

Rubin v. The Islamic Republic of Iran:  
A Struggle for Control of Persian Antiquities in America

By James A. Wawrzyniak, Jr.

**PART I. BACKGROUND**

In 2003, a group of American plaintiffs won a \$90 million default judgment against the Islamic Republic of Iran. This is the story of how they tried to execute that judgment.

*The Underlying Claim*

The incident which prompted the litigation was a suicide bombing on the afternoon of September 4, 1997 at a crowded pedestrian mall on Ben Yehuda Street, Jerusalem, Israel.<sup>1</sup> Five members of the plaintiff group were present that day, and suffered life-altering injuries. As the court later found, the bombers packed their bombs with “nails, screws, pieces of glass, and chemical poisons to cause maximum pain, suffering, and death.”<sup>2</sup> This vicious cocktail resulted in one plaintiff suffering multiple shrapnel wounds to his lower body, a shard of glass in his left eye, and a permanent hematoma to his left leg.<sup>3</sup> Another had a burned cornea and partially-severed ear.<sup>4</sup> A third had, among other injuries, burns covering 40% of his body and over 100 shrapnel-induced entry wounds.<sup>5</sup> The other plaintiffs present that day were injured in similarly painful ways. In addition, four of the victims’ family members (not present that day) sought recovery for the emotional injuries caused by watching their loved-ones suffer and for the time and effort required to provide full-time care to them in the attack’s immediate aftermath.

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<sup>1</sup> Campuzano v. Islamic Republic of Iran, 281 F.Supp.2d 258, 261 (D.D.C. 2003).

<sup>2</sup> Id. at 261.

<sup>3</sup> Id. at 266 (description of injuries of Daniel Miller).

<sup>4</sup> Id. (description of injuries of Abraham Mendelson).

<sup>5</sup> Id. at 267 (description of injuries of Noam Rozenman).

Altogether, then, nine individuals (sometimes named the “Rubin plaintiffs” after the lead plaintiff in the group) sustained injuries as a direct result of the terrorist attack.

Hamas claimed responsibility for the bombing.<sup>6</sup> Israeli police wasted no time arresting two Hamas operatives and bringing them to trial.<sup>7</sup> Both were subsequently convicted by an Israeli criminal court on multiple counts of murder, attempted murder, and membership in a terrorist organization.

Soon thereafter, the Rubin plaintiffs brought civil actions for damages against Hamas<sup>8</sup> (for actually carrying out the bombing) and the Islamic Republic of Iran<sup>9</sup> (for providing material support and finance for the bombing). The action against Iran was brought in United States District Court for the District of Columbia on July 31, 2001.<sup>10</sup> The plaintiffs named Iran, the Iranian Ministry of Information and Security (MOIS), Ayatollah Ali Hoseini Khamenei, Ali Akbar Hashemi-Rafsanjani, and Ali Fallahian-Khuzestani as defendants.<sup>11</sup> The individual defendants were high-ranking members of the Iranian government at the time of the bombing.

The district court noted jurisdiction based upon the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1602 et seq. None of the defendants made an appearance. The case was consolidated with another civil action in which the plaintiffs alleged injuries stemming from the same terrorist bombing, and a hearing was held to obtain relevant evidence upon which a default judgment award could be entered.<sup>12</sup> Experts testified that Iran provided terrorist training and

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<sup>6</sup> Id. at 262.

<sup>7</sup> Id. at 261. See also News in Brief, The Jerusalem Post, Sept. 10, 1999, at A2.

<sup>8</sup> See *Rubin v. Hamas – Islamic Resistance Movement*, 2004 U.S. Dist. LEXIS 20883 (2004). The Rubin plaintiffs brought suit and obtained a final judgment against Hamas *after* obtaining judgment against Iran.

<sup>9</sup> *Campuzano*, 281 F.Supp.2d at 261.

<sup>10</sup> Id.

<sup>11</sup> Id. at 258.

