The United States may decide whether or not to participate in litigation for a variety of reasons, including diplomatic and litigation strategy, regardless of whether the government agrees with a particular court's interpretation of the law.

C. The Charming Betsy Principle

The courts supporting a broad interpretation of the cause of action provided by the Flatow Amendment might have argued more persuasively by invoking the well-established principle of legal interpretation announced two centuries ago in the *Charming Betsy* case.[73] That principle provides that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[74] A court applying this principle to cases involving state-sponsored terrorism brought under the Antiterrorism Amendment and the Flatow Amendment might argue that the law of nations makes a state responsible for the acts of its agents in almost all circumstances where those acts violate international law.[75] Therefore, the courts should, if possible, construe the Flatow Amendment consistently with this international law of state responsibility and hold that it does in fact provide for liability against the foreign state itself. This construction would require a showing that the Flatow

71. *Id.* (internal citations omitted).

72. *Roeder,* 195 F. Supp. 2d at 166.

73. Murray v. The Schooner Charming Betsy, 6 U.S. 64, 118 (1804).

74. *Id.*

75. *But see* Theodore Meron, *Shakespeare's Henry the Fifth and the Law of War,* 86 A.J.I.L. 1, 16 (1992). Meron's article notes the "basic common law principle respondere non sovereign, an exception to respondeat superior."

Amendment is sufficiently ambiguous to allow alternative interpretations,[76] because the *Charming Betsy* principle is merely a principle of interpretation and cannot help a plaintiff if the meaning of a statute is clear.[77] Given the differing judicial interpretations of the Flatow Amendment,[78] it may not be too difficult for a plaintiff to demonstrate such ambiguity.

Applying the *Charming Betsy* principle would have been particularly useful in buttressing the respondeat superior argument of the *Cronin* court.[79] This argument, as noted above,[80] construed the Antiterrorism Amendment and the Flatow Amendment together and transposed the respondeat superior principle contained in 1605(a)(7) of the Antiterrorism Amendment to the Flatow Amendment.[81] Combining this argument with the *Charming Betsy* analysis would provide a firmer basis for finding in the Flatow Amendment a cause of action against a foreign state itself. The court could have easily found that the existence of the Antiterrorism Amendment exception evinces a congressional intent to not shield state sponsors of terrorism from liability. In keeping with this purpose, the Flatow Amendment simply supplements and gives more teeth to the Antiterrorism Amendment, thereby increasing deterrence and accountability with respect to acts of international terrorism. This approach is more persuasive than the *Cronin* court's focus on the idea that the Flatow Amendment could be read to "deny" victims of state-sponsored terrorism a cause of action against a foreign state, an erroneous presumption given the possibility of state or common law tort claims.[82]

Even if a court considered the Flatow Amendment sufficiently ambiguous to warrant application of the *Charming Betsy* principle, a defendant might raise the issue of whether a congressional decision to not hold a foreign state liable, through the Flatow Amendment, for the acts of its agents would actually *violate* an obligatory norm of international law. A defendant could argue that the Flatow Amendment complies with international law if it does not provide a cause of action against a foreign state, although it might violate international law if it explicitly *denied* a cause of action against the foreign state.

---

76. *See* Att'y General of Canada v. R.J. Reynolds Tobacco Holdings, Inc., 268 F.3d 103, 128 (2d Cir. 2001).

77. *See* Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 484 (1998).

78. *See supra* sections Part I.A, B.

79. Cronin v. Islamic Republic of Iran, 238 F. Supp. 2d 222, 233 (D.D.C. 2002).

80. *See supra* text accompanying notes 42–45.

81. *Id.*

82. *Id.* at 232.

A defendant in this position might caution the court to avoid using the *Charming Betsy* principle to redraft the legislation. One academic has criticized what he terms the "internationalist conception" of the *Charming Betsy* principle: "This conception, akin to the monist view of international law, might call for essentially rewriting a statute to conform it with international law, or for construing a statute broadly to mirror international law, even if such a construction is not necessary in order to avoid a violation of international law."[83] On these grounds, a defendant in a state-sponsored terrorism lawsuit should have a plausible objection to application of the *Charming Betsy* principle.

