

IS THE GAVEL MIGHTIER THAN THE SWORD?  
 FIGHTING TERRORISM IN AMERICAN COURTS:  
 THE PROBLEMATIC IMPLICATIONS OF USING THE  
 FOREIGN SOVEREIGN IMMUNITIES ACT TO  
 COMPENSATE MILITARY VICTIMS OF AMERICA'S  
 WAR ON TERROR

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INTRODUCTION

Some policy experts view the bombing of the USS Cole as the beginning of the current war on terrorism.<sup>1</sup> In both 1996 and 1998, Osama bin Laden issued fatwas<sup>2</sup> instructing Muslims to kill U.S. civilian and military personnel any place in the world until the United States withdrew its support of Israel and withdrew military forces from Islamic countries.<sup>3</sup> Bin Laden reportedly told his followers that “[i]f someone can kill an American soldier, it is better than wasting time on other matters.”<sup>4</sup> By late 1998, bin

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<sup>1</sup> NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., *THE 9/11 COMMISSION REPORT* 191 (2004) [hereinafter *9/11 COMMISSION REPORT*], available at <http://www.9-11commission.gov/report/911Report.pdf> (stating that the attack on the USS Cole “galvanized al Qaeda recruitment efforts,” as “Bin Laden anticipated U.S. military retaliation” for the bombing). After the attack on the Cole, bin Laden ordered his Al Qaeda media operatives “to produce a propaganda video that included a reenactment of the attack” on the warship. *Id.*

<sup>2</sup> A fatwa is a religious decree, or judgment, issued by a recognized Islamic legal authority. Wael B. Hallaq, *From Fatwas to Furuq: Growth and Change in Islamic Substantive Law*, 1 *ISLAMIC L. AND SOC'Y* 29, 31 (1994). The authority of bin Laden's fatwas are in doubt because he is not a scholar of Islamic law. See *9/11 COMMISSION REPORT*, *supra* note 1, at 47.

<sup>3</sup> Justice Thomas sees bin Laden's declaration of war against the United States in 1996 and 1998 as the true beginning of the war on terror. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2826-28 (2006) (Thomas, J., dissenting).

<sup>4</sup> *Rux v. Republic of Sudan*, 495 F. Supp. 2d 541, 552 (E.D. Va. 2007) (quoting a statement by Osama bin Laden in February 1998, in which bin Laden asserted that “the murder of any American, military or civilian, was the ‘individual duty for every Muslim who can do it in any country in which it is possible to do it.’”).

Laden was funding an operation to target U.S. warships entering the Port of Aden, and was explicitly looking to kill or injure American soldiers.<sup>5</sup>

On October 12, 2000, the USS Cole, a Navy guided missile destroyer, was refueling in Yemen's Port of Aden.<sup>6</sup> Just as most of the ship's service-members were sitting down to lunch, a small boat, manned by two men, rapidly approached the side of the Cole.<sup>7</sup> Shortly after the boat drove alongside the ship, the boat—which had been packed with explosives—exploded, ripping a thirty-two by thirty-six foot hole in the port side of the Cole and killing seventeen U.S. sailors.<sup>8</sup>

The suspects in the USS Cole bombing were all Al Qaeda operatives.<sup>9</sup> Six of the main suspects were captured, and a criminal trial was held in Yemen in 2004.<sup>10</sup> Although a Yemeni court tried and convicted the six suspects, sentencing two to death and four others to between five and ten years in prison, many family members of the Cole victims wanted to pursue additional legal action.<sup>11</sup> In July 2004, fifty-nine of the surviving family members of the seventeen USS Cole victims initiated a civil action, *Rux v. The Republic of Sudan*,<sup>12</sup> in a Virginia district court. Three years after the initia-

<sup>5</sup> *Id.*; see also 9/11 COMMISSION REPORT, *supra* note 1, at 190.

<sup>6</sup> *Rux*, 495 F. Supp. 2d at 544-45. At the time the ship entered the Port of Aden, the U.S. Department of Defense terrorist threat level “was ‘Threat Condition (THREATCON) Bravo,’ which indicated an increased and more predictable threat of terrorist activity.” *Id.* at 545.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* This single event tied Yemen's fate to the interests and threats of the American global war on terror. The Yemeni government cooperated with the U.S. government in its fight against terrorism in order to avert U.S. military action. See Richard Minter, Op-Ed., *U.S. Help From Yemen*, WASH. TIMES, Oct. 25, 2004, at A21, available at <http://www.richardminter.com/pdf/articles/20041025-art-washtimes.pdf>. As the United States began its war preparations to invade Iraq, the President of Yemen, Abdullah Saleh, met with President Bush in December 2002 at the White House. *Id.* “The Yemeni president tried to make [President Bush] understand that Yemen could not risk being too helpful in the War on Terror and that invading Iraq would be a mistake.” *Id.* President Saleh was reported to have said to President Bush, “[i]f [you] were to put a cat in a cage, it could likely turn into a fierce lion.” *Id.* Bush's response was stinging: “The cat has rabies and the only way to cure the cat is to cut off its head.” *Id.*

<sup>9</sup> 9/11 COMMISSION REPORT, *supra* note 1, at 190; see also Brian Whitaker, *Yemen Trial of USS Cole Suspects Starts*, IRISH TIMES, July 8, 2004, at 16.

<sup>10</sup> *Trial in Yemen Begins in USS Cole Bombing*, SEATTLE TIMES, July 8, 2004, at A7.

<sup>11</sup> William Branigin, *2 Sentenced to Die for USS Cole Attack*, WASH. POST, Sept. 30, 2004, at A18, available at <http://www.washingtonpost.com/wp-dyn/articles/A58874-2004Sep29.html>. The Cole suspects appealed their sentences, but in February 2005, a Yemeni court upheld the death sentence for Abd al-Rahim al-Nashiri, a Saudi national of Yemeni descent. *Rulings on Sentences in USS Cole Bombing*, NEWSDAY (New York), Feb. 27, 2005, at A26. Yemen transferred custody of al-Nashiri to the United States in 2002, where he was subsequently moved to a secret CIA prison and tried for the Cole bombings *in absentia* in 2004. Adam Liptak, *Detainee Says Torture Led to Confessions*, N.Y. TIMES, Mar. 31, 2007, at A10. After being sentenced to death by the Yemeni court for the Cole bombing, al-Nashiri was moved to Guantanamo Bay in September 2006, where he remains as one of fourteen “high-value detainees.” *Id.* Al-Nashiri told a combatant status review tribunal that he confessed involvement in terrorist activities because he was tortured. *Id.*

<sup>12</sup> 495 F. Supp. 2d 541, 543, 545 (E.D. Va. 2007).

tion of the action, the judge held that, under the Terrorism Exception to the Foreign Sovereign Immunities Act (“FSIA”), the Islamic Republic of Sudan was civilly liable for the deaths of the seventeen sailors aboard the USS Cole because of Sudan’s past material support of Al Qaeda.<sup>13</sup> This complicated and transnational case resulted in the Cole victims’ family members receiving an award of almost \$8 million in damages, to be seized from Sudanese assets frozen in the United States.<sup>14</sup>

“For decades, families of terrorism victims have repeatedly attempted to seek civil redress against terrorists, but until recently had been thwarted by the principle of sovereign immunity.”<sup>15</sup> According to this principle, “all states are equal sovereigns and cannot exercise jurisdiction over another state in domestic courts.”<sup>16</sup> In 1976, Congress passed FSIA, asserting that “a foreign state shall be immune from the jurisdiction of the Courts of the United States and of the States,” but also stipulating that immunity from suit would be subject to specific statutory exceptions.<sup>17</sup> In 1996, Congress amended FSIA, adding an exception to foreign state sovereign immunity to allow American victims of terrorist acts to sue certain foreign states that had been designated as state sponsors of terrorism by the U.S. State Department.<sup>18</sup> By passing the Terrorism Exception to FSIA, Congress sought to “end terrorism and [compensate] American victims,”<sup>19</sup> and insisted the legislation would “give American citizens an important economic and financial weapon against . . . outlaw states.”<sup>20</sup>

Proponents of civil suits against state sponsors of terrorism assert that the current war on terrorism can be won in the “orderly confines of the courtroom.”<sup>21</sup> Despite the multiple problems successful plaintiffs have had with recovering judgments against state sponsors of terrorism under FSIA,<sup>22</sup> the Terrorism Exception has provided American citizens with a vehicle for

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<sup>13</sup> *Id.* at 553-55, 567 (E.D. Va. 2007) (finding that “Sudan . . . actively provided Al Qaeda with support, guidance . . . and resources that allowed it to transform into a sophisticated, worldwide terrorist network, and that such support was critical to . . . the attack that killed the seventeen American sailors on the USS Cole.”).

<sup>14</sup> *Id.* at 569 (awarding plaintiffs a total of \$7,956,344 in damages against the Republic of Sudan).

<sup>15</sup> Seth N. Stratton, Note, *Taking Terrorists to Court: A Practical Evaluation of Civil Suits Against Terrorists Under the Anti-Terrorism Act*, 9 SUFFOLK J. TRIAL & APP. ADVOC. 27, 30 (2004).

<sup>16</sup> Jeewon Kim, Comment, *Making State Sponsors of Terrorism Pay: A Separation of Powers Discourse Under the Foreign Sovereign Immunities Act*, 22 BERKELEY J. INT’L L. 513, 513 (2004).

<sup>17</sup> 28 U.S.C. § 1604 (2000). The exceptions to sovereign immunity are in 28 U.S.C.S. §§ 1605, 1607 (LexisNexis 2008). Additionally, “[a]s it stood in 1976, the FSIA did not permit suits against foreign states for state-sponsored crimes, including acts of torture and execution against U.S. citizens.” Kim, *supra* note 16, at 514.

<sup>18</sup> Kim, *supra* note 16, at 514.

<sup>19</sup> *Id.*

<sup>20</sup> H.R. REP. NO. 104-383, at 62 (1995).

<sup>21</sup> See Jennifer Senior, *A Nation Unto Himself: Intruders in the House of Saud, Part II*, N.Y. TIMES, Mar. 14, 2004, § 6 (Magazine), at 36.

<sup>22</sup> See *infra* Part III.A.

redressing international human rights violations, and has ensured that foreign states cannot claim sovereign immunity from suit in an American courtroom if they sponsor acts of terrorism that injure American citizens.<sup>23</sup> In this sense, perhaps terrorism can be combated, or deterred, in the orderly confines of the courtroom.

However, allowing American victims of terrorism to recover monetary judgments against foreign states has taken on a new complexity due to the current war on terror. Initially, parties bringing suit pursuant to the Terrorist Exception under FSIA were civilian Americans, suing foreign states after becoming victims of international terrorism while studying, working, or traveling abroad.<sup>24</sup> Now, however, the United States is fighting a war on terror. While addressing the nation in June 2005, President Bush affirmed that:

[U.S.] troops . . . across the world are fighting a global war on terror. The war reached our shores on September the 11th, 2001. . . . Iraq is the latest battlefield in this war. Many terrorists who kill innocent men, women, and children on the streets of Baghdad are followers of the same murderous ideology that took the lives of our citizens in New York, in Washington, and Pennsylvania. . . . Our mission in Iraq is clear. We're hunting down the terrorists.<sup>25</sup>

The onset of the war on terror and combat activities in Iraq and Afghanistan have convoluted what “terrorism” means to American citizens—civilians and military personnel alike. Whereas before 9/11, terrorists were those who hijacked planes, or singularly killed innocent victims in a crowded marketplace by strapping themselves with bombs and blowing themselves up, now it seems all enemies encountered by U.S. troops are considered “terrorists.”<sup>26</sup>

With hundreds of thousands of U.S. troops deployed in a war to combat terrorism,<sup>27</sup> it is alarming that some active duty servicemembers, or their

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<sup>23</sup> Kim, *supra* note 16, at 516.

<sup>24</sup> BARRY E. CARTER ET AL., *INTERNATIONAL LAW* 604, 608-09 (5th ed. 2007).

<sup>25</sup> George W. Bush, *Address to the Nation on the War on Terror from Fort Bragg, North Carolina*, 41 WEEKLY COMP. PRES. DOC. 1079, 1079 (June 28, 2005) [hereinafter *Address to the Nation*].

<sup>26</sup> *Id.* As the war rages on, and more U.S. servicemembers are killed in the line of duty, more Americans are growing impatient. Some scholars have asked:

[W]hat [would] victory in a war on terror actually look like[?] The traditional notion of winning a war is fairly clear: defeating an enemy on the battlefield and forcing it to accept political terms. But what does victory—or defeat—mean in a war on terror? Will this kind of war ever end? How long will it take?

Philip H. Gordon, *Can the War on Terror be Won?: How to Fight the Right War*, FOREIGN AFFAIRS, Nov.-Dec. 2007, at 53, 54, available at <http://www.foreignaffairs.org/20071101faessay86604/philip-h-gordon/can-the-war-on-terror-be-won.html>.

<sup>27</sup> As of March 2008, there were approximately 170,000 troops deployed to support Operation Iraqi Freedom. Steven Lee Myers & Thom Shanker, *Bush Given Iraq War Plan With a Steady Troop Level*, N.Y. TIMES, Mar. 25, 2008, at A1, available at [http://www.nytimes.com/2008/03/25/washington/25policy.html?\\_r=1&oref=slogin&fta=y&pagewanted=print](http://www.nytimes.com/2008/03/25/washington/25policy.html?_r=1&oref=slogin&fta=y&pagewanted=print). As of April 2008, there were approxi-

surviving family members, could recover monetary judgments from a designated state sponsor of terrorism under FSIA's Terrorism Exception for injuries sustained during the servicemembers' deployment.<sup>28</sup> Yet, that is precisely what recent court decisions, such as *Rux*, have held. As originally enacted, FSIA did not explicitly state that servicemembers could recover under the Terrorism Exception.<sup>29</sup> In January 2008, however, Congress pushed to amend FSIA's Terrorism Exception to add servicemembers explicitly as a class able to recover monetary judgments against certain foreign states for injuries the servicemember incurred serving U.S. interests while deployed abroad.<sup>30</sup> Whether a soldier bringing terrorists to court is more effective than a soldier combating terrorists on the battlefield is an extremely complex legal, political, and moral issue; can the gavel truly be mightier than the sword?

This Comment examines the holding of *Rux v. Republic of Sudan* in light of other successful judgments under FSIA's Terrorism Exception, with a focused emphasis as to whether it is sound policy and law to allow servicemembers, or their surviving family members, to recover monetary judgments against foreign states during a time of war. By examining the principles of sovereign immunity as elucidated in both the Federal Tort Claims Act ("FTCA") and FSIA, this Comment argues that allowing U.S. servicemembers to recover monetary judgments against foreign states for injuries incurred during war interferes with the constitutionally granted executive powers of the President by frustrating U.S. foreign policy efforts, and significantly undermines the President's role as Commander in Chief of the U.S. military.<sup>31</sup> Allowing servicemembers to recover monetary judgments under FSIA's Terrorism Exception could also have an extremely negative impact on the military itself; permitting the unjustifiable discrimination between the types of recovery different servicemembers could collect if injured could drastically affect the morale of the very troops the United States is relying on to fight this war on terror.

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mately 31,000 troops deployed to support Operation Enduring Freedom in Afghanistan. Associated Press, *U.S. To Up Troop Levels In Afghanistan*, Apr. 4, 2008, <http://www.cbsnews.com/stories/2008/04/04/terror/printable3993900.shtml>.

<sup>28</sup> See generally *Rux v. Republic of Sudan*, 495 F. Supp. 2d 541 (E.D. Va. 2007); *Peterson v. Islamic Republic of Iran*, 264 F. Supp. 2d 46 (D.D.C. 2003).

<sup>29</sup> See 28 U.S.C. § 1605(a)(7) (2000).

<sup>30</sup> See *infra* Part.II.C.3.

<sup>31</sup> See generally U.S. CONST. art. 2, § 2. See also Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power Over Foreign Affairs*, 111 YALE L.J. 231, 238 (2001) (discussing what is known as "presidential primacy" over foreign affairs, which asserts that "[t]he President has primary responsibility for the conduct of the foreign affairs of the United States," and although Congress has some specific powers that "concern or bear upon foreign affairs[,] . . . the presidency is the institution on which the Constitution places the duty to look to the Republic's interests in the international arena.") (citing H. Jefferson Powell, *The President's Authority over Foreign Affairs: An Executive Branch Perspective*, 67 GEO. WASH. L. REV. 527, 545-46 (1999)).