<sup>12</sup> Id. at 261. The lead-plaintiff in that second civil action, Diana Campuzano, supplied the name for the consolidated case. See *Campuzano v. The Islamic Republic of Iran*, 2003 U.S. Dist. LEXIS 15963 (2003).

economic assistance to Hamas worth \$20 million to \$50 million annually during the 1990s.<sup>13</sup> Much of the money was funneled through MOIS, a powerful Iranian instrumentality with more than 30,000 employees and a budget of several-hundred-million dollars.<sup>14</sup> Experts also testified that Iranian governmental support for terrorism was an “official state policy,” supported by the highest-ranking members of the government.<sup>15</sup> A certain Mahmoud Abu Hanoud was determined to be the mastermind behind the 1997 bombing and the critical link between Iran and Hamas.<sup>16</sup>

Foreign states have generally been thought immune from the jurisdictional reach of United States’ courts.<sup>17</sup> This long-standing rule of immunity flows from principles of international law concerning “grace and comity” among sovereigns.<sup>18</sup> Due to its control of foreign relations, the Executive Branch was traditionally accorded deference to decide when it was acceptable for a court to override the presumption of immunity and subject a sovereign to suit.<sup>19</sup> In 1976, however, Congress decided that a comprehensive statutory scheme should supplant the politically influenced ad-hoc decision-making of the Executive.<sup>20</sup> This was thought fairer for both foreign sovereigns and American parties with grievances against those sovereigns.

The new statutory scheme was codified as the Foreign Sovereign Immunities Act (FSIA).<sup>21</sup> The FSIA retained the presumption that a foreign sovereign was generally immune

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<sup>13</sup> Campuzano, 281 F.Supp.2d at 262 (testimony of Dr. Bruce Tefft and Dr. Patrick Clawson).

<sup>14</sup> Id. at 262. Iran’s MOIS is analogous to the U.S.’s CIA. It is an enigmatic organization about which hard facts are difficult to ascertain. See, e.g., Neil MacKay, Iran’s Spies, *The Sunday Herald*, Dec. 24, 2006, at 39.

<sup>15</sup> Campuzano, 281 F.Supp.2d at 262.

<sup>16</sup> Id. at 262 (expert Yigal Pressler testified, “Until his death in November 2001, Hamas operative Mahmoud Abu Hanoud organized, planned, and executed a large number of deadly terrorist bombings, including the bombing at issue here.”).

<sup>17</sup> For the earliest exposition of the law surrounding sovereign immunity in the U.S., see *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812) (opinion of Marshall, C.J.). For more recent decisions, see *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480 (1983).

<sup>18</sup> See, e.g., *Republic of Austria v. Altmann*, 541 U.S. 677, 689 (2004).

<sup>19</sup> Id. at 689.

<sup>20</sup> Id. at 691. See also H. R. Rep. No. 94-1487 (1976); S. Rep. No. 94-1310 (1976).

<sup>21</sup> See 28 U.S.C. §§ 1602 through 1611.

from suit in United States' courts for its sovereign actions.<sup>22</sup> However, it also decreed, in accordance with an influential State Department letter known as the Tate Memorandum<sup>23</sup>, that the commercial activities and property of a foreign sovereign would generally not be immune.<sup>24</sup> More relevant to this case, a further exception to sovereign immunity was carved-out in 1996 to cover terrorist actions by foreign states. Thus, a sovereign is stripped of immunity from suit in every case 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 . . . for such an act,” the defendant-nation is designated a “state sponsor of terrorism,” and the claimant is a “national of the United States.”<sup>25</sup>

The Rubin plaintiffs alleged that Iran's sovereign immunity was revoked by this so-called terrorism exception. The court agreed. First, it is well-settled that a deadly terrorist attack is considered an act of “extrajudicial killing,” even if the plaintiffs bringing suit were not killed.<sup>26</sup> Further, the U.S. Department of State has designated Iran as a state sponsor of terrorism continuously since 1984.<sup>27</sup> Based on the plaintiffs' expert evidence, which was uncontroverted given the defendants' absence, the district court also found the Iranian defendants had materially supported Hamas. Therefore, the court concluded 28 U.S.C. § 1605(a)(7)'s terrorism exception

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<sup>22</sup> 28 U.S.C. § 1604.

<sup>23</sup> See Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dept. of State, to Acting U.S. Attorney General Philip B. Perlman (May 19, 1952), reprinted in 26 Dept. State Bull. 984–85 (1952), and in *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 711–15 (1976) (App. 2 to opinion of the Court).

<sup>24</sup> 28 U.S.C. § 1602 (implementing the position of the “Tate Memorandum”).

<sup>25</sup> See 28 U.S.C. § 1605(a)(7); *Peterson v. Islamic Republic of Iran*, 264 F.Supp.2d 46, 59–62 (D.D.C. 2003).

<sup>26</sup> *Campuzano*, 281 F.Supp.2d at 270. See also *Peterson*, 264 F.Supp.2d at 60 (citing *Flatow v. Islamic Republic of Iran*, 999 F.Supp. 1, 18 (1998)).