D. The Flatow Amendment Does Not Provide a Cause of Action Against a Foreign State

Recent judicial opinions finding that the Flatow Amendment provides a cause of action against a foreign state fail to persuade for a number of reasons, as discussed above.[84] These opinions seem to have misconstrued both the purpose and the scope of the Flatow Amendment, given that neither the text of the Amendment nor its legislative history suggest a cause of action against a foreign state. Accordingly, courts should not apply the concept of respondeat superior when doing so adds a category of damages that is explicitly forbidden by the immediately following section of the FSIA, which provides that foreign states not entitled to immunity under § 1605 or § 1607 "shall not be liable for punitive damages."[85] Moreover, requiring explicit statutory language or concrete evidence of congressional intent before judicially inserting the language "foreign state" into the Flatow Amendment is especially prudent given the foreign policy concerns that are inherent in state-sponsored terrorism cases against foreign governments. In this context, judicial consultation of the executive branch will bring important foreign policy considerations to the attention of the courts. The expertise of the executive branch in the arena of foreign policy will help the courts resolve any ambiguity in the statute.

II. THE BENEFITS OF EXECUTIVE PARTICIPATION IN LITIGATION INVOLVING QUESTIONS OF FOREIGN POLICY & SOVEREIGN IMMUNITY IN U.S. COURTS

If Congress does not act and courts must make the ultimate decision concerning the Flatow Amendment, they should carefully review the

83. Bradley, *supra* note 77, at 499 (internal quotation marks omitted).

84. *See supra* notes 44–72 and accompanying text.

85. 28 U.S.C. § 1606 (Supp. 2002).

views of the executive branch with respect to both the legal and the foreign policy issues presented by state-sponsored terrorism cases. A court may then weigh the legitimate foreign policy concerns of the executive branch against the legitimate interest in justice for victims of state-sponsored terrorism.

The State Department's participation in a number of cases with foreign policy implications inevitably gives rise to the question of how much deference a court should give to the views of the executive branch.[86] Since the Tate Letter of 1952[87] and the passage of the FSIA in 1976, the State Department no longer plays an essential role in determining questions of foreign sovereign immunity.[88] Nevertheless, courts frequently order or invite the State Department to express its views on sovereign immunity or other legal questions in cases that may affect foreign policy.[89] This section will explore the development of the executive power over foreign relations as rooted in the Constitution and expressed in litigation in U.S. courts, and analyze more specifically the benefits of executive branch participation in cases construing the Flatow Amendment and in other litigation that may affect the conduct of foreign policy.

A. The Constitutional Foundations of the Foreign Relations Power and the Principle As Developed in U.S. Courts

The foreign relations power of the executive is rooted in the Constitution, particularly Article II, Section 3, which provides that the President shall have the authority to "receive Ambassadors and other public Ministers."[90] The Constitution also provides that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur."[91] These constitutional provisions vest some explicit foreign relations powers in the executive but do not provide a comprehensive structure of the relationship between the executive and the judicial branches in the area where litigation and foreign policy intersect.

Early scholars and statesmen debated the scope of the executive's power over foreign relations and how it might conflict with the roles of

86. *See generally* Cicippio-Puleo v. Islamic Republic of Iran, 353 F.3d 1024 (D.C. Cir. 2004); Roeder v. Islamic Republic of Iran, 195 F. Supp. 2d 140 (D.D.C. 2002).

87. Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep't of State, to Acting U.S. Att'y General Philip B. Perlman (May 19, 1952), *reprinted in* 26 DEP'T STATE BULL. 984–85 (1952). The Tate Letter sets forth the restrictive theory of sovereign immunity, whereby sovereigns are not immune for certain private acts.