Part I briefly discusses the principle of sovereign immunity, examining the circumstances in which the U.S. government permits a private litigant to bring a claim against either the U.S. government or a foreign government, discussing both the foundations of the principle of sovereign immunity, as well as the legislative histories behind FTCA and FSIA. Part II juxtaposes the development of U.S. sovereign immunity under FTCA, with an emphasis on Congress's specific intent to prohibit active duty servicemembers from recovering monetary judgments against the United States for any claim arising out of combatant activities during a time of war, against the stark contradiction of allowing servicemembers to recover monetary judgments for combatant activities during a time of war against a foreign state under the Terrorist Exception to FSIA. Part III examines the logistics of how a successful plaintiff is supposed to recover a monetary judgment under the Terrorism Exception, and how—due to the complications and problems of FSIA collections—allowing active duty servicemembers to recover judgments under this Act directly undermines the President's ability to conduct foreign policy in a time of war as Commander in Chief, provides some servicemembers with unintended double redressability, and unjustifiably affects the amount of money a servicemember could receive if injured in combat. Part IV addresses the contradictory nature of Congress's domestic and foreign sovereign immunity policies, asserting that if Congress does not want to modify the established policy that the United States should remain immune from suits brought by active duty servicemembers injured in a time of war, it should reconsider the 2008 amendments to the FSIA Terrorism Exception. Part IV concludes with a normative analysis of how courts should apply the newly amended FSIA Terrorism Exception for claims brought by servicemembers against a foreign state sponsor of terrorism.

## I. EXAMINING SOVEREIGN IMMUNITY

Although the doctrine of sovereign immunity raises many complex legal and policy considerations, this Comment focuses on the unique implications that arise when a U.S. servicemember brings a claim for injuries against a sovereign government. At first glance, the fact that the family members of the Cole victims were able to bring a lawsuit against the government of Sudan may seem puzzling. The Cole bombing involves the deaths of U.S. sailors killed aboard an American warship, docked in Yemen's Port of Aden, by Yemeni nationals working as Al Qaeda agents.<sup>32</sup> How then was Sudan found liable for this attack in a U.S. court?

Under most circumstances, a sovereign state is immune from any lawsuit in a foreign court.<sup>33</sup> This legal principle has been recognized as the

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<sup>32</sup> *Rux*, 495 F. Supp. 2d at 545; see also 9/11 COMMISSION REPORT, *supra* note 1, at 190.

<sup>33</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 451 (1987).

doctrine of sovereign immunity, and it plays an essential role in both U.S. law and international law. Under U.S. law, a foreign state maintains its immunity from suit in American courts, except in a few enumerated circumstances in which Congress has granted U.S. courts the authority to hear a claim brought by a U.S. citizen against a foreign state.<sup>34</sup> The court in *Rux v. Republic of Sudan* was able to have jurisdiction over the claims of the USS Cole victims' families because of the Terrorist Exception to FSIA, pursuant to which Sudan was able to be tried because it is on the State Department's List of State Sponsors of Terrorism.<sup>35</sup>

In order to shed light on how U.S. servicemembers can sue a terrorist state in American courts, this Part examines the evolution of the U.S. policy on sovereign immunity. By analyzing FSIA and FTCA, this Part explains the legal foundations of a claim like the one brought in *Rux*, and also lays the foundation as to why, historically, U.S. servicemembers have been prohibited from bringing suit against a sovereign government for injuries incurred incident to service.

#### A. *The Evolution of Domestic Sovereign Immunity*

It is important to note that the immunity of a state from the jurisdiction of the courts of another state is an undisputed principle of customary international law.<sup>36</sup> The United States inherited its doctrine of sovereign immunity from eighteenth century English law.<sup>37</sup> Justice Kennedy has asserted that the doctrine of sovereign immunity in American jurisprudence derives "from the structure of the original Constitution," and is also confirmed by the Eleventh Amendment, which asserts that U.S. federal courts do not have the authority to hear cases in law and equity against states by private citizens.<sup>38</sup>

Under U.S. law, the doctrine of sovereign immunity prevents an individual from bringing a lawsuit against a state or the federal government without legislative consent.<sup>39</sup> The doctrine took hold in the United States

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<sup>34</sup> See 28 U.S.C.S. § 1605 (LexisNexis 2008), amended by Pub. L. No. 110-181, § 1083, 122 Stat. 3, 338-44 (2008).

<sup>35</sup> *Rux*, 495 F. Supp. 2d at 554-55. For more information on the U.S. State Department's List of State Sponsors of Terrorism, see *infra* Part II.B.2. See also Matthew J. Peed, Note, *Blacklisting as Foreign Policy: The Politics and Law of Listing Terror States*, 54 DUKE L.J. 1321, 1322 (2005).

<sup>36</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 451 cmt. a (1987); see also 28 U.S.C. § 1604 (2000) ("Subject to existing international agreements to which the United States is a party . . . a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.").

<sup>37</sup> Comment, *The Federal Tort Claims Act*, 56 YALE L.J. 534, 534 (1947).

<sup>38</sup> *Alden v. Maine*, 527 U.S. 706, 728-29 (1999); see also U.S. CONST. amend. XI.

<sup>39</sup> Joseph D. Block, *Suits Against Government Officers and the Sovereign Immunity Doctrine*, 59 HARV. L. REV. 1060, 1060 (1946). By the mid-nineteenth century, U.S. citizens viewed the doctrine of

after the adoption of the Constitution, when the lack of a judicial remedy for citizens with tort claims against the government forced citizens to appeal to their Congressional representatives for relief.<sup>40</sup> Due to the absence of any other remedy, “it became the customary practice to handle claims against the [g]overnment by special legislation.”<sup>41</sup> This practice, however, was frequently “denounced for usurpation of Congressional energies which might otherwise be devoted to consideration of important national problems.”<sup>42</sup> John Quincy Adams complained that addressing private constituents’ claims against the government consumed almost half of Congress’s time, and insisted that “[t]here ought to be no private business before Congress. . . . It is judicial business, and legislative assemblies ought to have nothing to do with it.”<sup>43</sup>

As the doctrine of sovereign immunity developed in U.S. common law, the Supreme Court asserted that the principle of preventing citizens from bringing tort claims against the government was based on a “policy imposed by necessity.”<sup>44</sup> Additionally, the Court held the principle of sovereign immunity as “applicable to all governments,” and recognized that governments should not “hold themselves liable for unauthorized wrongs inflicted by their officers on [a] citizen, though occurring while engaged in the discharge of official duties.”<sup>45</sup>

Between 1887 and 1925, Congress passed various statutes that waived the U.S. government’s immunity from suit in certain claims involving contract, admiralty, maritime, and patent infringement.<sup>46</sup> As a result, the then-existing “exemption in respect to common-law torts appear[ed] incongruous.”<sup>47</sup> Congress’s voluntary waiver of sovereign immunity in other areas of law, coupled with the still-present burden to assess private tort claims against the government, led Congress to pass FTCA<sup>48</sup> in 1946 as a “general waiver of government immunity in tort, limited only by enumerated exceptions.”<sup>49</sup> FTCA gave the federal district courts “exclusive original jurisdiction over all money claims . . . for . . . personal injury caused by the negligent or wrongful act of a Government employee within the scope of his employment,” and made the United States liable to the private claimant “in

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sovereign immunity as “an anachronism unsuited to democratic society because of the unfairness to individuals with just claims against the Government.” Comment, *supra* note 37, at 534.

<sup>40</sup> Alexander Holtzoff, *The Handling of Tort Claims Against the Government*, 9 LAW & CONTEMP. PROBS. 311, 311 (1942).

<sup>41</sup> *Id.*

<sup>42</sup> Comment, *supra* note 37, at 534.

<sup>43</sup> Holtzoff, *supra* note 40, at 311-12.

<sup>44</sup> *Gibbons v. United States*, 75 U.S. 269, 275 (1868).

<sup>45</sup> *Id.*

<sup>46</sup> H.R. REP. NO. 79-1287, at 2-3 (1945).

<sup>47</sup> *Id.*

<sup>48</sup> 28 U.S.C. §§ 2671-2780 (2000).

<sup>49</sup> Comment, *supra* note 37, at 536.

the same manner, and to the same extent as a private individual under like circumstances.”<sup>50</sup>

The fact that FTCA contains enumerated exceptions, wherein the U.S. government cannot be sued, reaffirms the Supreme Court’s view that the doctrine of sovereign immunity was “a policy imposed by necessity.”<sup>51</sup> Allowing private citizens to sue the government or governmental officials acting in the scope of their employment opens up the possibility of a great deal of litigation. Some members of Congress objected to waiving U.S. immunity to tort claims and warned that FTCA would “open[] the door [for] people ‘to sue the Government.’ If this policy is adopted . . . we will find danger ahead. When the door is opened by which the right is extended to sue the United States of America in one class of cases, we will find the attempt to force such right on every hand in the future.”<sup>52</sup>

### B. *The Evolution of Foreign Sovereign Immunity*

Around the same time Congress passed FTCA, the contemporary U.S. policy on foreign sovereign immunity was established by the Tate Letter, a document written by the State Department’s acting Legal Adviser, Jack B. Tate.<sup>53</sup> The Tate Letter established the policy of recognizing the immunity of a sovereign with regard to sovereign public acts (*de jure imperii*) of a state, but not with respect to private acts (*de jure gestionis*).<sup>54</sup>

Because “the presidency is the institution on which the Constitution places the duty to look to [U.S.] interests in the international arena,”<sup>55</sup> the executive authority vested in the State Department handled claims by U.S. citizens against foreign states.<sup>56</sup> After the Tate Letter was issued, if a U.S. citizen brought a claim against a foreign government, the State Department would assess a foreign state’s defense of sovereign immunity, much like Congress had previously done for tort claims against the U.S. government

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<sup>50</sup> *Id.* Under FTCA, there was an explicit prohibition against the recovery of punitive damages on private tort claims against the United States. *Id.* at 553.

<sup>51</sup> *Gibbons v. United States*, 75 U.S. 269, 275 (1868).

<sup>52</sup> H.R. REP. NO. 79-1287, at 13 (1945).

<sup>53</sup> CARTER ET AL., *supra* note 24, at 562-63.

<sup>54</sup> *Id.*; see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 451 cmt. a (1987). Tate asserted that because governments were increasingly engaging in private commercial activities, it was necessary to provide persons who engaged in business with a sovereign state a legal remedy in U.S. courts in the event of a dispute. CARTER ET AL., *supra* note 24, at 564. Tate also made clear that shifting from an absolute policy of foreign sovereign immunity to a more restrictive policy and granting “sovereign immunity to foreign governments in [U.S.] courts . . . [would be] most inconsistent with the action of . . . the United States in subjecting itself to suit in these same courts in both contract and tort and with its long established policy of not claiming immunity in foreign jurisdictions for its merchant vessels.” *Id.*

<sup>55</sup> Prakash & Ramsey, *supra* note 31, at 238.

<sup>56</sup> CARTER ET AL., *supra* note 24, at 565-66.

before FTCA was passed.<sup>57</sup> The State Department would later conduct quasi-judicial hearings on whether a foreign state's defense of immunity from U.S. courts was rightly based on an immune public act.<sup>58</sup> Many scholars and lawyers were unhappy with this process, however, and one insisted that "[i]n virtually every other country in the world, sovereign immunity is a question of international law decided exclusively by the courts and not by institutions concerned with foreign affairs."<sup>59</sup> These same scholars chastised the Tate Letter's policy, asserting that "[t]he purpose of sovereign immunity . . . is to promote the functioning of all governments by protecting a state from the burden of defending lawsuits abroad which are based on public acts."<sup>60</sup>

The Supreme Court, however, echoed its previous assertions that the doctrine of sovereign immunity is a "policy imposed by necessity," and insisted that the defense of sovereign immunity was equally applicable to a charge against a foreign government as it was against domestic sovereign immunity claims.<sup>61</sup> The Supreme Court also insisted that the "courts may not . . . exercise their jurisdiction [over] a friendly sovereign, as to embarrass the executive arm of the government in conducting foreign relations."<sup>62</sup> In deferring the question of sovereign immunity to the executive branch, the Supreme Court insisted that when a foreign nation submits a formal claim of immunity from U.S. courts to the State Department, "the judicial department of this government follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction."<sup>63</sup>

Unlike a U.S. citizen's tort claim against the U.S. government, private tort claims against a foreign state raise unique issues of the executive's constitutionally-granted power in foreign affairs. As has been recognized, "the federal power over external affairs [is] in origin and essential character different from that over internal affairs."<sup>64</sup> In 1936, ten years before Congress passed FTCA, the Supreme Court asserted that:

It is quite apparent that if, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved, congressional legislation . . . must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone

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<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 567.

<sup>60</sup> *Id.*

<sup>61</sup> *See infra* Part II.A.

<sup>62</sup> *Ex parte Republic of Peru*, 318 U.S. 578, 588 (1943), *superseded by statute*, Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611 (2000), *as recognized in In re Air Crash Disaster Near Warsaw, Poland*, 716 F. Supp. 84, 85 (E.D.N.Y. 1989).

<sup>63</sup> *Ex parte Republic of Peru*, 318 U.S. at 588 (quoting *United States v. Lee*, 106 U.S. 196, 209 (1882)).

<sup>64</sup> *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936).

involved. Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war.<sup>65</sup>

Due to the tenuous and unique nature of foreign affairs and policy, the Supreme Court recognized that “our national interest will be better served in such cases if the wrongs to suitors, involving our relations with a friendly foreign power, are righted through diplomatic negotiations rather than by the compulsions of judicial proceedings.”<sup>66</sup>

Despite this sentiment, twenty-five years after the Tate Letter, concern remained over the lack of comprehensive U.S. statutory provisions to inform parties when they could sue a foreign state and when foreign states were entitled to sovereign immunity.<sup>67</sup> Therefore, in 1976, Congress passed FSIA, leaving foreign sovereign immunity decisions exclusively to the courts, “discontinuing the practice of judicial deference to ‘suggestions of immunity’ from the President and the Department of State.”<sup>68</sup> FSIA, therefore, shifted a corpus of issues that could have an impact on foreign affairs away from the executive branch, by legislative action, into the judicial branch.

Congress originally passed FSIA to give U.S. federal courts jurisdiction to hear claims brought by American citizens against a foreign state for specific causes of actions.<sup>69</sup> FSIA provides an enumerated list of circumstances in which a U.S. federal court will not allow a foreign state to assert the defense of sovereign immunity.<sup>70</sup> Although not explicitly prohibited, FSIA—as originally enacted—contained no provision that would allow servicemembers to bring a claim against a foreign government for injuries incurred incident to service.<sup>71</sup> However, in light of the U.S. doctrine of sovereign immunity as enunciated in FTCA—which does contain an explicit prohibition against allowing servicemembers to bring suit against the U.S. government—FSIA should also prevent U.S. servicemembers from bringing suit against a foreign government.

The theory behind FSIA, unlike FTCA, was “that judges are less likely to be influenced by political pressure,” and would be able to base foreign immunity decisions as to whether a foreign state was acting in a public or private capacity when the plaintiff’s injury occurred purely “on legal

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<sup>65</sup> *Id.* at 320.

<sup>66</sup> *Ex parte Republic of Peru*, 318 U.S. at 589.

<sup>67</sup> *In re Air Crash Disaster*, 716 F. Supp. at 85, *rev’d on other grounds sub nom.* *Filus v. Lot Polish Airlines*, 907 F.2d 1328 (2d Cir. 1990).

<sup>68</sup> *Id.*; *see also* 28 U.S.C. §§ 1602-1611 (2000).

<sup>69</sup> *See* 28 U.S.C. §§ 1605, 1607 (2000). The Act gives federal district courts original jurisdiction in personam against foreign states, which are defined as including political subdivisions, agencies, and instrumentalities of foreign states. *See* 28 U.S.C. §§ 1330(a), 1603(a) (2000).

<sup>70</sup> 15 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* § 104.12 (3d ed. 2007).

<sup>71</sup> *But see infra* Part II.C.3.

grounds, rather than on the basis of foreign policy concerns.”<sup>72</sup> As will be discussed below, however, contemporary FSIA suits often involve judges making legal rulings on very contentious and complex foreign policy matters.<sup>73</sup> Additionally, FSIA’s scope has significantly broadened over time, as Congress has repeatedly introduced more legislation that would prevent a foreign government from claiming a defense of sovereign immunity.<sup>74</sup> The wider FSIA’s scope becomes, the more likely it is that judgments rendered on such claims could disrupt or undermine the President’s constitutional authority to conduct foreign affairs, as will be discussed below.<sup>75</sup>

## II. THE FEDERAL TORT CLAIMS ACT, THE FOREIGN SOVEREIGN IMMUNITIES ACT, AND THE MILITARY: A CONTRADICTION?

As discussed above, this Comment focuses on the unique issues that arise when a U.S. servicemember seeks to assert a claim against a foreign state for injuries the servicemember received while serving U.S. interests abroad. This scenario has become more salient since the USS Cole bombing and the attacks of 9/11, because the U.S. military is now engaged in a war with a non-state, transnational enemy. By 2000, Al Qaeda had become a transnational terrorist threat to the United States, targeting U.S. civilians and servicemembers alike.<sup>76</sup> In encouraging other Muslims to engage in jihad against America, bin Laden said that “[t]he worst thieves in the world today and the worst terrorists are the Americans. . . . We do not have to differentiate between military or civilian. As far as we are concerned, they are all targets.”<sup>77</sup>

Increased terrorist attacks against Americans, both civilians and servicemembers, have ushered in a new political reality, as well as new legal realities.<sup>78</sup> This Part examines the legal impact terrorism has had on U.S.