<sup>27</sup> *Campuzano*, 281 F.Supp.2d at 262. See also 49 Fed. Reg. 2836-02 (Jan. 23, 1984).

to foreign sovereign immunity applied, giving it jurisdiction to hold Iran liable for injuries sustained by the plaintiffs as a result of the 1997 bombing.<sup>28</sup>

The court awarded the plaintiffs both compensatory and punitive damages. Compensative damages for those physically injured were based on pain and suffering, loss of prospective income, and medical expenses; their caretakers recovered for their emotional suffering and grief (“solatium”). The sum of the nine plaintiffs’ awards totaled approximately \$71.5 million.<sup>29</sup> In addition, the court thought it appropriate to award punitive damages, because “punitive damages are intended to punish the defendants for the terrorist act.”<sup>30</sup> Other courts which had addressed similar fact patterns had often awarded \$300 million in punitive damages per terrorist act, reaching that figure by tripling Iran’s estimated annual budget for supporting terrorist groups. The district court followed those precedents and added \$300 million to the judgment award.<sup>31</sup> The final judgment was rendered on September 10, 2003.

### *Preliminary Execution Suits*

Obtaining the initial judgment against Iran was the easy part. Since representatives of the Islamic republic decided not to contest the suit, the Rubin plaintiffs provided uncontroverted evidence linking Iran and its top government officials to the Hamas-led suicide bombing. Without an adversarial party blocking their way, the litigation progressed smoothly. Attempting to recover on their judgment, however, would prove entirely more difficult.

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<sup>28</sup> Campuzano, 281 F.Supp.2d at 270. The plaintiffs also argued the Iranian defendants were liable to them based on the common law torts of battery, assault, and intentional infliction of emotional distress. The court upheld these causes of action as well. See *id.* at 270–71 & n.5.

<sup>29</sup> *Id.* at 274–77.

<sup>30</sup> *Id.* at 278.

<sup>31</sup> *Id.* at 278. Interestingly, courts are not allowed to levy punitive damages directly against foreign sovereigns or in favor of plaintiffs not suffering a “direct harm.” Thus, the punitive damages in this case were levied jointly and severally against all defendants, except Iran, for the benefit of the five Rubin plaintiffs present at the bombing. See *id.* at 278–79 (citing *Stern v. Islamic Republic of Iran*, 271 F.Supp.2d 286, 301–302 (D.D.C. 2003)).

On June 1, 2004, the Rubin plaintiffs sought to execute upon two Bank of America accounts containing funds belonging to the Consulate General of Iran.<sup>32</sup> The funds were associated with the former Iranian embassy in Washington, D.C. and had been safeguarded by the U.S. State Department since 1979. When the plaintiffs filed a motion for writ of execution, the United States quickly moved to quash it.<sup>33</sup> The plaintiffs claimed the money was subject to execution under the Terrorism Risk Insurance Act of 2002, § 201(a), while the United States argued it was immune under the Vienna Convention on Diplomatic Relations, which protected diplomatic assets located abroad, including Iran’s former embassy. The district court sided with the plaintiffs. It found that the money in the accounts was not “being used” for diplomatic purposes as required under the Vienna Convention, and therefore was subject to attachment and execution under TRIA § 201.<sup>34</sup> Unfortunately, the plaintiffs did not receive any funds, because an earlier judgment creditor had a prior lien upon them.<sup>35</sup>

The Plaintiffs next attempt was in New York. They sought to attach and execute against three Iranian-controlled bank accounts held by the Bank of New York.<sup>36</sup> The plaintiffs again claimed the assets held by the bank were subject to execution under TRIA § 201, this time under a provision which allowed for recovery against certain “blocked assets” of foreign nations. Following a similar case decided two years earlier, however, the U.S. district court determined

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<sup>32</sup> Rubin v. Islamic Republic of Iran, 2005 WL 670770 (D.D.C. 2005), at \*1. The two accounts were owned in the name of the “Consulate General of the Islamic Republic of Iran in Chicago” and the “Consulate General Iran.” Parties to the litigation referred to them as the “Third Account” and “Fourth Account,” respectively.

<sup>33</sup> Id. at \*1.

<sup>34</sup> Id. at \*4. Accord Weinstein v. The Islamic Republic of Iran, 274 F.Supp.2d 53, 61–62 (D.D.C. 2003). For further exploration of the TRIA § 201, see Part II, *infra*.