88. Verlinden v. Central Bank of Nigeria, 461 U.S. 480, 486–89 (1983).

89. *Id.*

90. U.S. CONST. art. II, § 3

91. U.S. CONST. art. II, § 2.

both the legislative and the judicial branches.[92] The jurisprudence in this area developed from Justice John Marshall's early analysis of constitutional foreign relations issues[93] to the leading modern cases of the twentieth century.[94] The Supreme Court in *Curtiss-Wright* described "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress."[95] The executive branch has often relied on this statement as support for its theory of presidential power in the area of foreign relations.[96] Furthermore, the Supreme Court in *Curtiss-Wright* declared that the executive power over foreign relations was an aspect of sovereignty that passed directly from the British Crown to the federal government upon the signing of the Declaration of Independence, and did not depend on any constitutional provision for its legitimacy:

> It results that the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality.[97]

To be sure, this extraconstitutional theory of executive power over foreign relations has been criticized as having no basis in historical fact.[98] Regardless of whether Justice Sutherland's account of the origins of the executive foreign relations power in *United States v. Curtiss-Wright* is correct historically, the wisdom of the federal courts' making

---

92. The most famous debate was between Alexander Hamilton, writing as "Pacificus," and James Madison, writing as "Helvidius." This debate focused on President Washington's Declaration of Neutrality (without calling Congress into session) in the war between England and France in 1793. The Pacificus-Helvidius Debate, at http://teachingamericanhistory.org/library/index.asp ?document=429 (last visited Apr. 20, 2005) (Hamilton's argument appeared in the Gazette of the United States, published in Philadelphia, on June 29, 1793. Madison's rebuttal to Hamilton appeared in a series of articles in the Gazette of the United States between August 24 and September 18, 1793).

93. *See, e.g.*, Little v. Barreme, 6 U.S. 170, 177 (1804).

94. *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

95. *Curtiss-Wright*, 299 U.S. at 320.

96. *See* United States v. Pink, 315 U.S. 203, 229 (1942); *see also* Raoul Berger, *The Presidential Monopoly of Foreign Relations*, 71 MICH. L. REV. 1 (1972).

97. *Curtiss-Wright*, 299 U.S. at 318.

98. G. Edward White, *What's Wrong with International Law Scholarships: The Historical Turn in the Constitutional Law of Foreign Relations*, 1 CHI. J. INT'L L. 133, 135 (2000); *see also* Michael J. Glennon, *Two Views of Presidential Foreign Affairs Power:* Little v. Barreme *or* Curtiss-Wright*?*, 13 YALE J. INT'L L. 5, 13 (1988).

decisions with foreign policy implications without considering the views of the executive branch is questionable. Notably, one scholar who criticizes the historical accuracy of the "extraconstitutional" theory of executive foreign relations power seems to understand the problematic nature of judicial foreign relations lawmaking:

> Even if we assume that the foreign relations powers of the federal government are "different" from those of its domestic powers—different because of the historical sources of the federal foreign relations power and the exigencies of international policymaking—it would seem to be because of the Constitution's expectation that the Executive (subject to Senate consent) would be the principal organ of foreign policymaking, and because (if one accepts one version of history) every international sovereign has some inherent power to conduct foreign relations. Neither of these grounds justify foreign relations lawmaking by the federal courts, especially in the absence of Executive suggestions and in light of the constitutional concerns raised by Erie about the legitimacy of federal judge-declared law not grounded in any positive edict of the federal government.[99]

The *Cronin* court's interpretation of the Flatow Amendment exemplifies exactly this type of foreign relations lawmaking by the federal courts.[100] Without any sound basis in statutory interpretation of the Amendment or in its legislative history, the federal courts have usurped the role of Congress and created a cause of action against a foreign sovereign in a statute that, on its face, does not provide one.[101] The proper role of the federal courts is to await further congressional action, or to find some other, legally valid method of compensating plaintiff victims of state-sponsored terrorism.[102]

The need for the courts to observe their proper constitutional function is particularly acute in cases touching on areas within the legitimate sphere of the executive branch's power to conduct diplomatic relations.[103] Given that this power is both firmly grounded in the Constitution

---

99. White, *supra* note 98, at 138 (discussing Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938)).

100. Cronin v. Islamic Republic of Iran, 238 F. Supp. 2d 222 (D.D.C. 2002).

101. *Id.* at 233.