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<sup>72</sup> 4B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1111 (3d ed. 2002). Some scholars assert, however, that “foreign-policy-by-litigation illegitimately grants judges and plaintiffs’ attorneys a power that should reside in the political branches.” Peed, *supra* note 35, at 1330.

<sup>73</sup> See *infra* Parts II.B.3, II.C.

<sup>74</sup> See *infra* Part II.B.1.

<sup>75</sup> See Kim, *supra* note 16, at 525 (discussing the problematic implications of FSIA’s Terrorism Exception, asserting that the “problem with permitting lawsuits against a few designated states is that the suits intrude on one policy area long considered outside the province of courts: U.S. diplomacy.”). It is worth noting that the constitutionality of FSIA’s Terrorism Exception has been consistently upheld. See, e.g., Owens v. Republic of Sudan, 374 F. Supp. 2d 1, 18-19 (D.D.C. 2005).

<sup>76</sup> See 9/11 COMMISSION REPORT, *supra* note 1, at 199.

<sup>77</sup> *Id.* at 47.

<sup>78</sup> See Kenneth Roth, *The Law of War in the War on Terror*, FOREIGN AFFAIRS, Jan.-Feb. 2004, at 2, 2, available at <http://www.foreignaffairs.org/20040101facomment83101-p0/kenneth-roth/the-law-of-war-in-the-war-on-terror.html> (asserting that “[b]y literalizing its ‘war’ on terror, the Bush administra-

law, specifically under the terrorism amendments added to FSIA, in an effort to give American victims of terrorism a civil remedy. Since the United States has been engaged in an unbounded war on terrorism, some scholars feel “[t]he recent battles fought against the Afghan and Iraqi governments were classic wars between organized military forces,”<sup>79</sup> while others assert that “this [war on terror] is a new and different kind of war.”<sup>80</sup> This uncertain fog of war, coupled with bin Laden’s prior declarations of intentionally targeting U.S. military personnel in an effort to bait and wage war against the United States, raises the legal question of whether U.S. servicemembers killed or injured in this current war should be considered casualties of war or victims of terrorism for purposes of deciphering and applying U.S. law.

This Part also addresses the very timely amendment to FSIA’s Terrorism Exception introduced in the Senate in October 2007 and passed into law by President Bush in January 2008.<sup>81</sup> The additional amendment to FSIA’s Terrorism Exception, among other purposes, explicitly adds servicemembers as a party that can recover under the exception.<sup>82</sup> This Part, therefore, looks to comparative doctrines of sovereign immunity under FTCA and FSIA to determine whether Congress generally treats military personnel as having the same legal rights as private citizens when issues of abrogating a sovereign’s immunity arise in a legal claim for injury or death.

#### A. *Federal Tort Claims Act: Explicit Prohibition Against Suits Brought by Servicemembers*

As FTCA is the source of jurisdiction for U.S. courts to hear claims against the U.S. government and FSIA is the source of jurisdiction for U.S. courts to hear claims against foreign states,<sup>83</sup> it is worth examining how and why Congress included an explicit prohibition in FTCA against servicemembers asserting claims against the U.S. government for injuries incurred incident to service.

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tion has broken down the distinction between what is permissible in times of peace and what can be condoned during a war”).

<sup>79</sup> *Id.*

<sup>80</sup> Gordon, *supra* note 26, at 53, 54 (asserting that “[v]ictory [in the war on terror] will come not when foreign leaders accept certain terms but when political changes erode and ultimately undermine support for the ideology and strategy of those determined to destroy the United States.”).

<sup>81</sup> See National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1083, 122 Stat. 3, 338-44.

<sup>82</sup> § 1083(a)(1), 122 Stat. at 338-41.

<sup>83</sup> See 28 U.S.C.S. §§ 1330(a), 1346(b) (LexisNexis 2008).

### 1. U.S. Military and the *Feres* Doctrine

The United States waived its own sovereign immunity for some torts committed by employees of the federal government while acting in the scope of their employment when it passed FTCA in 1946.<sup>84</sup> When passing FTCA, however, Congress explicitly enumerated an exception to liability from claims of servicemembers arising from combatant activities, and asserted that the United States cannot be held liable for “any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war,” or any claim “arising in a foreign country.”<sup>85</sup> In enumerating this exception, Congress explicitly prohibited a U.S. civilian from bringing suit against the United States for injuries the civilian incurred by a U.S. servicemember while the servicemember was acting in the scope of his employment during a time of war, and also prohibited servicemembers from bringing suit under FTCA against the United States due to injuries incurred by other servicemembers or civilians.<sup>86</sup>

The first tests to the military exceptions of FTCA came shortly after the passage of the Act in 1946. In *Brooks v. United States*,<sup>87</sup> the Supreme Court held that servicemembers could recover under FTCA for injuries not incident to their service.<sup>88</sup> The Court held that the phrase “any claim” in § 2680 of FTCA did not mean “any claim but that of servicemen,” and said

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<sup>84</sup> 28 U.S.C.A. §§ 1346, 2671-2680 (West 2006). Under FTCA, the district courts have exclusive jurisdiction of . . . claims against the United States . . . for injury . . . caused by the negligent or wrongful act . . . of any employee of the Government while acting within the scope of his . . . employment, under circumstances where the United States, if a private person, would be liable . . . in accordance with the law of the place where the act . . . occurred.

*Id.* § 1346(b)(1).

<sup>85</sup> *Id.* § 2680(j)-(k); *see also* Herbert B. Chermiside, Jr., Annotation, *Serviceman’s Right to Recover under Federal Tort Claims Act*, 31 A.L.R. FED. 146, § 12(b) (1977). FTCA “specifically provides that military departments of the United States are contemplated by [the Act’s] language, [and] that members of the military or naval forces are deemed to be employees of the government.” *Id.* § 2; *see also* *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711-12 (2004) (stating foreign country exception to waiver of government’s sovereign immunity under FTCA “bars all claims against federal government based on any injury suffered in a foreign country, regardless of where the tortious act or omission [giving rise to that injury] occurred,” and also codifies Congress’s unwillingness to subject the United States to liabilities depending on laws of foreign power).

<sup>86</sup> *See infra* Part II.A.2 (discussing the policy reasons behind this legislation). For the purposes of the FTCA exception, a member of the military “acting within the scope of his office or employment” has been deemed to mean “acting in the line of duty.” Chermiside, *supra* note 85, § 2. Additionally, an employee of the government, for purposes of § 2680, includes “officers or employees of any federal agency, members of the military or naval forces of the United States . . . and persons acting on behalf of a federal agency in an official capacity.” 28 U.S.C.A. § 2671 (West 2006). All of these types of government employees, and thus the United States, would be immune from suit during a time of war under § 2680’s exception.

<sup>87</sup> 337 U.S. 49 (1949).

<sup>88</sup> *Id.* at 51, 54.

that “[i]t would be absurd to believe that Congress did not have the servicemen in mind in 1946, when this statute was passed. The overseas and combatant activities exceptions make this plain.”<sup>89</sup>

Shortly after *Brooks*, the Supreme Court developed what has become known as the *Feres* Doctrine in *Feres v. United States*.<sup>90</sup> The *Feres* Doctrine, extending the holding in *Brooks*, asserted that FTCA’s waiver of sovereign immunity by the U.S. government does not apply to liability for injuries to servicemembers if these injuries arise out of or are incident to service.<sup>91</sup> Although the *Feres* Doctrine has often been interpreted as too restrictive, it has been affirmed many times by the courts, which often take the position that Congress has not seen fit to amend the exception to allow servicemembers to recover under FTCA for injuries incurred in the line of duty and that “it would be inappropriate for the courts to do by judicial interpretation what Congress has left undone.”<sup>92</sup>

## 2. Policy Reasons Behind FTCA’s Prohibition Against Servicemembers’ Claims

Since 1950, the Supreme Court has consistently upheld the policy reasons underlying the *Feres* Doctrine, including the policies that: (1) servicemembers have an extensive system of recovery available to them for injuries incurred incident to service, and therefore do not need the recovery methods civilians seek under FTCA; and (2) the relationship between a soldier and his superiors is extremely unique, and if servicemembers were allowed to sue their superiors for injuries incurred in the line of duty, military morale and discipline would be dramatically and negatively affected.<sup>93</sup>

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<sup>89</sup> *Id.* at 51.

<sup>90</sup> 340 U.S. 135 (1950).

<sup>91</sup> *Id.* at 146. It is also worth noting that from 1925 through 1935, Members of Congress introduced eighteen tort claims bills, and sixteen denied recovery to members of the armed forces explicitly. *Id.* at 139.

<sup>92</sup> Chermiside, *supra* note 85, § 2. A main reason the *Feres* Doctrine has often been criticized as too restrictive stems from the fact that § 2680 also serves to disqualify suits brought by servicemembers that were injured or killed by military doctors during surgery or other medical appointments, even though a civilian would be able to bring a medical malpractice suit against a doctor or hospital if injured or killed while receiving medical treatment. *See Quintana v. United States*, 997 F.2d 711, 712 (10th Cir. 1993) (holding that the *Feres* Doctrine barred the plaintiff’s medical malpractice claim against a military surgeon even when the alleged malpractice occurred while plaintiff was on reserve status).

<sup>93</sup> *United States v. Johnson*, 481 U.S. 681, 684 n.2 (1987) (citing *Stencel Aero Eng’g Corp. v. United States*, 431 U.S. 666, 671-72 (1977)).

a. *Existing System of Recovery for Military Injuries*

Courts have noted that the *Feres* Doctrine excludes only claims of injured servicemembers who are seeking money damages.<sup>94</sup> One reason courts have argued that servicemembers should not be able to recover compensatory or punitive judgments against the United States for injuries incurred in the line of duty is because the military already has an extensive compensation system provided by other congressional enactments, for both servicemembers and their families, if the servicemember is killed or injured in the line of duty.<sup>95</sup> The Supreme Court in *Feres* highlighted the complications of having servicemembers recover money from the U.S. government under a tort statute in addition to these already guaranteed military benefits. The Court asserted that:

We might say that the claimant may (a) enjoy both types of recovery, or (b) elect which to pursue, thereby waiving the other, or (c) pursue both, crediting the larger liability with the proceeds of the smaller, or (d) that the compensation and pension remedy excludes the tort remedy. There is as much statutory authority for one as for another of these conclusions. If Congress had contemplated that this Tort Act would be held to apply in cases of this kind, it is difficult to see why it should have omitted any provision to adjust these two types of remedy to each other.<sup>96</sup>

The Court went on to conclude that “[t]he absence of any such adjustment is persuasive that there was no awareness that the Act might be interpreted to permit recovery for injuries incident to military service.”<sup>97</sup>

b. *The Relationship Between Servicemembers and Superiors and the Effect on Military Morale and Discipline*

A compelling policy reason as to why U.S. military members should not be able to recover monetary judgments against the United States when acting in the scope of their employment during a time of war is the need to ensure the “preservation of military discipline,” which such monetary judgments could jeopardize due to the “special relationship of the soldier to his superiors.”<sup>98</sup> Without a § 2680 exception, servicemembers would otherwise be allowed to bring suit against superior officers for negligent orders that lead to injury, undermining the special and peculiar relationship between a soldier and his superiors.<sup>99</sup> The Supreme Court in *Brooks* stated

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<sup>94</sup> Chermiside, *supra* note 85, § 12.5.

<sup>95</sup> *Feres*, 340 U.S. at 145 (“[t]he compensation system . . . is not negligible or niggardly . . .”).

<sup>96</sup> *Id.* at 144.

<sup>97</sup> *Id.*

<sup>98</sup> Chermiside, *supra* note 85, §§ 9-10.

<sup>99</sup> *Id.*

that if servicemembers were allowed to recover under FTCA for such incidents, “[a] battle commander’s poor judgment . . . [or] a defective jeep which causes injury . . . would ground tort actions against the United States.”<sup>100</sup> The added complexities and uncertainties of war merely reinforce the need for such an exception.

Commanding officers of the military have supported FTCA’s § 2680 exception, warning Congress of the negative consequences on “military order, discipline, and effectiveness” that could result if servicemembers were able to bring suit against the U.S. government for injuries incurred incident to service.<sup>101</sup> Asserting that “[d]iscipline and teamwork are always foremost considerations,” scholars and commanding officers have warned that:

Allowing service members to question the decisions of their leaders and their fellow service members in civil court could cause leaders to second-guess their decisions before making them. It could also, theoretically, encourage insubordination and diminish unit cohesion. Carried to its logical conclusion, allowing such suits could diminish the legitimacy of a leader’s orders during battle, training, or daily operations and encourage service members to believe they can choose which orders to follow. This could also affect military decision and policy making, which is what the *Feres* doctrine is designed to avoid.<sup>102</sup>

### 3. In the Line of Duty under FTCA

Under FTCA, the exception prohibiting claims by or against servicemembers qualifies the prohibition by asserting such claims cannot be brought if they arise during a time of war.<sup>103</sup> The *Feres* Doctrine asserts that “during a time of war” can be read to mean any injury arising “incident to service.”<sup>104</sup> Which injuries are considered “incident to service,” prohibiting recovery under FTCA, is a question of fact.<sup>105</sup> In general, “the term has received broad interpretation,” and “has been characterized as a much broader test than the ‘scope of employment’ test for respondeat superior purposes.”<sup>106</sup> Some courts have insisted that whether an injury arises out of

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<sup>100</sup> *Brooks v. United States*, 337 U.S. 49, 52 (1949).

<sup>101</sup> Major Deirdre G. Brou, *Alternatives to the Judicially Promulgated Feres Doctrine*, 192 MIL. L. REV. 1, 53 (2007) (citing *The Feres Doctrine: An Examination of this Military Exception to the Federal Tort Claims Act: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 11 (2002) (statement of Major General John Altenburg)).

<sup>102</sup> *Id.* at 55.

<sup>103</sup> 28 U.S.C. § 2680(j) (2000) (“The provisions of this chapter and section 1346(b) of this title shall not apply to . . . Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.”). Under principles of statutory construction, it can be argued that FTCA authorizes servicemember’s actions except those arising from combatant activities during time of war.

<sup>104</sup> *Feres v. United States*, 340 U.S. 135, 146 (1950).

<sup>105</sup> Chermiside, *supra* note 85, § 6.

<sup>106</sup> *Id.* § 2.

activity incident to service “depends on whether it stems from an official military relationship between the negligent person and the [servicemember].”<sup>107</sup>

The above policies still stand as reasons for an explicit prohibition against a servicemember bringing suit under FTCA against his or her commanding officers or the U.S. government—his employer—for injuries incurred incident to service. One must question whether these same policies, in addition to other more pressing policies, should preclude a servicemember from bringing suit under FSIA against a foreign government for injuries incurred while deployed to serve U.S. interests. In order to analyze this question, it is integral to understand how FSIA came to include an exception for acts of state-sponsored terrorism.

## B. *Foreign Sovereign Immunities Act: Legislative History Behind FSIA’s Terrorism Exception*

### 1. Providing Recovery to Victims of Terrorism

When Congress originally passed FSIA in 1976, there was no clause that permitted suits against foreign states for terrorism crimes.<sup>108</sup> However, beginning in the 1980s and 1990s, U.S. citizens increasingly became victims of both national and international terrorism.<sup>109</sup> The victims and fami-

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<sup>107</sup> Harten v. Coons, 502 F.2d 1363, 1367 (10th Cir. 1974).

<sup>108</sup> Kim, *supra* note 16, at 514.