<sup>35</sup> See Rubin v. Islamic Republic of Iran, U.S. Dist. Ct. for the N. Dist. of Ill. (East. Div.), Case No. 03-CV-9370 [hereinafter “Ill. Lit.”], Pls.’ Consol. Mem. of Law (Docket #105), at 5.

<sup>36</sup> Bank of New York v. Rubin, 2006 U.S. Dist. LEXIS 10215 (S.D.N.Y. 2006), at \*2. More accurately, the procedural framework of the case was an interpleader action brought by the Bank of New York to resolve competing claims to the Iranian accounts. The analysis would have been identical had the Rubin plaintiffs brought a coercive action first.

the Iranian banks should retain ownership of the accounts; the plaintiffs could not execute against them.<sup>37</sup>

Finally, the plaintiffs sought to attach, sell, and recover upon an Iranian residence located in Lubbock, Texas.<sup>38</sup> The home was located near Lubbock's Reese Air Force Base, where the former Iranian crown prince had received fighter jet training.<sup>39</sup> The U.S. district court sitting in Amarillo agreed that the building could be attached by the plaintiffs and issued an order directing the sale of the property. On January 4, 2005, U.S. Marshals sold it for approximately \$390,000.<sup>40</sup> Thus, several years and hard-fought execution battles later, the Rubin plaintiffs had managed to recover only a pittance of their \$90 million judgment.

#### *Illinois and Massachusetts Execution Suits*

Within the year, the Rubin plaintiffs had decided upon a new approach: executing upon Persian antiquities in museum collections across the country. It mattered little whether the museums claimed full and complete ownership or only a temporary possessory interest; the plaintiffs propounded legal theories that would allow attachment either way. After registering their judgment in federal district courts in Illinois, Massachusetts, and Michigan, the plaintiffs began serving summonses and subpoenas.<sup>41</sup> "Upon information and belief," they asserted that the museums held antiquities which could be attached by the plaintiffs as judgment-creditors of Iran. Once attached, the invaluable collections would be sold to the highest bidder at auction to raise money to pay the plaintiffs' judgment award.

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<sup>37</sup> Id. at \*19 (finding that the accounts were not "blocked assets" and therefore not attachable under TRIA § 201(a)) (citing *Weinstein v. Islamic Republic of Iran*, 299 F.Supp.2d 63 (E.D.N.Y. 2004)).

<sup>38</sup> Ill. Lit., Pls.' Consol. Mem. of Law (Docket #105), at 5 & nn.3, 4.

<sup>39</sup> See *Hegna v. Islamic Republic of Iran*, 376 F.3d 485, 489 n.14 (5th Cir. 2004).

<sup>40</sup> Ill. Lit., Pls.' Consol. Mem. of Law (Docket #105), at 5 & nn.3, 4.

<sup>41</sup> See, e.g., Museum Security Network Mailing List, available at <http://msn-list.te.verweg.com/2006-March/004754.html> (last accessed April 21, 2007).

Needless to say, the museums were not happy. They began to fight the summons, subpoenas, and discovery requests. Although still in its relative infancy, the litigation may continue a long time more.<sup>42</sup>

Soon after the initial flurry of activity, the plaintiffs retrenched and consolidated their efforts to focus on two jurisdictions: the Northern District of Illinois (Eastern Division) and the District of Massachusetts. The unfortunate defendants were the University of Chicago's Oriental Institute and the Field Museum of Natural History in Illinois and Harvard University, several Harvard University art museums, and the Museum of Fine Arts in Massachusetts, respectively.

The Oriental Institute at the University of Chicago is one of the leading centers for the study of archaeological records in the Near East.<sup>43</sup> Its research arm's goal is to integrate "archaeological, textual, and art historical data to understand the development and functioning of the ancient civilizations of the Near East from the earliest Holocene through the Medieval period."<sup>44</sup> It regularly sponsors archaeological expeditions in the Near East, including Iran, Egypt, Sudan, Syria, and Turkey.<sup>45</sup> As a corollary to its research activities, the Institute also operates a museum.