102. White's concern about the legitimacy of federal judge-made law not based on any positive edict of the federal government highlights another troubling recent judicial trend. The federal courts should not make law on human rights grounds by incorporating non-self-executing treaties or other non-binding agreements into federal common law in result-driven opinions. *See, e.g.*, Martinez v. City of Los Angeles, 141 F.3d 1373 (9th Cir. 1998); Siderman de Blake v. Republic of Argentina, 965 F.2d 699 (9th Cir. 1992).

103. U.S. CONST. art. II.

and recognized by the U.S. Supreme Court,[104] there is no justification for the lower courts to ignore the foreign relations aspects of cases and/or legislate from the bench. Considering the views of the executive would add balance to these cases that often lack the adversarial pressure necessary to reaching a just result, and which are usually headed toward default judgments.[105]

Recognizing the legitimate interests of the executive branch in litigation affecting foreign policy, several modern courts have requested the views of the State Department in appropriate cases.[106] In *Kadic v. Karadzic*, plaintiffs brought an action against the leader of a self-proclaimed republic within Bosnia-Herzegovina, asserting causes of action for genocide; rape; forced prostitution; torture and other cruel, inhuman and degrading treatment; assault and battery; gender and ethnic inequality; summary execution; and wrongful death.[107] The plaintiffs' claims arose from a systematic campaign of atrocities carried out by military forces during the course of the Bosnian civil war.[108] The court addressed the defendant's potential immunity from service of process, as an invitee of the United Nations while in the United States, and the applicability of the political question doctrine.[109] The *Kadic* court characterized the views of the executive as "entitled to respectful consideration" and wrote to the attorney general to inquire whether the United States desired to offer any of its views on the issues raised in the case.[110] The response, signed by the solicitor general and the Legal Adviser of the State Department, indicated that the political question doctrine should not prevent litigation of the case.[111] The government's position in *Kadic* demonstrates that the United States will not always suggest immunity or otherwise attempt to protect a defendant.

The *Sarei v. Rio Tinto* court recognized the appropriateness of giving strong consideration to the views of the State Department.[112] The plaintiffs in *Rio Tinto* were current and former residents of the Island of

---

104. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936); *see also supra* notes 95–97 and accompanying text.

105. *See* Roeder v. Islamic Republic of Iran, 195 F. Supp. 2d 140, 145 (D.D.C. 2002).

106. *See* Doe v. Exxon Mobil, No. 01-CV-1357 (D.D.C. filed June 19, 2001); Sarei v. Rio Tinto P.L.C., 221 F. Supp. 2d 1116, 1180 (C.D. Cal. 2002); Kadic v. Karadzic, 70 F.3d 232, 250 (2nd Cir. 1995).

107. *Kadic*, 70 F.3d at 236–37.

108. *Id.*

109. *Id.* at 250.

110. *Id.*

111. An earlier letter signed by Michael J. Habib, Director of Eastern European Affairs for the State Department, had indicated that Karadzic was not immune from service of process as an invitee of the United Nations. *Id.*

112. Sarei v. Rio Tinto P.L.C., 221 F. Supp. 2d 1116, 1180 (C.D. Cal. 2002).

Bougainville in Papua New Guinea who filed a class action against an Australian corporation and a British corporation under the ATCA.[113] The plaintiffs alleged that the corporations committed crimes against humanity and war crimes and that the corporations' mining operations destroyed the environment, damaged the health of the people, and incited a civil war.[114] The court noted the views of the State Department Legal Adviser on the foreign relations impact of the case: "Specifically, Mr. Taft stated that continued adjudication of this lawsuit 'would risk a potentially serious adverse impact on the [Bougainville] peace process, and hence on the conduct of [United States] foreign relations.'"[115] The court explained that the State Department's views regarding the impact of the litigation on U.S. foreign policy are to be considered conclusive and cannot be litigated without violating settled separation of powers principles.[116] As such, the court rejected the plaintiffs' request that it disregard the Statement of the Legal Adviser.[117] Ultimately, the court held that the act of state doctrine and the political question doctrine required dismissal of plaintiffs' claims.[118] Regardless of whether the court reached the correct result in this particular case, the court showed appropriate deference to the State Department's position.[119]