<sup>109</sup> In December 1988, 270 people, including many Americans, were killed when Pan Am Flight 103—headed to New York’s JFK International Airport—exploded over Lockerbie, Scotland. Ruth Marcus & John Goshko, *Bush Vows to ‘Punish Severely’ Perpetrators of Pan Am Bombing*, WASH. POST, Dec. 30, 1988, at A22. It was determined by investigators that a bomb had been smuggled and detonated on the plane. *Id.* Although several international terrorist groups were quick to claim responsibility for the bombing, it was later determined that two men of Libyan descent were responsible, and it was alleged that the bombing was sponsored by Libyan President Muammar al-Gaddafi. See Generally Bruce W. Jentleson & Christopher A. Whytock, *Who “Won” Libya?: The Force-Diplomacy Debate and Its Implications for Theory and Policy*, 30 INT’L SECURITY 47, 47, 62 (2005-06) (discussing Libyan foreign relations regarding the Pan Am 103 crash and subsequent related events). Libya has never formally admitted responsibility for the Pan Am bombing, and to date has merely “accepted responsibility for the actions of its officials,” and has also “renounced terrorism and arranged for payment of appropriate compensation for the families of the victims.” Press Release, Security Council, Security Council Lifts Sanctions Imposed on Libya After Terrorist Bombing of Pan Am 103, UTA 772, U.N. Doc. SC/7868 (Dec. 9, 2003). Subsequently, in February 1993, six people were killed and hundreds were injured when a bomb was detonated in the underground parking garage of the World Trade Center’s Tower One. *6th Blast Suspect Indicted*, SUN-SENTINEL (Fort Lauderdale), May 20, 1993, at 3A. A group of Islamic, Al Qaeda-linked conspirators were found responsible, prosecuted, and convicted. 9/11 COMMISSION REPORT, *supra* note 1, at 72. Some policy experts later pointed out that despite the success of the 1993 World Trade Center prosecutions, “the successful use of the legal system . . . had the side effect of obscuring the need to examine the character and the extent of the new threat facing the United

lies of these attacks found themselves without a viable course of judicial action or means of compensatory or punitive recovery because FSIA, “the sole basis for obtaining jurisdiction over a foreign state in [U.S.] courts,”<sup>110</sup> did not include an exception for the waiver of sovereign immunity for acts of terrorism.<sup>111</sup> In response to these acts of terrorism, Congress added another exception to the existing version of FSIA to allow U.S. citizens to sue foreign states for violations of human rights deemed to be terrorist activities.<sup>112</sup> Congress passed the Antiterrorism and Effective Death Penalty Act (“AEDPA”) in 1996, “to provide American citizens and their families the opportunity to seek money damages against state-sponsors of terrorism.”<sup>113</sup> Congress asserted that two of the primary purposes of AEDPA were to compensate American victims and deter terrorism “by forcing [foreign states] to pay huge sums of money to those who won judgments.”<sup>114</sup>

## 2. Qualification of Suit under the Terrorism Exception: The State Sponsor of Terrorism List

The AEDPA amendment added an additional exception to FSIA, under which a foreign state is determined to have automatically waived its sovereign immunity if it is found to have committed or sponsored certain acts of terrorism.<sup>115</sup> The Terrorism Exception states:

A foreign state shall not be immune from jurisdiction of the courts of the United States or of the States in any case . . . not otherwise covered by [the commercial activity exception], 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 if such act or provision of material

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States.” *Id.* Additionally, some felt that “although the [first World Trade Center] bombing heightened awareness of a new terrorist danger, successful prosecutions contributed to widespread underestimation of the threat.” *Id.* at 73. Later, in a horrific act of domestic terrorism, 168 people died when the Alfred P. Murrah Federal Building was bombed in Oklahoma City. Associated Press, *Nichols Decides Against Appeal*, WASH. POST, Aug. 20, 2004, at A3. It was later determined that Americans Timothy McVeigh and Terry Nichols were responsible for the bombings. *Id.*

<sup>110</sup> *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989); see also Act of Sept. 9, 1976, Pub. L. No. 94-583, reprinted in 1976 U.S.C.C.A.N 6604, 6610 (codified at 28 U.S.C. §§ 1602-1611 (2000)) (“FSIA sets forth the sole and exclusive standards to be used in resolving questions of sovereign immunity raised by foreign states before Federal and State courts in the United States.”).

<sup>111</sup> Kim, *supra* note 16, at 514.

<sup>112</sup> Ruthanne M. Deutsch, *Suing State-Sponsors of Terrorism Under the Foreign Sovereign Immunities Act: Giving Life to the Jurisdictional Grant after Cicippio-Puleo*, 38 INT’L LAW 891, 892 (2004).

<sup>113</sup> *Id.*

<sup>114</sup> Kim, *supra* note 16, at 516-17.

<sup>115</sup> 28 U.S.C. § 1605(a)(7) (2000).

support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her officer, employment, or agency . . . .<sup>116</sup>

A significant prerequisite to a foreign state being sued under FSIA, however, is that the state must be designated by the State Department, under the authority of the President, as an official state sponsor of terrorism at the time the act occurred.<sup>117</sup> The designation of countries on the terror list, however, is “profoundly affected by . . . political compromises.”<sup>118</sup> The fact that only states on this terror list can be sued under the Terrorism Exception means that many countries that are or could be guilty of similar acts of terrorism against U.S. citizens remain immune from prosecution in U.S. courts.<sup>119</sup> The consequence of this “foreign policy entanglement in the judicial process” is the possibility that “by only allowing suit against specific countries, [Terrorism Exception] . . . plaintiffs [are encouraged] to stretch the bounds of plausibility in their pleadings to catch a state-sponsor of terrorism, warping the judicial process.”<sup>120</sup> This qualifier to the Terrorism Exception helps explain why it was the country of Sudan that the families of the USS Cole victims brought a suit against for the deaths of the U.S. sailors, even though the suicide bombing occurred in Yemen by Yemeni nationals. Because Yemen is not a designated state sponsor of terrorism, the

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<sup>116</sup> *Id.* As the case law on this subject has developed, suicide bombings have repeatedly been held to be a justiciable offense under § 1605(a)(7), and are considered an “extrajudicial killing.” See *Peterson v. Islamic Republic of Iran*, 264 F. Supp. 2d 46, 60-61 (D.D.C. 2003) (holding that the terrorist bombing of a Marine barracks leading to the deaths of more than 200 United States Marines was an extrajudicial killing); *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 18 (D.D.C. 1998) (“[A] suicide bombing . . . is an act of ‘extrajudicial killing’ within the meaning of 28 U.S.C. § 1605(a)(7).”). An “extrajudicial killing” is defined as “a deliberate killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.” Torture Victim Protection Act of 1991, Pub. L. No. 102-256, § 3(a), 106 Stat. 73, 73 (1992).

<sup>117</sup> 28 U.S.C. § 1605(a)(7)(A) (2000); see also *Peed*, *supra* note 35, at 1333 (“[T]he AEDPA’s incorporation of the state sponsors of terrorism list into the FSIA is a significant departure from the purpose of [FSIA]. It resurrects the State Department’s ability to introduce highly political considerations into determinations of sovereign immunity, raising the very concerns [FSIA] sought to avoid.”). It is also important to note that the statute only permits a cause of action if the foreign state was designated a state sponsor of terrorism either at the time the alleged event occurred, or as a result of that event. 28 U.S.C. § 1605(a)(7)(A) (2000).

<sup>118</sup> *Peed*, *supra* note 35, at 1322, 1333 (“Decisions over which countries to put on the list . . . are fraught with political considerations. As a result, major allies are often spared inclusion despite their ties to terrorists, while longtime enemies remain on the list despite scant evidence of state support of terrorism.”). This often results in “unprincipled distinctions between similarly situated plaintiffs,” and results in victims of terrorism having “unequal access to courts of justice.” *Id.* at 1334.

<sup>119</sup> *Id.* at 1323. Currently, five states are listed as sponsors of terrorism: Cuba, Iran, North Korea, Sudan, and Syria. OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, U.S. DEP’T OF STATE, COUNTRY REPORTS ON TERRORISM 2005, at 171 (2006), available at <http://www.state.gov/documents/organization/65462.pdf>.

<sup>120</sup> *Peed*, *supra* note 35, at 1331.

families had to bring a claim against one of the countries on the list if they wanted to recover monetary damages.

### 3. Evolution of Civil Suits under FSIA's Terrorism Exception

The first case to be tried under FSIA's original § 1605(a)(7) amendment awarded the plaintiffs a windfall judgment—nearly \$50 million in compensatory damages and \$137 million in punitive damages.<sup>121</sup> The case arose after the Cuban Air Force shot down two planes belonging to a Florida-based Cuban exile group, Brothers to the Rescue, in what the court called an “outrageous contempt for international law and basic human rights.”<sup>122</sup> The families of the four men who were killed claimed the attack was a terrorist act sponsored by the Cuban government.<sup>123</sup> In *Alejandro v. Republic of Cuba*, the court held that the “unprovoked firing of deadly rockets at defenseless, unarmed civilian aircraft undoubtedly comes within [§1605 (a)(7)]’s meaning of ‘extrajudicial killing,’”<sup>124</sup> and that “the Cuban Air Force was acting as an agent of Cuba,” which had “been designated as a state sponsor of terrorism.”<sup>125</sup> Cuba did not appear to defend the judgment, and the windfall damages award was given to the families after they “established their ‘claim or right to relief by evidence that is satisfactory to the court,’” the necessary standard of evidence for a default judgment under FSIA § 1608(e).<sup>126</sup> The court in *Alejandro* insisted that “punitive damages are . . . an appropriate remedy in international law” and serve to “punish truly reprehensible conduct,” as well as “deter others from committing similar acts.”<sup>127</sup>

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<sup>121</sup> *Alejandro v. Republic of Cuba*, 996 F. Supp. 1239, 1253 (S.D. Fla. 1997).

<sup>122</sup> *Id.* at 1242.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 1248. See *supra* note 116 and accompanying text for definition of extrajudicial killings.

<sup>125</sup> *Id.* The planes were in international water because they were shot down between eighteen and thirty miles from Cuba's coast, which the court found was “well outside the twelve-mile territorial sea claimed by Cuba and permitted under international law.” *Id.*

<sup>126</sup> *Alejandro*, 996 F. Supp. at 1242 (quoting 28 U.S.C. § 1608(e) (1994)). In a lawsuit against a foreign state, a court may not enter judgment by default; rather, plaintiffs must establish their “claim or right to relief by evidence that is satisfactory to the court.” RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 459(2) (1987). This provision of FSIA was meant to protect foreign states from unfounded default judgments rendered solely upon procedural default. See 28 U.S.C. § 1608(e) (2000).

<sup>127</sup> *Alejandro*, 996 F. Supp. at 1250-51. Former Deputy Secretary of Treasury Stuart Eizenstat opposed the release of frozen Cuban assets to the *Alejandro* plaintiffs, insisting that such a release would be unfair to the “thousands of other U.S. citizens that have also lodged claims against Cuba.” Kim, *supra* note 16, at 524. There were “nearly six thousand claims against Cuba for death, injury, and expropriation during and after Castro's takeover, which were determined to be legitimate by the Foreign Claims Settlement Commission. . . .” JENNIFER K. ELSEA, CONG. RES. SERVICE, LAWSUITS AGAINST STATE SUPPORTERS OF TERRORISM: AN OVERVIEW 4 (2005), available at <http://fas.org/sgp/crs/terror/>

The success of the *Alejandre* plaintiffs encouraged other victims of terrorism to initiate similar suits.<sup>128</sup> Some of the cases have resulted in multi-million dollar judgments for single plaintiffs against state sponsors of terrorism, and to date, “U.S. courts have awarded . . . more than [\$16 billion] in judgments against State sponsors of terrorism under the terrorism exception to the FSIA.”<sup>129</sup>

C. *Military Recovery Under FSIA: Rux and Other Successful Terrorism Exception Servicemember Plaintiffs*

Most courts awarding Terrorism Exception judgments have done so with an eye toward upholding the exception’s original intent: to punish and deter foreign states from sponsoring terrorism, and to compensate innocent Americans who were traveling or working abroad when they became victims of international terrorism.<sup>130</sup> Most of the successful cases brought under the Terrorism Exception have been brought by civilian victims or families of civilians who had been traveling or working abroad and later became victims of terrorism.<sup>131</sup> As the common law of such cases grew, however, a new type of claim arose under FSIA’s Terrorism Exception: the claim of a U.S. servicemember against a foreign state for acts of terrorism. Exemplified by *Rux*, such claims can become extremely problematic, as judges are

RS22094.pdf. The *Alejandre* judgment depleted the frozen Cuban assets by half, significantly limiting the ability of the other claimants to recover. *Id.*; see also *infra* Part III.A.

<sup>128</sup> See JENNIFER K. ELSEA, CONG. RES. SERVICE, SUITS AGAINST TERRORIST STATES BY VICTIMS OF TERRORISM 12 (2007), available at <http://fas.org/sgp/crs/terror/RL31258.pdf>.

<sup>129</sup> *Id.* at 54. Note that the figure of \$10 billion originally published in the CRS report was reported in December 2007, before a U.S. federal court ordered Libya in January 2008 to pay a \$6 billion judgment to the families of seven Americans who were killed in the bombing of UTA Flight 722. See *Pugh v. Socialist People’s Libyan Arab Jamahiriya*, 530 F. Supp. 2d 216, 264-74 (D.D.C. 2008); see also *Libya Must Pay \$6bn Over Terror Attack on Plane*, EVENING STANDARD (London), Jan. 16, 2008, at A26. Worth noting is that “[o]ver the last few years, Libya has voluntarily paid several hundred million dollars in damages to the European and African victims of the UTA 772 bombing, mostly through the Qaddafi Charitable Foundation.” *Court Awards US Victims More Than \$6 Billion for 1989 Libyan Terrorist Bombing of French Airliner That Killed 170 People Over African Desert*, PR NEWSWIRE, Jan. 15, 2008. Libyans were surprised at the U.S. court’s huge judgment, as “a financial settlement was reached years ago [between the European and African victims],” but the “[U.S.] victims’ families opted out of the deal [reached] with France;” therefore, Libya “will ignore this issue because legally it is not bound to pay these amounts.” *Libya “Not Legally Bound” to pay US Victims of 1989 Bombing*, BBC MONITORING MIDDLE EAST, Jan. 17, 2008.

<sup>130</sup> See Deutsch, *supra* note 112, at 892.

<sup>131</sup> See, e.g., *Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024, 1026-27 (D.C. Cir. 2004) (involving the acting comptroller of the American University of Beirut in Lebanon, who had been abducted, beaten, and tortured from 1986 through 1991 by Hezbollah, an Islamic terrorist organization that receives material support from Iran); *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 7-8 (D.D.C. 1998) (involving an American student studying abroad in Israel who was killed by a suicide bomber on a passenger bus traveling from Israel to Gaza).

forced to decide legally whether a servicemember injured or killed in the line of duty was killed by an act of war or an act of terrorism.

1. *Blais*: Labeling Injured Servicemembers as Victims of Terrorism

In *Blais v. Islamic Republic of Iran*,<sup>132</sup> a former U.S. Air Force airman sued Iran, the Iranian Ministry of Intelligence and Security (“MOIS”), and the Iranian Islamic Revolutionary Guard Corp (“IRGC”) under the Terrorism Exception for injuries he sustained in the terrorist bombing of the Khobar Towers in Saudi Arabia on June 25, 1996.<sup>133</sup> None of the defendants appeared to defend the suit, and the court held that the defendants were liable for their material support of Hezbollah, the terrorist organization that carried out the bombings, and entered a default judgment against the defendants for over \$28 million.<sup>134</sup> In concluding, the court said, “This Court takes note of plaintiffs’ courage and steadfastness in pursuing this litigation and their efforts to take action to deter more tragic suffering of innocent Americans at the hands of terrorists. Their efforts are to be commended.”<sup>135</sup>

The *Blais* court’s concluding comments again raise the question of whether U.S. servicemembers killed or injured in a war, like the current war on terror, should be considered casualties of war or victims of terrorism. This question must also be asked to understand *Rux v. Islamic Republic of Sudan*.<sup>136</sup> As explained above, the surviving family members of the U.S. Navy sailors killed aboard the USS Cole sued the Republic of Sudan for its material support of Al Qaeda, the terrorist organization responsible for the attack.<sup>137</sup> The court held that it had jurisdiction under the Terrorism Exception because Sudan was labeled a state sponsor of terrorism at the time the USS Cole was bombed.<sup>138</sup> The court held that “the deliberate murder of the seventeen American sailors qualifies as an ‘extrajudicial killing,’” and that “Sudanese government officials, employees, or agents acting within the scope of their office provided various forms of material support to Al Qaeda, whose operatives planned and carried out the Cole bombing.”<sup>139</sup> The

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<sup>132</sup> 459 F. Supp. 2d 40 (D.C. Cir. 2006).

<sup>133</sup> *Id.* at 45.

<sup>134</sup> *Id.* at 53, 61; *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 459(2) (1987) (“A court . . . may enter a default judgment against a state only upon determination by the judge . . . after the claimant has established the claim or right to relief by evidence satisfactory to the court.”).

<sup>135</sup> *Blais*, 459 F. Supp. 2d at 61.

<sup>136</sup> 495 F. Supp. 2d 541 (E.D. Va. 2007).

<sup>137</sup> *Id.* at 542.

<sup>138</sup> *Id.* at 563.