From the Oriental Institute, the Rubin plaintiffs sought to attach the "Persepolis Fortification archive" and the "Chogha Mish collection." The Persepolis archive was principally discovered during several field seasons of work at the site of Tall-i-Bakun in the plain of

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<sup>42</sup> See, e.g., Ehsan Tabesh, *Legal Disputes Against Harvard and the University Of Chicago over Persian Artifacts Continue* (predicting the cases will ultimately be decided by the United States Supreme Court), available at National Iranian American Council, <http://www.niacouncil.org>. See also Brian Boucher, *Terrorism Victims Sue for Museum Artifacts*, 94 *Art in America* 39 (Sept. 1, 2006); Robin Pogrebin, *An Unlikely Suit Linking Iran and a U.S. Museum Moves Forward*, *N.Y. Times*, July 18, 2006, at E1.

<sup>43</sup> For example, the Institute has the largest collection of Iranian painted pottery shards in the United States. See Peggy Horton Grant, *The Oriental Institute News and Notes*, No. 142, "Iranian Pottery in the Oriental Institute," (Summer 1994). Available at [http://oi.uchicago.edu/research/pubs/nn/sum94\\_grant.html](http://oi.uchicago.edu/research/pubs/nn/sum94_grant.html).

<sup>44</sup> The Oriental Institute, "Research at the Oriental Institute," <http://oi.uchicago.edu/research/> (last revised 2/7/07).

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

Persepolis starting in 1928 and continuing into the 1930s.<sup>46</sup> It consists of tens of thousands of whole and fragmented clay tablets stamped with seal impressions and dated to the period of the Achaemenid Persian Empire (ca. 550–330 B.C.).<sup>47</sup> The seals and impressions, written in the Elamite cuneiform alphabet, served an important textual role in the Persian imperial system.<sup>48</sup> Since the tablets were found in a citadel at the site of the ancient city, they were called the Persepolis Fortification tablets. Due to their vast number and dating, the archive is important to a wide range of scholars, from linguists and sociologists to historians and classicists. Around 1935, the Oriental Institute and the National Museum of Iran entered into an agreement to allow researchers at the Institute to catalogue and study the Persepolis collection in the United States.<sup>49</sup> The tablets are periodically returned to Iran as the Institute completes study of them.<sup>50</sup> Mr. Gil Stein, director of the Institute, estimates that more than two-thirds of the collection has been returned to Iran, leaving only 8,000 tablets and 11,000 fragments remaining in the U.S.<sup>51</sup>

The Chogha Mish collection is the product of excavations at Chogha Mish, Iran between 1961 and 1978.<sup>52</sup> The excavations yielded evidence of cultures in the area much earlier than had previously been known. It also extended backward the known length of human occupation on the plain by more than a millennium (to ca. 6000 B.C.). The results added knowledge of the Archaic

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<sup>46</sup> The Oriental Institute, “Highlights from the Collection: Iran,” <http://oi.uchicago.edu/museum/highlights/iran.html> (last revised 2/7/07). See also News & Notes No. X (Summer 1994).

<sup>47</sup> Mark B. Garrison & Margaret Cool Root, *Seals on the Persepolis Fortification Tablets, Volume I: Images of Heroic Encounter* (2001), at 1, 3. Many of the tablets can be more specifically attributed to the period 509–494 B.C., during the reign of Darius I.

<sup>48</sup> Garrison & Root, at 1.

<sup>49</sup> See Ill. Lit., Cit. Resp’ts. Mem. of Law in Supp. of Mot. to Declare Prop. Imm. from Citation and Execution (Docket #22), at 5.

<sup>50</sup> Id. at 5.

<sup>51</sup> Id.

<sup>52</sup> The Oriental Institute, “The Chogha Mish Project,” <http://oi.uchicago.edu/research/projects/cho/> (last revised 2/7/07). The project was terminated only because of the increasingly unstable political situation in Iran. In 1995, a book was published covering the first five digs (conducted between 1961–71). A second book (covering the years 1972–78) is being prepared for publication. See generally Helene Kantour and P. Delougaz, *Chogha Mish, Volume 1: The First Five Seasons, 1961–1971*, (Abbas Alizadeh ed. 2001).

period to the already well-known Susiana prehistoric.<sup>53</sup> Before transportation to the U.S., the Institute and the Iranian government entered into a similar study-and-return understanding as had been more formally written up with regard to the Persepolis Fortification collection.<sup>54</sup> In 2005, study of the Chogha Mish collection was completed and the Institute prepared all remaining materials for shipment back to Iran. The U.S. State Department halted the shipment, however, because a claim related to the collection is currently pending in the Iran-U.S. Claims Tribunal in The Hague.<sup>55</sup> Although the Institute is not a party to that proceeding, it must await the outcome before transporting the collection.