B. The Legitimate Interests of the Executive and the Benefits of Executive Participation in Litigation That Affects Foreign Policy

There is practical wisdom underlying executive participation in litigation that affects foreign policy. To begin with, the attorneys at the State Department and the Department of Justice are capable of providing sound, persuasive, and unique legal arguments, helpful for consideration of complex legal issues by the courts. On this basis alone, the federal courts should consider the views of the executive branch when addressing issues of statutory interpretation and international law.

Furthermore, careful consideration of the views of the executive by the federal courts is particularly appropriate given the current state of judicial activism in human rights and state-sponsored terrorism cases.[120]

---

113. Alien Tort Claims Act, 28 U.S.C. § 1350 (2000).

114. *Sarei*, 221 F. Supp. 2d at 1180.

115. *Id.* at 1181.

116. *Id.* at 1181–82.

117. *Id.* at 1192.

118. *Id.* at 1208–09.

119. The State Department did not take a position on whether or not the act of state or political question doctrines required dismissal of the case. The State Department only weighed in on the foreign policy issues in the case, and the court correctly considered the State Department's view on that matter conclusive.

120. *See* Cronin v. Islamic Republic of Iran, 238 F. Supp. 2d 222 (D.D.C. 2002).

Such consideration will provide deeper insight into the foreign policy implications of decisions that seem morally justifiable on human rights grounds, but may prove unwise in the long term from a foreign policy or a human rights perspective, decisions that, as demonstrated in the line of cases interpreting the Flatow Amendment, are supported by creative yet questionable legal reasoning. Considering the long-range foreign policy and human rights implications of a decision alongside each other will provide a balanced approach to judicial analysis of both legal and nonlegal ramifications of particular cases.

State-sponsored terrorism lawsuits in particular have the potential to interfere with the legitimate interests of the executive branch in conducting foreign policy. The executive branch faces the sensitive and often difficult task of conducting diplomatic relations, a task that is especially challenging when conducted with potentially dangerous states.[121] Lawsuits in U.S. courts frequently result in default judgments against the foreign state, and judgment enforcement is difficult and potentially troublesome.[122] Indeed, enforcement of default judgments might involve paying plaintiffs from frozen assets of the foreign state defendant.[123] This practice would reduce executive leverage over rogue states, as one commentator has noted:

> In practice, frozen assets have proven useful as "diplomatic bargaining chips" to encourage a government to cooperate or to reward regime change. For example, former deputy Treasury Secretary Stuart Eizenstat noted that "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," including accounting for POWs and MIAs from the Vietnam War.[124]

Another prominent example is the resolution of the Iran hostage-taking crisis in 1980: "Several officials noted in a joint statement to Congress that 'the critical bargaining chip' in the Iran Hostage Crisis was the $10 billion in assets that had been blocked after the U.S. embassy was taken."[125] If default judgments awarded by courts are satisfied from frozen assets of rogue states, the executive branch will lose a valuable tool in the conduct of foreign relations.

---

121. For example, the task of improving relations with Iran and Libya.

122. *See* Flatow v. Islamic Republic of Iran, 308 F.3d 1065 (9th Cir. 2002).

123. *See* Allison Taylor, *Another Front in the War on Terrorism? Problems with Recent Changes to the Foreign Sovereign Immunities Act*, 45 ARIZ. L. REV. 533, 545 (2003).

124. *Id.*

125. *Id.* at 545 n.131 (quoting H.R. REP. NO. 106–733, at 13–14 (2000) (Joint testimony of Treasury Deputy Secretary Stuart E. Eizenstat, Defense Department Undersecretary for Policy Walter Slocombe, and State Department Undersecretary for Policy Thomas Pickering)).