<sup>139</sup> *Id.* at 554-55.

court ultimately awarded the families of the Cole victims a judgment in excess of \$7 million.<sup>140</sup>

## 2. *Acree*: Undermining Executive Discretion in Foreign Affairs

In 2004, former prisoners of war (“POWs”) of the 1991 Gulf War sought damages in *Acree v. Republic of Iran*<sup>141</sup> under FSIA’s Terrorism Exception for injuries inflicted while they were tortured while in Iraqi captivity.<sup>142</sup> Although a district court had already awarded compensatory and punitive damages against Iraq, the U.S. government—through the Department of Justice (“DOJ”)—subsequently filed a motion to intervene on the judgment, insisting that the recently enacted Emergency Wartime Supplemental Appropriations Act<sup>143</sup> made § 1605(a)(7) inapplicable to Iraq.<sup>144</sup> By 2003, the United States had begun its invasion of Iraq, and the President sought to make any provision of law that applied to countries that supported terrorism inapplicable to Iraq.<sup>145</sup> In 2003, after U.S. troops invaded Iraq and Saddam Hussein’s government was overthrown, the U.S. policy toward Iraq changed from considering Iraq a state sponsor of terrorism, as it was considered during the 1991 Gulf War, to reconstructing Iraq’s government and rebuilding the country’s infrastructure.<sup>146</sup> After many appeals and intervening issues, the U.S. Court of Appeals for the District of Columbia Circuit in 2004 held the plaintiffs in *Acree* could not recover damages from Iraq.<sup>147</sup> The court noted that “the appellees[] have obtained a nearly billion dollar default judgment against a foreign government whose present and future stability has become a central preoccupation of the United States’ foreign policy.”<sup>148</sup>

The *Acree* case illustrates how judgments under FSIA’s Terrorism Exception can hinder “the President’s control over foreign assets as a necessary component of a flexible and responsive foreign policy.”<sup>149</sup> Additionally, by attempting to seize assets from a state sponsor of terrorism at a time when defense efforts against the same country are ramping up, such judgments could seriously weaken the President’s ability to oversee U.S. na-

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<sup>140</sup> *Id.* at 569.

<sup>141</sup> 370 F.3d 41 (D.C. Cir. 2004).

<sup>142</sup> *Id.* at 41.

<sup>143</sup> Pub. L. No. 108-11, § 1503, 117 Stat. 559, 579 (2003).

<sup>144</sup> *Acree*, 370 F.3d at 41.

<sup>145</sup> § 1503, 117 Stat. at 579.

<sup>146</sup> *Acree*, 370 F.3d at 46.

<sup>147</sup> *Id.* at 65.

<sup>148</sup> *Id.* at 58.

<sup>149</sup> Kim, *supra* note 16, at 526.

tional security efforts, or conversely, “hinder efforts to normalize relations with the designated state sponsor of terrorism.”<sup>150</sup>

3. *Peterson*, the 2008 Amendment to FSIA’s Terrorism Exception, and Encroachment on Executive Authority

Additionally, in *Peterson v. Islamic Republic of Iran*,<sup>151</sup> another case involving a default judgment against Iran for its support of Hezbollah, a U.S. district court judge held Iran was liable under the Terrorism Exception for the deaths of the 241 Marines killed in the 1983 Beirut, Lebanon bombing of a Marine barracks.<sup>152</sup> The court awarded the families of the deceased Marines a judgment in excess of \$2 billion.<sup>153</sup> In so doing, the court noted that it was “aware that the judgment entered . . . may be the largest ever entered by a court of the United States against a foreign nation,” but that “[t]he President has not filed a suggestion of interest indicating that actions by this Court will in any way interfere with the foreign relations of the United States,” and that the “[c]ourt is properly performing its duty under a constitutional statute.”<sup>154</sup>

After the *Acree* and *Peterson* judgments, the Senate took action, yet again, to amend FSIA’s Terrorism Exception. In the fall of 2007, the Senate proposed an amendment to FSIA’s Terrorism Exception that would, among many other changes: (1) explicitly add servicemembers as a class able to sue foreign states for terrorism claims; (2) change the way such judgments were to be paid out to successful litigants; and (3) freeze Iraqi assets to pay for claims stemming from Gulf War I and Saddam Hussein’s regime, despite the fact that Iraq was removed from the State Department’s Terrorism List at the beginning of Operation Iraqi Freedom (“OIF”).<sup>155</sup> Senator Lautenberg, who introduced the amendment, insisted it would “allow victims of

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<sup>150</sup> *Id.*

<sup>151</sup> 264 F. Supp. 2d 46 (D.D.C. 2003).

<sup>152</sup> *Id.* at 48.

<sup>153</sup> *Peterson v. Islamic Republic of Iran*, 515 F. Supp. 2d 25, 60 (D.D.C. 2007).

<sup>154</sup> *Id.* at 37 n.2. Subsequently, a U.S. federal court ordered Libya to pay a \$6 billion judgment to the families of seven Americans who were killed in the bombing of UTA Flight 772 flying from Paris to Chad on September 19, 1989. *U.S. Court Orders Libya to Pay \$6 Billion*, BBC NEWS, Jan. 16, 2008 [hereinafter *U.S. Court Orders*], available at <http://news.bbc.co.uk/2/hi/americas/7191278.stm>. See also *supra* note 129 and accompanying text.

<sup>155</sup> 153 CONG. REC. S10793-94 (daily ed. Aug. 2, 2007) (statement of Sen. Lautenberg). The FSIA amendment would have “expos[ed] the new [Iraqi] government to litigation in U.S. courts stemming from treatment of Americans in Iraq during Saddam’s reign. Even cases that had once been rejected could be refiled.” Ben Feller, *Pres. Declares Pocket Veto of Defense Authorization Bill*, FED. NEWS RADIO, Dec. 31, 2007, available at <http://www.federalnewsradio.com/index.php?sid=1318456&nid=78>.

state-sponsored terror to have their day in court,” and would “let victims sue countries and hold those countries accountable.”<sup>156</sup>

The Senate had originally embedded the proposed FSIA amendment as a rider deep in the 2008 Defense Authorization Act, a 1,300 page bill that would set out U.S. defense policy for 2008, and authorize \$696 billion in defense spending, including \$189 billion for the wars currently being fought in Iraq and Afghanistan.<sup>157</sup> After some discussion, the Senate and the House passed the 2008 Defense Authorization Act,<sup>158</sup> and the embedded FSIA amendment, with a veto-proof majority in December 2007.<sup>159</sup> However, the possible repercussions of the proposed amendment were substantial and dramatic, and in an unpredicted and unprecedented move, President Bush chose to pocket veto the entire 2008 Defense Authorization Act because of his staunch opposition to the FSIA changes the Senate attached to the bill.<sup>160</sup>

President Bush, in vetoing the bill, asserted that the proposed changes to FSIA’s Terrorism Exception would “permit plaintiffs’ lawyers to freeze Iraqi funds [and] would do intolerable harm to the country’s reconstruction efforts and the United States’ relationship with Iraq.”<sup>161</sup> The amendment would cause “a rush of litigation that could freeze tens of billions of dollars in Iraqi assets being held in U.S. banks. Money at the heart of the Iraqi rebuilding effort would be tied up in court, potentially halting the very stabilization efforts that could get U.S. troops home faster.”<sup>162</sup> In reiterating the complications of the fog of war, and reasserting his right as the President both to serve as Commander in Chief and to determine the course of U.S. foreign policy, President Bush asserted that “Iraq must not have its crucial reconstruction funds on judicial hold while lawyers argue and courts decide such legal assertions.”<sup>163</sup>

Senator Lautenberg responded to the President’s veto by stating that “it is hard to understand why President Bush would suddenly veto this bi-

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<sup>156</sup> Press Release, Sen. Frank R. Lautenberg, Senate Passes Lautenberg, Specter Legislation to Provide Justice for Victims of State-Sponsored Terrorism (Dec. 14, 2007), available at <http://lautenberg.senate.gov/newsroom/record.cfm?id=289077>.

<sup>157</sup> H.R. 4986, 110th Cong. (2008); see also Feller, *supra* note 155.

<sup>158</sup> H.R. 1585, 110th Cong. (2007).

<sup>159</sup> Walter Alarkon, *Democrats Say Bush Can’t Pocket Veto Defense Bill*, THE HILL (Wash., D.C.), Jan. 1, 2008, available at <http://thehill.com/leading-the-news/democrats-say-bush-cant-pocket-veto-defense-bill-2008-01-02.html>. This version of the Defense Authorization Bill was vetoed by President Bush on December 28, 2007. Feller, *supra* note 155.

<sup>160</sup> See Amy Gardner, *Bush Plans to Veto Defense Policy Bill*, WASH. POST, Dec. 29, 2007, at A2 (asserting that Bush vetoed “the defense authorization bill because of Iraq’s concerns that the legislation could hinder redevelopment efforts by entangling the country’s assets in court claims by victims of Saddam Hussein.”).

<sup>161</sup> *Id.*

<sup>162</sup> Feller, *supra* note 155.

<sup>163</sup> Gardner, *supra* note 160, at A2.

partisan proposal at the last minute. [He] should be listening to the pleas of Americans [sic] victims of terror . . . and should help give them the justice they deserve.”<sup>164</sup> It seemed that Senator Lautenberg and other co-sponsors of the FSIA amendment were not concerned about drastically infringing upon the centuries-old doctrine of sovereign immunity, encroaching on the executive authority of the President, and seriously undermining the efforts of servicemembers currently fighting two wars. Senator Carl Levin responded to the veto by reminding all that the Defense Authorization Bill “is important to our men and women in uniform.”<sup>165</sup> The longer the Senate fought the President on the FSIA amendment, the longer troops in the theater were not receiving the funds and equipment necessary to keep them safe and to assist them in fighting the very terrorists that certain plaintiffs’ lawyers were trying to sue in U.S. courts for millions of dollars.<sup>166</sup>

Congress chose not to challenge the President’s veto, and on January 16, 2008, the House passed the 2008 Defense Authorization Act with a new FSIA Terrorism Exception amendment, which added a presidential waiver for all claims against Iraq, as long as “Iraq continues to be a reliable ally of the United States and partner in combating acts of international terrorism.”<sup>167</sup> However, despite this compromise between Congress and the executive, two months later, the Bush Administration asked Congress also to exempt Libya from claims being brought under the new Terrorism Exception.<sup>168</sup> Libya had formerly been designated a state sponsor of terrorism by the State Department, but diplomatic relations between the United States and Libya normalized in 2003 when Libyan President Moammar Gadhafi pledged to end his weapons of mass destruction program.<sup>169</sup> President Bush

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<sup>164</sup> Press Release, Sen. Frank R. Lautenberg, Lautenberg Statement on Announced Bush Veto of Defense Authorization Bill (Dec. 28, 2007), available at <http://lautenberg.senate.gov/newsroom/record.cfm?id=290187>.

<sup>165</sup> Gardner, *supra* note 160, at A2.

<sup>166</sup> Lawyers, less concerned with the effect the amendment would have on troops in the field and more concerned with getting their clients substantial judgments, also responded to the President’s veto. One lawyer representing the *Peterson* plaintiffs rebuked the President’s veto, and insisted the amendment should pass because it would “give [his clients] access to up to \$6 billion in Iranian funds . . . held in the United States [to satisfy their \$2.6 billion judgment]” and that “[i]t is impossible to get to those assets under current law.” Walter Alarkon & Roxana Tiron, *Terrorism Victims Battle Bush over DoD Pocket Veto*, THE HILL (Wash., D.C.), Jan. 15, 2008, at 7. Another lawyer insisted that the current Iraqi government and its assets should not be immune from suit to satisfy claims stemming from actions of Saddam Hussein, asserting that “[a] carve-out for Iraq . . . is no compromise,” jeopardizing his clients’ chance at receiving judgment awards of “at most \$100 million.” *Id.*

<sup>167</sup> David Herszenhorn, *After Veto, House Passes a Revised Military Policy Measure*, N.Y. TIMES, Jan. 17, 2008, at A28; National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1083(d)(1)(c), 122 Stat. 3, 338-41.

<sup>168</sup> Jennifer Loven, *Bush Administration Seeks Libya Waiver*, EXAMINER.COM, Mar. 25, 2008, available at [http://www.examiner.com/a-1301277~Bush\\_Administration\\_Seeks\\_Libya\\_Waiver.html](http://www.examiner.com/a-1301277~Bush_Administration_Seeks_Libya_Waiver.html).

<sup>169</sup> *Id.* After relations normalized, Libya “was given a reprieve from U.N., U.S. and European sanctions . . . and allowed a seat on the U.N. Security Council.” *Id.*

most likely sought such a waiver for Libya in response to a January 2008 ruling, in *Pugh v. Socialist People's Libyan Arab Jamahiriya*, that held Libya must pay a \$6 billion judgment for the bombing of UTA Flight 722.<sup>170</sup> In emphasizing that the President should have supremacy in matters involving foreign affairs and policy, President Bush's national security spokesman insisted that "seizing . . . assets [under the Terrorism Exception] . . . could discourage nations like Libya that have renounced the export of terrorism from now helping the United States to fight terrorism."<sup>171</sup>

How Congress will respond to such a request from the President is uncertain, but some Senators have insisted that "payments [from Libya] be completed before normalized relations are finalized."<sup>172</sup> This new battle involving the President's desire to control foreign affairs with Libya is another example of how FSIA's Terrorism Exception can hinder "the President's control over foreign assets as a necessary component of a flexible and responsive foreign policy,"<sup>173</sup> and can significantly "hinder efforts to normalize relations with [a formerly] designated state sponsor of terrorism."<sup>174</sup>

The battle among the Senate, eager plaintiffs' lawyers, and the President over the 2008 FSIA amendment exposes the problems that arise when the doctrine of sovereign immunity is slowly eroded. Lawyers are seeking more and more ways to sue foreign governments for multi-million dollar judgments.<sup>175</sup> Although victims of terrorism are deserving of compensation for their injuries, it is difficult to justify political wrangling over essential defense funds for servicemembers currently fighting a war on terror, or interfering with the President's diplomatic negotiations to end a rogue state's weapons of mass destruction program, so that a handful of claim-

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<sup>170</sup> 530 F. Supp. 2d 216, 264-74 (D.D.C. 2008). See also *supra* note 129 and accompanying text. Although Libya is no longer listed as a state sponsor of terrorism, the Terrorism Exception allows claims to be brought against a state if the state "was designated a state sponsor of terrorism at the time the act" occurred. § 1083(a)(2)(i), 122 Stat. at 336. Additionally, a lawsuit can be filed against a former state sponsor of terrorism as long as it is within "ten years after the cause of action arose." § 1083(c)(2)(C)(i)(II), 122 Stat. at 341.

<sup>171</sup> Loven, *supra* note 168.

<sup>172</sup> *Id.* The information regarding Libya was current at the time this Comment went to publication in April 2008.

<sup>173</sup> Kim, *supra* note 16, at 526.

<sup>174</sup> *Id.*

<sup>175</sup> See Publication, Gibson, Dunn & Crutcher LLP, Amendment to Foreign Sovereign Immunities Act Makes It Easier for Victims to Recover Damages from State Sponsors of Terrorism (Jan. 28, 2008), available at <http://www.gibsondunn.com/publications/pages/Amendment-ForeignSovereignImmunitiesAct.aspx> ("Gibson, Dunn & Crutcher . . . successfully lobbied for enactment of this provision [of the National Defense Authorization Act for Fiscal Year 2008 that will make] [v]ictim's of state-sponsored terrorism . . . more readily . . . able to recover damages from terrorist states."). Gibson, Dunn & Crutcher assisted the plaintiffs in *Peterson* in attaining their \$2.6 billion judgment against Iran for the 1983 Beirut bombing. *Id.*

ants, some servicemembers themselves, can receive multi-million dollar judgments.

### III. U.S. SERVICEMEMBERS RECOVERING JUDGMENTS UNDER FSIA: AN EFFECTIVE WAY TO FIGHT THE WAR ON TERROR?

On January 28, 2008, President Bush—satisfied with the Senate’s amended version of the FSIA Terrorism Amendments and the inclusion of the waiver—signed the bill into law.<sup>176</sup> Servicemembers are now explicitly listed as parties who can sue certain foreign states for terrorism.<sup>177</sup> One must ask, however, if having servicemembers sue foreign states for injuries incurred while fighting the war on terror is an effective and politically and legally sound way to fight the war on terror. Although some scholars assert that the current war on terror can be won in the “orderly confines of the courtroom,”<sup>178</sup> this possibility seems less realistic and more problematic if the plaintiffs bringing the terrorists to court are the very persons responsible for combating the terrorists on the battlefield.

This Part examines the problematic history of FSIA judgments, and addresses the unintended consequences these issues have had on the President’s constitutional authority to conduct foreign policy and act as the U.S. military’s Commander in Chief. This Part then takes a sharp look at whether it is sound policy and law to allow military plaintiffs to recover under FSIA’s newly amended Terrorism Exception. Using the policy rationales that have supported the *Feres* Doctrine for the last sixty years, which have precluded military plaintiffs from suing the U.S. government for injuries incurred in the line of duty, this Part shows that these same policy rationales apply even more strongly to claims by military plaintiffs against foreign governments. This Part concludes by asserting that, for the same reasons the U.S. Congress and Supreme Court have consistently held that military plaintiffs cannot sue the U.S. government for injuries incurred in the line of duty, Congress should reexamine whether military plaintiffs should receive monetary compensation from state sponsors of terrorism.

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<sup>176</sup> *Lautenberg/Specter Bill to Provide Justice for Victims of State-Sponsored Terrorism Signed into Law*, STATES NEWS SERVICE, Jan. 29, 2008.

<sup>177</sup> National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 1083(a)(1), 122 Stat. 3, 338-41.

<sup>178</sup> Senior, *supra* note 21, at 36.