The Field Museum of Natural History was founded to highlight various exhibits during the World's Columbian Exposition in Chicago in 1893. It has grown beyond its original mission of housing biological and anthropological collections to researching and exhibiting more than twenty-million wide-ranging objects.<sup>56</sup> Since the museum's focus is on natural history—as opposed to human history—most of the Persian antiquities in its collection are not available to the general public. Instead, they are used for study by researchers.

From the Field Museum, the plaintiffs claimed a right to execute upon the so-called Herzfeld collection. The Herzfeld collection consists of a group of objects Professor Ernst Herzfeld of Princeton University collected during his many years of archaeological excavations of Persian sites in Iran and neighboring countries during the 1920s and 1930s. The collection contains about 500 pieces of prehistoric pottery, about 500 pieces of objects in metal (mostly bronze) such as weapons and horse trappings, about 200 ornaments such as seals and figurines,

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<sup>53</sup> Abbas Alizadeh, *The Oriental Institute News and Notes*, No. 153, "Excavations at Chogha Bonut: The Earliest Village in Susiana, Iran." (Spring 1997). Available at [http://oi.uchicago.edu/research/pubs/nn/spr97\\_alizadeh.html](http://oi.uchicago.edu/research/pubs/nn/spr97_alizadeh.html).

<sup>54</sup> See Ill. Lit., Pls.' Consol. Mem. of Law (Docket #105), at 5.

<sup>55</sup> See Ill. Lit., Cit. Resp'ts. Mem. of Law in Supp. of Mot. to Declare Prop. Imm. from Citation and Execution (Docket #22), at 5–6.

<sup>56</sup> The Field Museum, "Research & Collections," [http://www.fieldmuseum.org/research\\_collections](http://www.fieldmuseum.org/research_collections).

and various lists, photographs, and related documentation.<sup>57</sup> Herzfeld sold the collection to the Field Museum in 1945 for \$7,300.<sup>58</sup>

Harvard University and its constituent art museums were parties in the Massachusetts litigation.<sup>59</sup> Founded in 1636, Harvard is the oldest institution of higher education in the United States. It currently enrolls approximately 18,000 degree-earning candidates in ten principle academic units.<sup>60</sup> There are three main art museums on its campus. According to its website, these Harvard museums “house more than 160,000 objects of art that range in date from ancient times to the present, and come from Europe, North America, North Africa, the Middle East, South Asia, East Asia, and Southeast Asia.”<sup>61</sup>

The Museum of Fine Arts is one of the oldest art museums in the United States. Founded in Boston, Massachusetts in 1870, it has the second biggest collection in the Western Hemisphere—surpassed only by the Metropolitan Museum of Art in New York. Its mission statement begins, “The Museum of Fine Arts houses and preserves preeminent collections and aspires to serve a wide variety of people through direct encounters with works of art.”<sup>62</sup> Its collection from the ancient Near East includes more than 7,000 years of art from Nubia, Egypt, Iraq, Iran, Turkey, Cyprus, Greece, and Italy. Objects include architectural elements, sculpture, painting, and coinage.<sup>63</sup>

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<sup>57</sup> Ill. Lit., Aff. of Bennet Bronson, Attach. A (letter of Professor Ernst Herzfeld to Orr Goodson, dated 7/18/44).

<sup>58</sup> Id.

<sup>59</sup> The “Harvard parties” involved in the litigation were Harvard University, the President and Fellows of Harvard College, Harvard University Art Museums, the Busch-Reisinger Museum, the Fogg Art Museum, the Sackler Museum, the Semitic Museum, and the Peabody Museum. Harvard’s attorneys asserted that only the President and Fellows of Harvard College is a legal entity capable of being made a party to litigation. See *Rubin v. Islamic Republic of Iran*, U.S. Dist. Ct. for the Dist. of Mass., Case No. 1:06-cv-11053-GAO [hereinafter “Mass. Lit.”], Mem. of Law of Harvard Parties in Supp. of Mot. to Quash Summons and to Diss. Attach. by Trustee Process (Docket #17), at 1 n.1.

<sup>60</sup> The Harvard Guide, The Early History of Harvard University, <http://www.news.harvard.edu/guide/intro/index.html>.

<sup>61</sup> The Harvard Guide, The University Art Museums, [http://www.news.harvard.edu/guide/to\\_do/to\\_do4.html](http://www.news.harvard.edu/guide/to_do/to_do4.html).