Large default judgments may also hinder U.S. efforts to normalize relations with rogue states. As one author has predicted with respect to Cuba and Iran, "outstanding judgments under the 1996 amendments could retard the improvement of relations between the United States and countries such as Cuba and Iran. Large unresolved claims against an economically strapped state struggling to implement democracy may not be in the foreign policy interest of the United States."[126] By awarding large default judgments against foreign states, courts interfere with the executive branch's efforts to promote democracy. Thus, default judgments may encourage extremism and terrorism by inhibiting political and ideological change in rogue states, with the possible consequence of producing the opposite result from that intended by the courts.

In reality, the courts' imposition of default judgments poses not only a technical obstacle to normalizing relations[127] and promoting democracy in rogue states, but a psychological obstacle as well. It is not hard to imagine the reaction of Iranian government officials when learning that a U.S. court has rendered an enormous default judgment against its nation. The international community "has generally resisted U.S. assertions of extraterritorial jurisdiction in such realms as employment law, antitrust law, and export controls."[128] The international community will further resist U.S. extraterritorial jurisdiction in tort claims cases that result in staggering default judgments. The symbolic meaning of these judgments, while highly touted and valued by plaintiffs, is surely not lost on the foreign state defendants, whose strong resentment might be fairly presumed.

Indeed, such resentment may encourage foreign states to retaliate against the United States with indictments for terrorism in their own courts. In fact, one commentator has observed that "we have also terrorized large swaths of the world through decades of military interventions and support for terrorist regimes and organizations."[129] At least two nations, Iran and Cuba, have already retaliated against the U.S. by providing for lawsuits against the United States in their courts.[130] Iran's legislation allows "Iranian 'victims of U.S. interference' to sue the United States for damages."[131] As frustration with America and the perceived

126. Glannon, *supra* note 8, at 700.

127. Including trade relations—presumably Iran would prefer to engage in commerce with nations that provide a more secure environment for investment.

128. Glannon, *supra* note 8, at 706.

129. Beth Stephens, *Accountability Without Hypocrisy: Consistent Standards, Honest History,* 36 NEW ENG. L. REV. 919, 922 (2002).

130. *See* Taylor, *supra* note 123, at 549–50.

131. *Id.* at 549 (quoting *Iran's MPs Cry "Down With America," Approve Lawsuits Against the United States*, AGENCE FRANCE PRESSE, Nov. 1, 2000).

arrogance of U.S. courts increases abroad, other nations might follow Iran's example. Such lawsuits would threaten U.S. diplomatic property abroad, which is valued at $12 billion to $15 billion.[132] While this figure is nothing to smirk at, the true cost of retaliation or reciprocity must also include the damage to already challenging relationships with rogue states, and as such cannot be realistically assigned a dollar value.

The category of lawsuits with potentially damaging foreign policy implications is not limited to those filed directly against a foreign government, but may include those involving judicial scrutiny of the actions of a foreign government. In the *Exxon Mobil* case, for example, adjudication of the dispute might involve judicial criticism of Indonesian military conduct, which Indonesia may consider an affront to its sovereignty.[133] Angering Indonesia could affect its participation in the war on terrorism.[134] Considering the importance of Indonesia as a key Islamic nation identified as a "focal point" for efforts against Al Qaeda, courts should consider the risk of damage to diplomatic relations with that nation.[135] Additionally, adjudication of the lawsuit could "diminish our ability to work with the Government of Indonesia . . . on a variety of important programs, including efforts to promote human rights in Indonesia."[136] While these concerns do not necessarily mandate dismissal of the case, the courts should give them considerable weight.[137]

The *Roeder* case highlights yet another potentially troubling foreign policy issue raised by state-sponsored terrorism lawsuits: interference with U.S. treaty obligations and executive agreements.[138] The power of the executive to enter into agreements extinguishing the claims of U.S. nationals against foreign governments was recently restated by the Supreme Court: "Given the fact that the practice goes back over 200 years to the first Presidential administration, and has received congressional acquiescence throughout its history, the conclusion '[t]hat the President's

---

132. Taylor, *supra* note 123, at 548.

133. Letter from William H. Taft, Legal Adviser, Department of State, to Honorable Louis F. Oberdorfer, U.S. District Court Judge (July 29, 2002), *in* Terry Collingsworth, *The Alien Tort Claims Act – A Vital Tool for Preventing Corporations from Violating Fundamental Human Rights* 18, *at* http://www.laborrights.org/ (last visited Apr. 20, 2005).