## A. *Collecting Judgments Under FSIA: A Problematic History*

### 1. FSIA Judgments Under the Original Terrorism Amendment

After the enactment of the AEDPA amendment to FSIA, American victims of terrorism were still having a difficult time obtaining monetary judgments against terrorists and terror-sponsoring states. When the first suits under the Terrorism Exception were brought against Iran and Cuba,<sup>179</sup> the claimants sought to satisfy their multi-million dollar judgments by attaching the states' diplomatic and consular property, as well as the states' frozen assets located in the United States that had been seized by the State Department after the foreign state was officially listed as a state sponsor of terrorism.<sup>180</sup> Because such attachments would violate the Vienna Convention on Consular Relations,<sup>181</sup> the Clinton Administration vehemently opposed them, arguing that:

[T]he United States has international treaty obligations to protect . . . diplomatic . . . properties, that the blocked assets of foreign states provide useful diplomatic leverage and should remain available for future use, that the attachment of the blocked assets by early claimants under the FSIA exception would mean that nothing would be left to compensate future claimants, and that the attachment of both kinds of assets would expose U.S. assets to reciprocal action in certain foreign States.<sup>182</sup>

Congress responded to these arguments by saying the President was prohibiting claimants from receiving their just payments due to actions of executive stonewalling, and insisted that President Clinton “has chosen to protect terrorist assets over the rights of American citizens seeking justice.”<sup>183</sup> Private litigants continued to lobby Congress to enable them to collect judgments from state sponsors of terrorism. As a result, in 1998, Congress again amended the Terrorism Exception in an effort to make it easier for plaintiffs to recover monetary judgments received in cases against foreign states.<sup>184</sup> By enacting the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Congress provided that “victims who obtained judgments against terrorist States could attach both the terror-

<sup>179</sup> See *supra* Part II.C.

<sup>180</sup> See ELSEA, *supra* note 127, at 3.

<sup>181</sup> See Vienna Convention on Consular Relations art. 27(1)(a), Apr. 24, 1963, 596 U.N.T.S. 261 (“In the event of the severance of the consular relations between two States . . . the receiving State shall, even in case of armed conflict, respect and protect the consular premises, together with the property of the consular post and the consular archives.”).

<sup>182</sup> ELSEA, *supra* note 127, at 3.

<sup>183</sup> ELSEA, *supra* note 128, at 13 (quoting *Terrorism: Victims' access to Terrorist Assets: Hearing Before the Sen. Comm. on the Judiciary*, 106th Cong. (1999) (statement of Sen. Mack)).

<sup>184</sup> See Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, § 117, 112 Stat. 2681, 2681-491 (1998).

ist state's frozen assets and their diplomatic and consular property."<sup>185</sup> Congress did, however, respect the executive's authority in the realm of international affairs, and gave the President the authority to waive such attachments in the interest of national security.<sup>186</sup> With that caveat, President Clinton signed the bill into law, and immediately invoked his waiver.<sup>187</sup> In explaining why he invoked the waiver provision, President Clinton stated:

I am concerned . . . [that i]f this section were to result in attachment and execution against foreign embassy properties, it would encroach on my authority under the Constitution to "receive Ambassadors and other public ministers." Moreover, if applied to foreign diplomatic or consular property, [this Act] would place the United States in breach of its international treaty obligations . . . [and would erode] the principle that diplomatic property must be protected regardless of bilateral relations. . . . [Additionally, the Act] would also effectively eliminate use of blocked assets of terrorist States in the national security interests of the United States, including denying an important source of leverage.<sup>188</sup>

The amount of assets a state sponsor of terrorism has seized in the United States, however, is a finite amount; as of September 2007, the total amount of blocked terrorist assets in the United States was \$309.5 million, and the total amount of non-blocked terrorism assets was \$102 million.<sup>189</sup> Although a few FSIA Terrorism Exception claimants have received their judgments, every judgment paid from frozen funds simply lowers the account for the next litigant; as a result, the more judgments actually rendered, the less likely it is that the next litigant in line will get anything at all.<sup>190</sup> Lobbyists continued to pressure Congress, demanding that the U.S. government allow terrorism victims to "have their day in court," and to make sure the "state sponsors of [such] horrific acts . . . be made to pay for their crimes."<sup>191</sup> As a result, Congress continued to enact more legislation to try to get the judgments paid. In 2000, Congress passed the Victims of Traf-

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<sup>185</sup> ELSEA, *supra* note 127, at 3.

<sup>186</sup> *Id.*

<sup>187</sup> CARTER ET AL., *supra* note 24, at 610.

<sup>188</sup> Statement by President William J. Clinton Upon Signing H.R. 4328, 34 WEEKLY COMP. PRES. DOC. 2108, 2113 (Nov. 2, 1998).

<sup>189</sup> ELSEA, *supra* note 128, app. II, at 62.

<sup>190</sup> See *Justice for Victims of Terrorism Act: Hearing on H.R. 3485 Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 106th Cong. 48-49 (2000) (statement of Deputy Secretary of Treasury Stuart E. Eizenstat, Under Secretary of Defense for Policy Walter Slocombe, and Under Secretary of State Thomas Pickering). Eizenstat, Slocombe, and Pickering asserted that the Victims of Terrorism Act was "fundamentally flawed," in part because:

[I]t would create a race to the courthouse benefiting one small . . . group of Americans over a far larger group . . . of Americans . . . [and] with regard to current judgment holders, it would result in their competing for the same limited pool of assets, which would be exhausted very quickly and might not be sufficient to satisfy all judgments.

*Id.*

<sup>191</sup> 153 CONG. REC. S10793 (daily ed. Aug. 2, 2007) (statement of Sen. Lautenberg).

ficking and Violence Protections Act (“VTVPA”) of 2002.<sup>192</sup> This act sought to pay portions of some selected judgments out of U.S. funds.<sup>193</sup> The act directed the U.S. Treasury to pay a portion of the compensatory judgments against Cuba and Iran out of those states’ frozen assets.<sup>194</sup> One judgment that paid out to a successful claimant against Cuba depleted Cuba’s frozen assets in the United States by half.<sup>195</sup> For the compensatory judgments against Iran, the Act dictated that the damages be made from appropriated funds, and that “the United States would then be obligated to seek reimbursement for those payments from Iran.”<sup>196</sup>

With single plaintiffs receiving over half of a terrorist state’s frozen assets in one judgment, and with the U.S. Treasury paying millions of dollars to a handful of claimants that had been victims of terrorism, some felt that the Terrorism Exception’s main purpose—to deter states from sponsoring terrorism—was being completely undermined.<sup>197</sup> Although the victims of terrorism should be compensated, having U.S. tax dollars paying million dollar compensatory and punitive civil judgments against Iran “seemed to . . . contradict one of the major justifications for enacting the terrorist state exception to the FSIA in the first place, namely, to force terrorist States to pay a price for their actions and to deter them from engaging in such acts in the future.”<sup>198</sup>

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<sup>192</sup> Pub. L. No. 106-386, § 2002(a)(2), 114 Stat. 1464, 1542 (2000) (specifying that existing claims against Cuba and Iran brought under the Terrorism Exception were to be satisfied with only compensatory damages, and not punitive). This act allowed payment of damages from the liquidation of frozen assets in one case against Cuba, and also included the assistance of the U.S. Treasury for ten cases against Iran. ELSEA, *supra* note 127, at 3.

<sup>193</sup> ELSEA, *supra* note 127, at 3.

<sup>194</sup> *Id.* Over \$96.7 million of the Cuban assets frozen in the United States was paid to the claimants in one judgment against Cuba, and more than \$380 million was paid out for ten judgments against Iran. *Id.* at 3-4. These cases represent the very few § 1605(a)(7) judgments that were actually paid out to claimants. *Id.* As stated above, however, this money largely came from the U.S. Treasury.

<sup>195</sup> ELSEA, *supra* note 127, at 3-4.

<sup>196</sup> *Id.* at 3. Additionally, the most commonly sued state, Iran, as of 2004, had only \$251.9 million in frozen assets, and the State Department said that Iran’s blocked assets were not sufficient even to pay the compensatory damages for existing judgments in 2004. Kim, *supra* note 16, at 524. Since 2004, numerous other lawsuits have been brought against Iran, including the judgment in *Peterson* that awarded plaintiffs over \$2 billion. *See Peterson v. Islamic Republic of Iran*, 515 F. Supp. 2d 25 (D.D.C. 2007).

<sup>197</sup> ELSEA, *supra* note 127, at 4.

<sup>198</sup> *Id.* Congress subsequently did not address this issue, however, and in 2002 passed the Terrorism Risk Insurance Act (“TRIA”), which made more frozen assets available for attachment by restricting the presidential waiver authority only to property protected by international treaties. *See Terrorism Risk Insurance Act of 2002*, Pub. L. No. 107-297, § 201, 116 Stat. 2322, 2337-40 (codified in scattered sections of 15 U.S.C.).

## 2. FSIA Judgments Under the 2008 Terrorism Exception Amendment

The recently passed 2008 Senate amendment to FSIA's Terrorism Exception again changes the way successful FSIA judgments are paid out so that—despite having a finite amount of frozen terrorism assets located in the United States—more successful plaintiffs and their attorneys can collect on their multi-million, and at times multi-billion, dollar judgments.<sup>199</sup> The new FSIA Terrorism Exception makes collecting FSIA judgments easier for plaintiffs by amending the current legislation in two major ways: (1) by allowing plaintiffs to have access to funds collected under the 1984 Victims of Crime Act (“VOCA”);<sup>200</sup> and (2) by allowing “for the seizure of hidden commercial assets belonging to the terrorist state so that the victims of terrorism can be justly compensated.”<sup>201</sup> Both of these scenarios, however, can potentially create tremendous problems.

VOCA was passed in 1984 to authorize the creation of an International Terrorism Victim Expense Reimbursement Program (“ITVERP”), “so that victims of acts of international terrorism that occur outside the United States may receive reimbursement for ‘expenses associated with that victimization.’”<sup>202</sup> After 9/11, however, the USA PATRIOT Act<sup>203</sup> amended VOCA to set up a \$50 million Antiterrorism Emergency Reserve, available only for victim assistance or compensation related to acts of terrorism or mass violence.<sup>204</sup> “At no point may the Reserve exceed \$50 million.”<sup>205</sup> The

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<sup>199</sup> See National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1083, 122 Stat. 3, 338-44. To date, the total value of judgments from cases brought under FSIA's Terrorism Exception that are not entitled to compensation from the fund created by § 2002, and therefore have not been paid out, is at least \$6.267 billion. ELSEA, *supra* note 128, app. I, at 61 (“\$3,766,976,843.04 of this figure is compensatory damages, the remaining \$2.5 billion represents punitive damages.”).

<sup>200</sup> § 1083(a)(1), 122 Stat. at 338-41.

<sup>201</sup> 153 CONG. REC. S10793 (daily ed. Aug. 2, 2007) (statement of Sen. Lautenberg); *see also* § 1083(a)(1), 122 Stat. at 338-41.

<sup>202</sup> OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, INT'L TERRORISM VICTIM EXPENSE REIMBURSEMENT PROGRAM: REPORT TO CONGRESS, at v (2006) [hereinafter OFFICE OF JUSTICE PROGRAMS], available at [http://www.ojp.usdoj.gov/ovc/publications/infores/intlterrorismreport/ncj210645\\_part1.pdf](http://www.ojp.usdoj.gov/ovc/publications/infores/intlterrorismreport/ncj210645_part1.pdf). Prior to the passage of VOCA, the victim's state of residence provided the necessary financial assistance, but that created an unequal reimbursement scheme, where survivors of the same terrorism act that were residents of different states were receiving different levels of compensation for the same injuries. *Id.* As a result, “VOCA was amended so that states are no longer required to compensate victims of international terrorism occurring outside the United States.” *Id.* The specific authority to implement ITVERP falls under 42 U.S.C. § 10603(c). *Id.* at 5.

<sup>203</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered sections of the U.S.C.).

<sup>204</sup> OFFICE OF JUSTICE PROGRAMS, *supra* note 202, at 6 (citing 42 U.S.C. § 10601(d)(5)(A), (B) (2000)).

<sup>205</sup> *Id.* at 7 (citing 42 U.S.C. § 10601(d)(5)(A) (2000)).

Reserve “create[s] a régime under which the Federal Government quickly can bring resources to bear (without using tax dollars) for emergency assistance in the wake of terrorist violence.”<sup>206</sup> The obvious problem with this change, therefore, is that if the VOCA fund is not legally allowed to exceed \$50 million in a given year, and most FSIA terrorism judgments are generally multi-million dollar judgments, there is no way the VOCA fund can both exist as an Antiterrorism Emergency Reserve fund and pay out the multitude of remaining FSIA judgments.

The Act also allows “for the seizure of hidden commercial assets belonging to the terrorist state so that the victims of terrorism can be justly compensated.”<sup>207</sup> Though this terminology sounds somewhat opaque, recent statements by some plaintiffs’ attorneys bringing claims under FSIA’s Terrorism Exception have shed more light on how this change allows plaintiffs broader access to funds for their judgments. After Libya was ordered in January 2008 to pay a \$6 billion judgment to seven American victims of a 1989 plane bombing over Niger,<sup>208</sup> the plaintiffs’ attorneys insisted that “if Libya does not pay up,” the attorneys will be able to “get a court order to obtain [the judgment money] from American companies with which Libya is now doing business.”<sup>209</sup> In defending the magnitude of the award, one of the attorneys insisted that the \$6 billion judgment “proves that the rule of law will always prevail over state-sponsored terrorism.”<sup>210</sup>

The newly amended FSIA, therefore, provides much wider latitude for plaintiffs’ lawyers to seize foreign assets—or, if necessary, U.S. business assets—to satisfy their large judgments. This encroaching latitude is one of the main reasons President Bush vetoed the recently proposed FSIA amendment.<sup>211</sup> With servicemember plaintiffs seeking large judgments against foreign states, however, there are more issues at stake: paying large judgments out of strategic defense funds to servicemember plaintiffs for past injuries incurred while deployed jeopardizes the ability to provide funds for servicemembers currently fighting a war, as was shown in the battle between the President and the 1991 Gulf War POW plaintiffs in *Acree*.<sup>212</sup>

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<sup>206</sup> *Id.* The overall VOCA fund is funded by fines, not U.S. tax dollars. *Id.*

<sup>207</sup> 153 CONG. REC. S10793 (daily ed. Aug. 2, 2007) (statement of Sen. Lautenberg); *see also* National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1083(a)(1), 122 Stat. 3, 338-41.

<sup>208</sup> *See supra* Part II.C.3.

<sup>209</sup> *U.S. Court Orders, supra* note 154.

<sup>210</sup> *Id.*

<sup>211</sup> *See supra* Part II.C.3.

<sup>212</sup> *See supra* Part II.C.2.

B. *Using the Policies that Prohibit Servicemembers from Recovering under FTCA to Assess Whether Military Plaintiffs Should be Able to Recover Under FSIA's Terrorism Exception*

As discussed above, the Supreme Court has consistently upheld certain policy reasons why a U.S. servicemember cannot bring suit against the U.S. government for injuries received incident to service, including: (1) servicemembers have an extensive system of recovery available to them for injuries incurred incident to service; and (2) the relationship between a soldier and his superiors is extremely unique, and the government must protect and uphold military morale and discipline.<sup>213</sup> These same policy rationales apply even more forcefully against allowing servicemembers to recover monetary judgments against a foreign state, under FSIA, for injuries incurred incident to service. Additionally, aside from significantly broadening the abrogation of a foreign state's sovereign immunity from suit under the original FSIA, allowing servicemembers to recover huge judgments from foreign states for injuries received during war raises even more policy concerns, including the risks of: (1) significantly undermining the President's prerogatives as Commander in Chief; (2) significantly jeopardizing military morale and discipline; and (3) blatantly creating an unjustifiable discrimination between the amount of compensation servicemembers could receive if injured or killed in war.

1. Undermining Presidential Prerogatives as Commander in Chief

Given the already complicated and controversial nature of how some civilian Terrorism Exception plaintiffs have sought to have their judgments paid, one must examine how such a controversial system will be impacted now that servicemembers are explicitly able to receive judgments as well. As *Acree* shows, in 2003, former POWs from the 1991 Gulf War were trying to recover judgments against Iraq at a time when hundreds of thousands of other troops were getting ready to deploy to Iraq to engage in OIF.<sup>214</sup> Allowing servicemembers to recover under FSIA's Terrorism Exception, thereby possibly undermining the President's abilities to plan and conduct a war as Commander in Chief, jeopardizes other military members who are currently in the line of duty.<sup>215</sup>

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<sup>213</sup> *United States v. Johnson*, 481 U.S. 681, 684 n.2 (1987) (citing *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666, 671-72 (1977)).

<sup>214</sup> See *Acree v. Republic of Iraq*, 370 F.3d 41, 43-46 (D.C. Cir. 2004).