<sup>62</sup> The Museum of Fine Arts, Mission Statement, <http://www.mfa.org>.

<sup>63</sup> The Museum of Fine Arts, Art of the Ancient World, <http://www.mfa.org/collections>.

Unlike the detailed items sought to be attached for execution in the Illinois litigation, the Rubin plaintiffs cast a wider net over the collections at the MFA and Harvard. They alleged generally that “upon information and belief” the parties possessed antiquities owned by Iran. The only specific claim was that “at least six antiquities on display at the Sackler Museum<sup>64</sup> at Harvard University that relate to the ancient civilization at Persepolis” “may be the property of Iran.”<sup>65</sup> The university has contended those reliefs were donated to the museum by Grenville L. Winthrop on his death in 1937.<sup>66</sup>

Asserting that they did not hold any antiquities owned by Iran, Harvard and the MFA (referred to as “trustee process defendants”) moved to quash the summonses and to dissolve any attachments. “[T]he Harvard parties possess no Iranian antiquities that belong to the government of Iran or any of the other judgment debtors.”<sup>67</sup> They further claimed that even if they did hold Iranian property, it would be immune from attachment under the FSIA. In response, the plaintiffs filed a motion for partial summary judgment, arguing that the trustee process defendants did not have standing to assert the sovereign immunity of Iran’s property from attachment and even if they did, the property would not be immune under the FSIA. First, they said that since the antiquities were on display in a museum open to the public, the antiquities fell within the commercial use exception to the FSIA. Second, notwithstanding any available immunity under the FSIA, the property was subject to attachment and execution under TRIA § 201 as a “blocked asset” of Iran. Harvard and the MFA opposed the plaintiffs’ motion for partial summary

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<sup>64</sup> Upon further investigation, the author has concluded the six pieces described by the plaintiffs are located in the Near East room at the Sackler Museum. There, the far wall boasts six limestone reliefs averaging about two-feet in height and one-foot in width that date to the fifth century B.C. They were found at the same site in Iran as the Oriental Institute’s Persepolis Fortification archive. Their placards show they were donated by Grenville L. Winthrop and came into the museum’s collection in 1943.

<sup>65</sup> See Mass Lit., Mem. of Law in Supp. of Pls.’ Mot. for Order of Attach. by Trustee Process (Docket #3), at 3–4.

<sup>66</sup> See Mass Lit., Mem. of Law of Harvard Parties in Supp. of Mot. to Quash Summons and to Diss. Attach. by Trustee Process (Docket #17), at 2.

<sup>67</sup> Id.

judgment, contending that the immunity of the property from attachment was an issue that could be raised properly by them or even by the Court *sua sponte*.

In Illinois, the legal arguments put forth by both sides were similar. The main difference stemmed from the Oriental Institute's concession that Iran owned the property in question. It acknowledged the Persepolis Fortification archives and the Chogha Mish materials were only on loan to the U.S. for cataloguing and studying; ownership remained with the National Museum of Iran. This factual stipulation differed from that asserted by the Field Museum, which pursued the same approach as the MFA and Harvard in arguing that it—not Iran—owned the collection the plaintiffs sought to attach. Thus, while the MFA and Harvard could put forth a joint defense, based upon shared factual assertions, the Oriental Institute and Field Museum found themselves arguing different positions.

As in Massachusetts, the earliest motions in the Illinois litigation revolved around the question of whether the Oriental Institute and Field Museum (referred to as “citation respondents”) had standing to assert that the materials were immune from attachment under the FSIA. The plaintiffs argued that foreign sovereign immunity is an affirmative defense available to the sovereign alone. As such, only Iran had standing to assert its property was immune from attachment under the FSIA. The Oriental Institute and the Field Museum disagreed, characterizing the issue of sovereign immunity in jurisdictional terms and arguing that any party to the litigation could raise it. The Field Museum sought to quash the attachment on the additional ground that it alone owned the antiquities at issue.

## **Part II. The Legal Issues: FSIA and TRIA**

The first step for the Rubin plaintiffs trying to recover the money owed them was to register their judgment against Iran in federal district courts in Northern Illinois and Massachusetts.<sup>68</sup> Under 28 U.S.C. § 1963 and Fed. R. Civ. P. 69(a), those courts acquired supplemental jurisdiction over the matter, even with regard to third parties in possession of property owned by the original defendant.<sup>69</sup> Rule 69(a) sets forth the general mechanism by which a judgment creditor can seek property in satisfaction of a judgment. In relevant part, it provides that proceedings in aid of executing a judgment follow the practices of the state in which the judgment has been registered, “except that any statute of the United States governs to the extent that it is applicable.”<sup>70</sup> The Foreign Sovereign Immunities Act (FSIA) and the Terrorism Risk Insurance Act (TRIA) are two such federal statutes. Each is addressed in turn.