134. *Id.* at 1.

135. *Id.*

136. *Id.* Taft attached a letter sent from the Indonesian Ambassador to Richard Armitage. This letter expressed Indonesia's objection to the extraterritorial jurisdiction of the U.S. court and expressed fears about the negative effect of the litigation on peace and stability in Indonesia. *Id.* at 7.

137. Even those critical of the role the executive plays in litigation have acknowledged that courts should at the minimum consider the views of the executive. *See* Brian C. Free, Comment, *Awaiting* Doe v. Exxon Mobil Corp.*: Advocating the Cautious Use of Executive Opinions in Alien Tort Claims Act Litigation*, 12 PAC. RIM L. & POL'Y J. 467, 480–81 (2003).

138. *See* Roeder v. Islamic Republic of Iran, 195 F. Supp. 2d 140, 145 (D.D.C. 2002)

control of foreign relations includes the settlement of claims is indisputable.'"[139] In *Roeder*, the plaintiffs' lawsuit, which arose out of the 1979 hostage crisis at the American Embassy in Tehran, attempted to circumvent the Algiers Accords, which had been negotiated with Iran to secure the release of the hostages.[140] Despite congressional interference with the litigation,[141] the court determined that Congress had not abrogated the Algiers Accords, and thus plaintiffs could not proceed. In so deciding, the court recognized the limitations of its mandate and its expertise: "There are two branches of government that are empowered to abrogate and rescind the Algiers Accords, and the judiciary is not one of them. The political considerations that must be balanced prior to such a decision are beyond both the expertise and the mandate of this Court."[142] The executive branch appropriately provided the expertise the court lacked.[143] Had the executive branch not intervened in *Roeder*, the court might have rendered a judgment in direct conflict with an international obligation of the United States. Both the executive branch's knowledge of the Algiers Accords and its unique legal expertise in international law were crucial to the court's reaching the correct result in *Roeder*.[144] Therefore, the *Roeder* case demonstrates the wisdom of courts giving careful consideration to the views of the State Department in cases involving foreign policy issues and questions of international law.

III. CONCLUSION: KEEPING AN EYE ON THE LATEST DECISIONS AND ANY (PERHAPS RELATED) MOVEMENTS IN CONGRESS

The D.C. Circuit's recent decision in *Cicippio-Puleo*[145] may resolve some of the controversy surrounding interpretation of the Flatow Amendment, or it may add fuel to the fire. At least for the moment, a narrower interpretation of the Flatow Amendment has gained momentum.[146] The D.C. Circuit stated, "The ultimate question is one of Congressional intent, not one of whether this Court thinks that it can improve

139. *See* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 415 (2003) (quoting United States v. Pink, 315 U.S. 203, 240 (1942)).

140. Declaration of the Democratic and Popular Republic of Algeria, Jan. 19, 1981, 20 I.L.M. 223, 224; Declaration of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States and the Government of the Islamic Republic of Iran, Jan. 19. 1981, 20 I.L.M. 223, 230.

141. *See Roeder*, 195 F. Supp. 2d at 166.

142. *Roeder*, 195 F. Supp. 2d. at 145.