<sup>215</sup> See Josh Rogin, *With House Passage, Revised Authorization Bill Set for Senate Vote*, CQ TODAY (Wash., D.C.), Jan. 16, 2008 (discussing how the FSIA amendment was holding up the passage of the overall defense authorization bill and asserting that "[t]here [was] little desire in Congress to hold

Additionally, countless lawsuits against foreign states or foreign state officials could significantly undermine the President's ability to normalize relations with a state, as the Libya example shows.<sup>216</sup> This could also be the reaction to the judgment in *Rux*.<sup>217</sup> Although the families of the USS Cole victims suffered a tragic loss, waging a lawsuit against Sudan for actions committed by Al Qaeda operatives in Lebanon at a time when United States foreign policy is focused on trying to quell the violence in Darfur and stabilize a very shaky Sudan Peace Accord seems contradictory, counterproductive, and destabilizing for foreign relations.<sup>218</sup>

## 2. Jeopardizing Military Morale and Discipline

Because the new FSIA Terrorism Exception explicitly allows servicemembers to bring suits against foreign states, the courts and Congress must take into consideration that the President, as Commander in Chief, decides where and when certain servicemembers are to be deployed to assist in ongoing war efforts. A servicemember, who volunteered for military service to work on behalf of the U.S. government to fight the ongoing war on terror, knows that—as a deployed, uniformed, U.S. servicemember during a time of war—he or she will be targeted by enemies. If one of the enemies injures or kills the servicemember, and if the enemy was linked to a state sponsor of terrorism, the servicemember would then, under the new Terrorism Exception, be able to sue a sovereign state for injuries incurred while fighting for the United States in the war on terror.<sup>219</sup>

What is most alarming about a servicemember receiving a large judgment under FSIA's Terrorism Exception, is that only a servicemember "fortunate" enough to be injured or killed by activities that can be linked to a state sponsor of terrorism would be able to recover; the servicemember's potential judgment would be linked to where and by whom the injury oc-

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up [the bill]," and that House Armed Services Chairman Ike Skelton, D-Mo., "[urged] a swift resolution so as not to further delay final action on the defense bill.").

<sup>216</sup> Gardner, *supra* note 160, at A2 (reporting that in response to the proposed FSIA amendment's allowance of seizing current Iraqi funds to satisfy judgments against Saddam Hussein, U.S. ambassador to Iraq, Ryan C. Crocker, said "[I] cannot overemphasize the potentially devastating impact this could have to our relationships in Iraq.").

<sup>217</sup> *Rux v. Republic of Sudan*, 495 F. Supp. 2d 541 (E.D. Va. 2007).

<sup>218</sup> See *Sudan: Peace Agreement Around the Corner?: Testimony before the Subcomm. on Africa of the H. International Relations Comm.*, 108th Cong. (Mar. 11, 2004) (statement of Charles Snyder, Acting Assistant Secretary of State for African Affairs), available at <http://www.state.gov/p/af/rls/rm/30356.htm>. The State Department has asserted that "[t]he road to peace in Sudan has been long and hard. . . . Implementation of any peace agreement reached between the parties will pose major challenges. . . . [But] [a]chieving peace in Sudan is one of the Administration's highest priorities in Africa." *Id.*

<sup>219</sup> National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1083(a)(1), 122 Stat. 3, 338-41.

curred. When addressing a servicemember's right to recover under FTCA for claims against the U.S. government, because the tort law of the state in which the injury occurred governs FTCA claims, the Supreme Court was concerned that the "sheer luck of assignment location or state in which the injury occurred would determine the amount, if any, recoverable," and that "the resulting geographically inconsistent recovery would disrupt the uniformity necessary to the effective operation of the armed forces."<sup>220</sup> This same reasoning would apply tenfold to a servicemember's FSIA judgment. That one soldier killed in Afghanistan saving his comrades would not qualify for a FSIA judgment because Afghanistan is not on the State Sponsors of Terrorism List, while a fellow soldier killed by an Iranian-linked roadside bomb in Iraq could recover millions, if not billions, of dollars from Iran because Iran is on the list, could significantly "disrupt the uniformity necessary to the effective operation of the armed forces."<sup>221</sup>

Such an inconsistent law creates an enormously unjustifiable disparity between two injuries. This disparity could have an extremely detrimental effect on military morale and discipline, as servicemembers who are injured or killed in one theater of war would have access to multi-million dollar judgments against a foreign state, while servicemembers in a different theater of war would only have the military's regular system of death and injury benefits to sustain them.<sup>222</sup> Additionally, such arbitrary discrimination could hinder military discipline, as troops begin to question their superiors' decisions to send some servicemembers into a FSIA theater, and others to a non-FSIA theater. As has been noted, "Military decision-making entails balancing, among other things, the demands of the mission with the safety of the individual servicemember and the safety of the unit. . . . [M]ilitary leaders at all levels cannot afford to cloud their decisions with issues of potential governmental or personal tort liability."<sup>223</sup>

### 3. Double Redressability: FSIA Judgments and Military Death Benefits

Another reason Congress should reconsider whether servicemembers should be able to recover judgments under FSIA as a means of compensation for injuries incurred in the line of duty is the same reason the U.S. government does not waive its own sovereign immunity for military claimants in similar situations: because the military already has an extensive compensation system provided by other congressional enactments, for both ser-

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<sup>220</sup> Brou, *supra* note 101, at 16.

<sup>221</sup> *Id.*

<sup>222</sup> See *supra* Part II.B.2 (discussing the role of the State Department's List of State Sponsors of Terrorism as the source for which states can be sued under the Terrorism Exception).

<sup>223</sup> Brou, *supra* note 101, at 3-4.

vicemembers and their families, if the servicemember is killed or injured in the line of duty.<sup>224</sup> Civilian victims of terrorism abroad do not have the benefit of a comprehensive system of injury and death benefits in the event that they are injured or killed by a terrorist act.<sup>225</sup> This fact was one of the main reasons Congress passed the original Terrorism Exception—because the families of innocent civilians who were killed by international terrorists while traveling or working abroad had nobody to turn to for assistance or compensation.<sup>226</sup> Military personnel, however, are not roaming around Baghdad or Kabul for fun—they are there because they were sent there by their employer, the U.S. government, to fight a war. The military provides an extensive compensation system to servicemembers injured in war, as well as extensive benefits for surviving family members of servicemembers killed in the line of duty.<sup>227</sup>

The Supreme Court addressed this very issue when considering whether servicemembers injured or killed in the line of duty or incident to service could recover tort damages against the United States under FTCA.<sup>228</sup> The Court in *Feres* held that “[a]s to injuries sustained by servicemembers ‘incident to service,’ it is established that the compensation laws provide the exclusive remedy.”<sup>229</sup> However, in *Brooks*, another case where a servicemember was trying to recover compensation under FTCA for injuries incurred incident to service, the Supreme Court asserted that although Congress had provided for exclusiveness in remedy for military

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<sup>224</sup> *Feres v. United States*, 340 U.S. 135, 145 (1950) (“[t]he compensation system . . . is not negligible or niggardly . . .”).

<sup>225</sup> U.S. victims of overseas terrorism do, however, have access to VOCA funds for some compensation of injuries suffered at the hands of international terrorism. See *supra* Part III.A.2.

<sup>226</sup> Deutsch, *supra* note 112, at 892. Some victims of overseas terrorism now, however, are not without technical support. In 2005, almost ten years after the passage of FSIA, the Department of Justice created an Office of Justice for Victims of Overseas Terrorism (“OJVOT”) “to ensure that the investigation and prosecution of terrorist attacks against American citizens overseas remain a high priority within the Department of Justice.” United States Department of Justice, Office of Justice for Victims of Overseas Terrorism, <http://www.usdoj.gov/nsd/ojvot.htm>. OJVOT, however, provides victim support and assists other agencies in the *criminal* investigation of terrorist attacks involving U.S. citizens abroad. See United States Department of Justice, *Information for U.S. Victims of Overseas Terrorism and Their Families* 2, [http://www.usdoj.gov/nsd/overseas\\_terrorism.pdf](http://www.usdoj.gov/nsd/overseas_terrorism.pdf). Its duties include: “monitoring the investigation and prosecution of terrorist attacks against Americans abroad; working with other pertinent Justice Department components to ensure that the rights of victims of such attacks are honored and respected; [and] establishing a Joint Task Force with the Department of State, to be activated in the event of a terrorist incident against American citizens overseas.” United States Department of Justice, Office of Justice for Victims of Overseas Terrorism, <http://www.usdoj.gov/nsd/ojvot.htm>. On the other hand, FSIA allows U.S. victims of terrorism to bring *civil* suits seeking damages against state sponsors of terrorism. See *supra* Part II.B.3.

<sup>227</sup> See Major Dana Chase, *The Judge Advocate General’s Legal Center and School: Legal Assistance Notes: Survivor Benefits Update*, 2006 ARMY LAW. 26, 26-28 (Feb. 2006).

<sup>228</sup> See discussion *supra* Part II.B.

<sup>229</sup> Chermiside, *supra* note 85, § 12(b).

personnel injured incident to service, “this does not mean that the amount payable under servicemen’s benefit laws should not be deducted, or taken into consideration, when the serviceman obtains judgment under the [FTCA]. . . . [W]e now see no indication that Congress meant the United States to pay twice for the same injury.”<sup>230</sup> This same scenario arises if a servicemember is able to recover under FSIA: the servicemember, and/or his or her family, would receive either injury or death compensation from the U.S. government under the Military Benefits system, but can also bring a civil suit against a foreign state with the hope of recovering millions of dollars.

#### 4. Applying the *Feres* “In the Line of Duty” Limitation to FSIA Claims

The original text of FTCA’s exception involving servicemembers asserts that FTCA does not apply to “[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, *during time of war*,”<sup>231</sup> and also prohibits “[a]ny claim arising in a foreign country.”<sup>232</sup> The Supreme Court in *Feres*, however, extended the literal text of the FTCA exception to preclude any claim of a servicemember arising out of action that was “incident to service.”<sup>233</sup> This extension of the exception and departure from the literal language of the text have been considered by many as judicial legislation, unsupported by the literal language of FTCA.<sup>234</sup> Regardless of its origins, both *Feres* Doctrine supporters and critics agree that the FTCA’s exception should apply to servicemember activities during a time of war, to prevent a servicemember’s claim against the U.S. government for combat-related injuries.<sup>235</sup>

Given the similar origins and similar policy considerations of FTCA and FSIA, the *Feres* Doctrine limitation of FTCA should be applied by courts to limit a servicemember’s FSIA claims against a foreign state. Recently, in assessing damages for a servicemember’s FSIA claim, several

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<sup>230</sup> *Brooks v. United States*, 337 U.S. 49, 53 (1949).

<sup>231</sup> 28 U.S.C. § 2680(j) (2000) (emphasis added).

<sup>232</sup> *Id.* § 2680(k).

<sup>233</sup> *Feres v. United States*, 340 U.S. 135, 144 (1950).

<sup>234</sup> *See, e.g.*, *United States v. Johnson*, 481 U.S. 681, 692 (1987) (Scalia, J., dissenting) (“As it did almost four decades ago in *Feres v. United States*, the Court today provides several reasons why Congress might have been wise to exempt from the [FTCA] certain claims brought by servicemen. The problem now, as then, is that Congress not only failed to provide such an exemption, but quite plainly excluded it.” (citations omitted)).

<sup>235</sup> *See, e.g.*, Jonathan Turley, *Pax Militaris: The Feres Doctrine and the Retention of Sovereign Immunity in the Military System of Governance*, 71 GEO. WASH. L. REV. 1, 6 (2003) (asserting that the *Feres* Doctrine “has little legal or practical foundation and should be rejected in its entirety,” but arguing that “a limited combat-related injury exception would better serve both the military and society.”).

judges have applied a *Feres*-like test to limit such a claim.<sup>236</sup> Under this limitation, a foreign state would maintain its immunity from suit for injuries a U.S. servicemember incurred incident to service, but a foreign state would not be absolutely immune. If the servicemember incurred injuries at the hands of a terrorist sponsored by a foreign state and if the servicemember was not acting “incident to service,” then the servicemember’s claim should not be barred.<sup>237</sup>

In 2003, for example, the District Court for the District of Columbia in *Peterson v. Islamic Republic of Iran*, held that a servicemember and his or her family may recover under FSIA’s Terrorism Exception only if the servicemember was a non-combatant not engaged in military hostilities.<sup>238</sup> The Court established a two-prong test, somewhat mirroring the *Feres* Doctrine, to determine whether a servicemember was acting incident to service. Under the *Peterson* test, a servicemember is deemed a non-combatant, and therefore not acting incident to service, “if he or she was: (1) engaged in a peacekeeping mission; and (2) operating under peacetime rules of engagement.”<sup>239</sup> This test significantly limits which servicemembers can successfully bring claims under FSIA’s new Terrorism Exception. Under the *Peterson* test, only those servicemembers injured by an officially designated state sponsor of terrorism while engaged in a peacekeeping mission—like those injured in the 1983 Beirut bombing or others currently supporting official UN Peacekeeping missions<sup>240</sup>—and *not* servicemembers actively engaging in combat on a battlefield, can recover monetary judgments against state sponsors of terrorism.

The explicit grant of a right to servicemembers to bring a FSIA claim under the 2008 Terrorism Exception amendments does not suggest that Congress intended for a servicemember to be able to sue for claims arising “incident to service.” Therefore, in order to avoid the multitude of complications that could arise if all servicemembers injured by a state sponsor of terrorism were able to bring claims under FSIA’s new Terrorism Exception, the narrow *Peterson* test should possibly be applied to all servicemember’s FSIA claims. The only servicemembers that would recover under the new FSIA Terrorism Exception under this strict *Peterson* test are those who are injured: (1) while engaged in a peacekeeping mission; (2) while operating

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<sup>236</sup> See, e.g., *Estate of Heiser v. Islamic Republic of Iran*, 466 F. Supp. 2d 229, 258 (D.D.C. 2006); *Peterson v. Islamic Republic of Iran*, 264 F. Supp. 2d 46, 60 (D.D.C. 2003).

<sup>237</sup> See, e.g., *Estate of Heiser*, 466 F. Supp. 2d at 258 (holding that “plaintiffs have conclusively demonstrated that the servicemen who died at the Khobar Towers satisfy the two-prong test under *Peterson*,” and therefore “plaintiffs are not excluded from recovering under the state-sponsored terrorism exception to the FSIA.”).

<sup>238</sup> 264 F. Supp. 2d 46, 60 (D.D.C. 2003).

<sup>239</sup> *Estate of Heiser*, 466 F. Supp. 2d at 258 (citing *Peterson*, 264 F. Supp. 2d at 60).

<sup>240</sup> There are currently seventeen active UN Peacekeeping missions. See *United Nations Peacekeeping Operations*, <http://www.un.org/Depts/dpko/dpko/bnote.htm>.

under peacekeeping rules of engagement; (3) by an officially designated state sponsor of terrorism.

However, the judge in *Peterson* determined that the Marines killed in the 1983 Beirut bombing were non-combatants because they were engaged in a peacekeeping mission.<sup>241</sup> Therefore, others seeking to apply the FSIA Terrorism Exception more broadly to servicemembers could argue that the key to any FSIA Terrorism Exception claim brought by a servicemember is not that the servicemember was serving in a peacekeeping capacity, but that he or she was injured by a state sponsor of terrorism while officially acting in a non-combatant role. The court in *Rux* did not apply a *Peterson*-like test to assess whether the USS Cole victims were acting incident to service or in a non-combatant capacity. One could argue, however, that the victims could have been deemed non-combatants. The seventeen soldiers killed in the suicide bombing were on their ship and getting ready to sit down for lunch when the attack occurred.<sup>242</sup> In fact, when President Clinton addressed the families of the Cole victims at a memorial service, he said:

[T]he . . . *Cole* [was] headed for the Persian Gulf, where our forces are working to keep peace and stability in a region that could explode and disrupt the entire world. [The] tragic loss [of the Cole victims] reminds us that even when America is not at war, the men and women of our military still risk their lives for peace. I am quite sure history will record in great detail our triumphs in battle, but I regret that no one will ever be able to write a full account of the wars we never fought, the losses we never suffered, the tears we never shed because men and women like those who were on the . . . *Cole* were standing guard for peace. We should never, ever forget that.<sup>243</sup>

The bombing of the USS Cole seems to constitute a terrorist act more than a suicide bomber slamming into a Humvee caravan patrolling the streets of Baghdad. The Cole victims were not ready to engage the enemy when they sat down for lunch that day, whereas a U.S. Army Humvee patrol in Baghdad would be armed and ready for combat.

This argument may, however, stretch the boundaries of a *Peterson* non-combatant test too far. It is difficult to accept that the USS Cole victims were non-combatants because at the time of the Cole bombing, the Port of Aden was not considered a safe zone for the U.S. military. Although the United States had the permission of the Yemeni government to refuel their ships in the port, the U.S. government had declared the Port of Aden an active combat zone as of January 17, 1991.<sup>244</sup> Combat zones are designated by an Executive Order from the President as areas in which the U.S. Armed

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<sup>241</sup> *Peterson*, 264 F. Supp. 2d at 49-51.