143. *Id.*

144. *Id.*

145. Cicippio-Puleo v. Islamic Republic of Iran, 353 F.3d 1024 (D.C. Cir. 2004).

146. *See* Wyatt v. Syrian Arab Republic, 225 F.R.D. 1 (D.D.C. 2004); Lawton v. Republic of Iraq, 307 F. Supp. 2d 1 (D.D.C. 2004).

upon the statutory scheme that Congress enacted into law."[147] While the issue of congressional intent behind the Flatow Amendment remains open to debate, the plain language of the statute supports the narrower interpretation properly adopted by the court.[148] The courts should heed the advice of the D.C. Circuit and approach the issue with a proper measure of objectivity and judicial restraint:

> Clearly, Congress's authorization of a cause of action against officials, employees, and agents of a foreign state was a significant step toward providing a judicial forum for the compensation of terrorist victims. Recognizing a federal cause of action against foreign states undoubtedly would be an even greater step toward that end, but it is a step that Congress has yet to take. And it is for Congress, not the courts, to decide whether a cause of action should lie against foreign states.[149]

If Congress believes that the D.C. Circuit misinterpreted the Flatow Amendment in *Cicippio-Puleo*, it may choose to clarify the issue by further legislation. Indeed, such a development would not be surprising, given the strong interest of Congress in providing meaningful access to justice for victims of terrorism and other egregious human rights violations, as opposed to the foreign policy concerns adduced in the second part of this paper.

Nonetheless, a recently proposed resolution in the House of Representatives, while not explicitly related to the line of cases interpreting the Flatow Amendment, seems to cut the other way. The text of the newly proposed resolution states, in relevant part:

> Whereas it is the appropriate judicial role to faithfully interpret the expression of the popular will through laws enacted by duly elected representatives of the American people and our system of checks and balances;
>
> Whereas Americans should not have to look for guidance on how to live their lives from the often contradictory decisions of any of hundreds of other foreign organizations; and
>
> Whereas inappropriate judicial reliance on foreign judgments, laws, or pronouncements threatens the sovereignty of the United States, the separation of powers and the President's and the Senate's treaty-making authority: Now, therefore, be it

147. *Cicippio-Puleo*, 353 F.3d at 1033 (quoting Touche Ross & Co. v. Redington, 442 U.S. 560, 578 (1979)).

148. *Id.* at 1033–34.

149. *Id.* at 1036.

> *Resolved,* That it is the sense of the House of Representatives that judicial determinations regarding the meaning of the laws of the United States should not be based in whole or in part on judgments, laws, or pronouncements of foreign institutions unless such foreign judgments, laws, or pronouncements are incorporated into the legislative history of laws passed by the elected legislative branches of the United States or otherwise inform an understanding of the original meaning of the laws of the United States.[150]

This resolution was referred to the House Subcommittee on the Judiciary on March 17, 2004, and referred to the Subcommittee on Crime, Terrorism, and Homeland Security on March 19, 2004. The text of the proposed resolution demonstrates Congress's frustration with judicial reliance on international sources of law that have not been affirmatively incorporated into U.S. law through the appropriate legislative channels. Arguably, this congressional frustration will be exacerbated if the courts use the *Charming Betsy* principle to bring nonincorporated international law into analysis of the Flatow Amendment and the Antiterrorism Amendment. On the other hand, if Congress did in fact intend the Flatow Amendment to apply to foreign states, then the *Charming Betsy* principle may help hold states liable for the acts of their agents under the respondeat superior principle.

The most recent decision in the D.C. Circuit provides the better statutory analysis of the Flatow Amendment.[151] By contrast, the *Cronin* opinion is a prime example of judicial usurpation.[152] First, it usurps the legislative power by creating a cause of action not supported by the statutory language, thereby replacing the democratically enacted text with judicially created federal law.[153] Second, it interferes with the executive power by intruding into foreign affairs.[154]

---

150. H.R. Res. 568, 108th Cong. (2004). There were fifty-nine sponsors of this resolution.

151. Cicippio-Puleo v. Islamic Republic of Iran, 353 F.3d 1024 (D.C. Cir. 2004)

152. Cronin v. Islamic Republic of Iran, 238 F. Supp. 2d 222 (D.D.C. 2002); *see also* Acree v. Republic of Iraq, 370 F.3d 41 (D.C. Cir. 2004).

153. *Cronin*, 238 F. Supp. 2d at 231.

154. *Id.*