<sup>242</sup> *Rux v. Republic of Sudan*, 495 F. Supp. 2d 541, 545 (E.D. Va. 2007).

<sup>243</sup> William J. Clinton, Remarks at the Memorial Service for the U.S.S. *Cole* in Norfolk, Virginia, 3 Pub. Papers 2216, 2217 (Oct. 18, 2000).

<sup>244</sup> Exec. Order No. 12,744, 56 Fed. Reg. 2,663 (Jan. 21, 1991), reprinted in 26 U.S.C. § 112 (2000).

Forces are engaging or have engaged in combat.<sup>245</sup> Therefore, a counter-argument could be made that although the USS Cole victims were not poised to engage an enemy attack at the time of their deaths, as a U.S. warship in a designated combat zone, it would be difficult to dismiss the possibility that a terrorist attack could occur on the ship. Additionally, by late 1998, the U.S. government had “significant credible intelligence suggesting the possibility of an imminent terrorist action in the Middle Eastern region,” and although “intelligence did not make clear exactly where the attack would occur or how many attacks were planned,” it was clear that “bin Laden was orchestrating retaliation against Americans.”<sup>246</sup> Therefore, although the USS Cole victims were not engaged in hostilities at the time of their deaths, as deployed U.S. sailors in an active combat zone, they were more likely than not serving “incident to service” as U.S. servicemembers, and therefore could arguably not be deemed non-combatants.

#### IV. IS THE GAVEL MIGHTIER THAN THE SWORD?

As of April 2008, several thousand U.S. troops have perished in Iraq since 2003.<sup>247</sup> Whether the current U.S. war on terror can be won in the orderly confines of the courtroom remains unclear. After the bombing of the Cole, the tragedy of 9/11, and the launch of Operation Enduring Freedom (“OEF”) in October 2001 and Operation Iraqi Freedom (“OIF”) in March 2003, many policy experts and scholars have warned that this war on terror will not be easily won.<sup>248</sup> It has been asserted that:

[V]ictory in the war on terror will not mean the end of terrorism, the end of tyranny, or the end of evil. . . . Terrorism . . . has been around for a long time and will never go away entirely. . . . Like violent crime, deadly disease, and other scourges, it can be reduced and contained. But it cannot be totally eliminated.

This is a critical point, because the goal of ending terrorism entirely is not only unrealistic but also counterproductive. . . . [T]he consequences of the solutions would be less acceptable than the risks themselves.<sup>249</sup>

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<sup>245</sup> 26 U.S.C. § 112(c)(2).

<sup>246</sup> Steven Lee Myers, *Bin Laden Plot Reported Against U.S. Sites in the Gulf*, N.Y. TIMES, Dec. 16, 1998, at A3.

<sup>247</sup> See Iraq Coalition Casualty Count, <http://icasualties.org/oif/> (last visited April 18, 2008).

<sup>248</sup> See Gordon, *supra* note 26, at 58.

<sup>249</sup> *Id.* at 58-59.

### A. *The Future of Foreign Sovereign Immunity*

Critics of the original FTCA warned that allowing private citizens to sue the U.S. government for certain tort claims would “[open] the door to the people ‘to sue the Government . . .’ and warned that once “the door is opened by which the right is extended to sue the United States of America in one class of cases, we will find the attempt to force such right on every hand in the future.”<sup>250</sup> The risk, of course, is once a government relinquishes its right of sovereign immunity from suit, the number of litigants asserting claims for relief will rise. This same risk exists if the sovereign immunity of a foreign state is abolished. The Supreme Court has warned that “in affairs between nations, outstanding claims by Nationals of one country against the government of another country are ‘sources of friction’ between the two sovereigns.”<sup>251</sup> Therefore, claims of sovereign immunity from a foreign state should involve a substantial amount of foreign policy and executive deference.<sup>252</sup>

In light of Congress’s recent amendment to FSIA’s Terrorism Exception, which explicitly added servicemembers as parties who can sue foreign states that sponsor terror, and due to fact that the U.S. military remains embroiled in a war on terror, it is integral that this exception to foreign sovereign immunity be critically re-examined. Although Congress has sought to “allow victims of state sponsored terrorism to have their day in court”<sup>253</sup> by waiving a foreign state’s sovereign immunity from suit in the United States if it sponsors terrorist activity, FSIA’s Terrorism Exception has not succeeded in deterring state sponsors of terrorism.

### B. *Undermining Executive Authority*

The history of FSIA’s Terrorism Exception judgments has resulted in U.S. courts, acting under the authority granted by Congress, making judicial findings of fact on policy and intelligence issues that could have a significant impact on U.S. foreign policy.<sup>254</sup> In the fog of war, however, particularly a war as amorphous and ill-defined as a war on terror, a court’s legal finding of fact could be nothing more than a premature policy declaration,

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<sup>250</sup> H.R. REP. NO. 79 -1287, at 13 (1945).

<sup>251</sup> *Dames & Moore v. Regan*, 453 U.S. 654, 679 (1981).

<sup>252</sup> *See United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936).

<sup>253</sup> 153 CONG. REC. S10793 (daily ed. Aug. 2, 2007) (statement of Sen. Lautenberg).

<sup>254</sup> *See* 28 U.S.C. § 1608(e) (2000) (“No judgment by default shall be entered by a court of the United States . . . against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.”).

and could later be determined to be extremely incorrect.<sup>255</sup> Therefore, courts hearing FSIA Terrorism Exception cases, involving either civilian or servicemember plaintiffs, should be very cautious to grant judgments—particularly large, multi-million dollar judgments—against foreign states based on barely-ripe intelligence evidence.

The policy implications of such judicial judgments also reinforce the need to keep foreign policy decisions in the realm of the executive branch. It could be argued that because it is the executive who determines which foreign states are on the State Department's State Sponsor of Terrorism List, and this list serves as the qualifier as to which foreign states can be sued under FSIA's Terrorism Exception, that the President ultimately maintains control of FSIA judgments.<sup>256</sup> His authority, therefore, could not be undermined by judicial rulings under the Terrorism Exception.<sup>257</sup> The difficulty with such an argument, however, is obvious: why the executive places a foreign state on the Terrorism List, or takes a state off, is the result of a myriad of complex, multi-faceted policy determinations, and is "profoundly affected by necessary political compromises."<sup>258</sup> The President, therefore, would not automatically remove a foreign state from the Terrorism List even if FSIA judgments against the state were undermining current foreign policy efforts.<sup>259</sup> Congress, especially in the face of war and terrorism, must not undermine the executive's authority in foreign affairs and war. As the United States remains embroiled in a war on terror, it is worth remembering that:

[The] 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 . . . . It is quite apparent that if, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved, congressional legislation . . . must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved. . . . [E]specially is this true in time of war.<sup>260</sup>

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<sup>255</sup> See *Smith v. Islamic Emirate of Afg.*, 262 F. Supp. 2d 217, 232 (S.D.N.Y. 2003) (holding, based on expert testimony, that "plaintiffs have shown, albeit barely . . . that Iraq provided material support to bin Laden and al Qaeda" in a § 1605(a)(7) case brought against Iraq and Saddam Hussein in the immediate aftermath of 9/11). Later intelligence reports proved, however, that the evidence the *Smith* court relied on for its judgment was faulty, and official U.S. policy experts later declared that there "existed only some anecdotal evidence linking Iraq to al Qaeda," and there was "no 'compelling case' that Iraq had either planned or perpetrated [the 9/11] attacks." 9/11 COMMISSION REPORT, *supra* note 1, at 334, 351.

<sup>256</sup> See, e.g., *Rein v. Socialist People's Libyan Arab Jamahiriya*, 995 F.Supp. 325, 329 (E.D.N.Y. 1998).

<sup>257</sup> See *supra* note 75 and accompanying text.

<sup>258</sup> Peed, *supra* note 35, at 1322.

<sup>259</sup> See *supra* Part II.C.2.

<sup>260</sup> *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936).

C. *Jeopardizing Military Effectiveness and Troop Morale*

Allowing U.S. servicemembers to bring claims against a foreign state for injuries incurred while serving the U.S. government in the war on terror could have disastrous consequences, and could significantly undermine both troop morale and military effectiveness. It is important to keep in mind that FSIA Terrorism Exception claims only arise where “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 . . . .”<sup>261</sup> If Congress and the Supreme Court continue to support the *Feres* Doctrine policies underlying the prohibition against a servicemember bringing suit against the U.S. government for injuries incurred in combat, Congress should apply these prohibitions against servicemembers bringing suit against a foreign state for combat injuries under FSIA.

The possibility that one servicemember could recover a multi-billion dollar judgment in the event that he is killed by a terrorist sponsored by a state on the Terrorism List, while a different servicemember, possibly in the same theater, dies shielding his comrades from a suicide bomber not connected to a terrorist state, and is therefore only entitled to standard military death benefits, creates an unjustifiable disparity between the two injuries. The result of such a disparity is one servicemember being labeled a “victim of terrorism,” while the other servicemember becomes a casualty of war. Although both servicemembers were performing the same job, and served their country in the same manner, FSIA’s Terrorism Exception determines one person’s service to his or her country is “worth” more than another’s service.<sup>262</sup> Such a blatantly incongruous policy lacks both a political and legal justification.

After the passage of FSIA’s new Terrorism Exception, *Rux v. Republic of Sudan* and the victims of the USS Cole bombing again provided an example of how the Terrorism Exception will continue to be problematic as it relates to compensating servicemember plaintiffs for injuries received while deployed. In February 2008, one week after the passage of the new FSIA Terrorism Exception, some of the family members of the USS Cole victims sought to reopen their lawsuit against Sudan in order to use the new Terrorism Exception to receive additional damages.<sup>263</sup> A lawyer for the plaintiffs

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<sup>261</sup> National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1083(a)(1), 122 Stat. 3, 338-41.

<sup>262</sup> See, e.g., Lee Michael Katz, *What’s a Life Worth? What I’ve Learned: Kenneth Feinberg*, WASHINGTONIAN, Mar. 2008, at 33, 33-36.

<sup>263</sup> Tim McGlone, *Families of Cole Victims Seek to Reopen Suit Against Sudan*, THE VIRGINIAN-PILOT, Feb. 1, 2008, at A1, available at <http://hamptonroads.com/2008/01/families-cole-victims-seek-reopen-suit-against-sudan>. Under the new Terrorism Exception, claimants can attempt to retry actions as

insisted that the families were “well within [their] rights to go back to [the judge]” to ask for additional damages.<sup>264</sup> However, at least one family member expressed hesitation against reopening the trial, insisting that she “wasn’t prepared to go through this all over again.”<sup>265</sup>

## CONCLUSION

In light of the complicated realities of war, and the important principles of sovereign immunity, Congress should reexamine FSIA’s Terrorism Exception with regard to U.S. servicemembers bringing claims against foreign states for injuries incurred while serving the U.S. government. As the law is written now, however—regardless of the potential repercussions or whether it is bad policy—servicemembers injured or killed by a state sponsor of terrorism can sue certain foreign states in a civil action in U.S. courts.<sup>266</sup> Therefore, courts hearing such suits should be wary of granting large judgments to all servicemember plaintiffs; such large judgments do not deter state sponsors of terrorism, create an unjustifiable discrimination between servicemembers’ injuries, and undermine the executive’s authority in foreign affairs.<sup>267</sup> If such judgments are going to be made, however, the new FSIA Terrorism Exception should be interpreted as narrowly as possible.

Courts hearing claims involving servicemember plaintiffs should apply a *Peterson*-like test to distinguish between those servicemembers injured while acting incident to service, and those servicemembers who were injured while in a non-combatant role.<sup>268</sup> The USS *Cole* incident, however, demonstrates the blurred line between peace and war zones, which could make application of the seemingly straightforward *Peterson* non-combatant test difficult. As the *Rux* example has shown, determining when a servicemember is acting incident to service is not always clear, especially when servicemembers are fighting a war on terrorism, and have been declared legitimate targets by the enemy, regardless of whether they are engaged in a combatant role.<sup>269</sup> This blurred line is another example of a complication that arises by literalizing a “war” on terror.<sup>270</sup>

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long as they bring the new suit within ten years after the date on which the cause of action arose. § 1083(a)(1), 122 Stat. at 338-41.

<sup>264</sup> McGlone, *supra* note 263.

<sup>265</sup> *Id.*

<sup>266</sup> § 1083(a)(1), 122 Stat. at 338-41.

<sup>267</sup> *See supra* Part II.

<sup>268</sup> *See supra* Part III.B.4. The *Peterson* test would also make the standard of review for FSIA judgments involving servicemember plaintiffs more in line with the standard of review for servicemember plaintiffs in FTCA cases. *See supra* Part II.A.

<sup>269</sup> *See supra* note 4 and accompanying text.

<sup>270</sup> *See Roth, supra* note 78.

These complications can make it incredibly difficult for a judge to determine whether a servicemember seeking a judgment under FSIA was injured while acting incident to service, or while acting in a non-combatant capacity. Whether a clear line or sliding scale could be drawn for judges applying FSIA's Terrorism Exception to servicemember claims is uncertain. If a line can be drawn, it would be an ambiguous, amorphous, and precarious one; for, as President Bush himself has said, most U.S. troops currently deployed abroad have been deployed for the same reason: to "hunt[] down the terrorists."<sup>271</sup> However, judges applying FSIA's new Terrorism Exception amendment to servicemember claims should carefully consider a number of factors, including whether the servicemember aptly meets a *Peterson*-like test—whether narrowly applied to only those servicemembers injured by state sponsors of terrorism while serving as peacekeepers, or broadly applied to any servicemember injured by state sponsors of terrorism while serving in a non-combatant role. Judges should equally weigh other considerations, however, and consider precluding a servicemember from recovering monetary damages under FSIA's Terrorism Exception if there is evidence of other "fog of war" factors, such as whether the servicemember was injured in an officially designated combat zone; whether the designated Force Protection Condition<sup>272</sup> was elevated at the time and location the servicemember was injured; whether there existed other intelligence-related information that was known by the servicemember, other commanding officers, or Department of Defense ("DoD") officials that affected or influenced threat-assessment levels or operational plans at the time of the attack; and whether the President, as the executive in charge of U.S. foreign affairs and as Commander in Chief of the U.S. military, has "filed a suggestion of interest indicating that [rendering a particular FSIA judgment against a foreign state] . . . will in any way interfere with the foreign relations of the United States."<sup>273</sup>

Although some may feel that the war on terror can be won in the orderly confines of the courtroom, for many legal and political reasons, the gavel should not be considered a substitute for the sword. President Bush has said that the rest of America "live[s] in freedom because every generation has produced patriots willing to serve a cause greater than them-

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<sup>271</sup> See *Address to the Nation*, *supra* note 25, at 1079.

<sup>272</sup> Force Protection Condition ("FPCON") is a terrorist threat system overseen by the Department of Defense which describes the measures that need to be taken by security agencies in response to various levels of terrorist threats against military facilities. See U.S. DEP'T OF DEFENSE, INSTR. 2000.16, DOD ANTITERRORISM STANDARDS (June 14, 2001), available at [http://www.fas.org/irp/doddir/dod/i2000\\_16p.pdf](http://www.fas.org/irp/doddir/dod/i2000_16p.pdf). Force Protection includes "[s]ecurity programs designed to protect Service members, civilian employees, family members, facilities, information, and equipment in all locations and situations, accomplished through the planned and integrated application of combating terrorism, physical security, operations security, personal protective services, and supported by intelligence, counterintelligence, and security programs." *Id.* ¶ E2.1.7.

<sup>273</sup> *Peterson*, 515 F. Supp. 2d 25, 37 n.2 (D.D.C. 2007).

selves.”<sup>274</sup> The thousands of soldiers, sailors, airmen, and Marines who have died fighting the war on terror should not be considered victims of terrorism; they should be remembered as heroes who sacrificed their lives for their country.

When addressing current servicemembers fighting the war on terror, President Bush reminded the nation that:

In this war, we have lost good men and women who left our shores to defend freedom and did not live to make the journey home.

. . . [T]here is no higher calling than service in our Armed Forces. . . . Those who serve today are taking their rightful place among the greatest generations that have worn our Nation’s uniform. When the history of this period is written, the liberation of Afghanistan and the liberation of Iraq will be remembered as great turning points in the story of freedom.

. . . Our enemies are brutal, but they are no match for the United States of America, and they are no match for the men and women of the United States military.<sup>275</sup>

Due to the inherent risk of undermining the President’s foreign policy objectives and his role as Commander in Chief, the risk of significantly undermining troop morale and military discipline, and the unjustifiable contradiction between the policy of U.S. sovereign immunity compared to U.S. policy on foreign sovereign immunity, servicemembers injured while acting in a combatant role on behalf of the United States should be precluded from bringing a claim for damages against a foreign state under FSIA’s Terrorism Exception.

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<sup>274</sup> *Address to the Nation*, *supra* note 25, at 1084.

<sup>275</sup> *Id.* at 1083-84.