#### A. Standing under the Foreign Sovereign Immunities Act

In accordance with long-standing international practice, the FSIA sets forth a default rule that the non-commercial property of a foreign sovereign is immune from attachment and execution.<sup>71</sup> Section 1609(a) reads, “the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of

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<sup>68</sup> See 28 U.S.C. § 1963 (“A judgment in an action for the recovery of money or property entered in any court of appeals, district court, bankruptcy court, or in the Court of International Trade may be registered by filing a certified copy of the judgment in any other district . . . when the judgment has become final by appeal or expiration of the time for appeal or when ordered by the court that entered the judgment for good cause shown. . . . A judgment so registered shall have the same effect as a judgment of the district court of the district where registered and may be enforced in like manner.”).

<sup>69</sup> See, e.g., *U.S.I. Properties Corp. v. M.D. Constr. Co.*, 230 F.3d 489, 496–98 (1st Cir. 2000) (“Where a post-judgment proceeding presents an attempt simply to collect a judgment duly rendered by a federal court, even if chasing after the assets of the judgment debtor now in the hands of a third party, the residual jurisdiction stemming from the court’s authority to render that judgment is sufficient to provide for federal jurisdiction over the post-judgment claim.”).

<sup>70</sup> Fed. R. Civ. P. 69(a).

<sup>71</sup> 28 U.S.C. § 1609. See also Part I, *supra*, at 3–4.

this chapter.”<sup>72</sup> Although sections 1610 and 1611 describe several exceptions to the default rule of immunity, they fail to explain which parties to an attachment proceeding have standing to raise the immunity issue.

### *Positions of the Litigants*

The Rubin plaintiffs argued that Section 1609(a), and the FSIA more generally, provided that sovereign immunity was an affirmative right exercisable only by the foreign state itself. On their reading, Congress intended to codify international practice, which focused on upholding notions of “grace and comity” among sovereigns in foreign courts. Since the sovereign’s personal dignity was at stake in any foreign lawsuit, it should not be forced to contest a case it disliked. Under this reading, only Iran could raise the issue of whether the property in question was immune from attachment under the FSIA; the third-party respondents did not have standing.

Turning to the legislative history behind the FSIA, the plaintiffs pointed out that the House report on the matter stated that Congress intended to make the FSIA “an affirmative defense which must be specially pleaded.”<sup>73</sup> This authority was strengthened when cited approvingly by the Supreme Court in an important sovereign immunity decision.<sup>74</sup>

In response, the third-party respondents in both Illinois and Massachusetts argued they had standing to assert that the antiquities at issue were non-executable assets under the FSIA. For purposes of determining the standing question alone, they assumed the property belonged to Iran. They argued that sovereign immunity was a question of subject matter jurisdiction. Since the scope of every federal court’s powers is limited by Article III of the U.S. Constitution, every

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<sup>72</sup> Section 1610 deals with the “commercial use” exception, while § 1611 implements immunity provided for by the International Organizations Immunities Act.

<sup>73</sup> See H. R. Rep. No. 94-1487, at 17 (1976).

<sup>74</sup> See *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 494 n.20 (1983).

federal judge must affirmatively verify that the court possesses subject matter jurisdiction over a case *before* considering the merits of the claims. Since sovereign immunity is a threshold jurisdictional issue, any party—even the court itself—can and must raise it before proceeding to the merits of the claims. On this theory, the third-parties in possession of the antiquities could raise the question of whether the property was immune under the FSIA just as surely as Iran could.

The third-party respondents also contested the plaintiffs’ resort to legislative history. They argued it was unnecessary where, as here, the meaning of the statute was clear on its face. The language of section 1609, referring to “the property in the United States of a foreign sovereign,” clearly showed that the immunity ran with the property—not the sovereign.<sup>75</sup> Thus, whoever was in possession of the property had standing to raise the FSIA issue. Finally, even if resort to legislative history were appropriate, the plaintiffs’ citation of a single sentence from a House report was not sufficient to prove anything. Although the Supreme Court had also cited it, the Court did so in a footnote, not the main text of the opinion.<sup>76</sup>

#### *Decision of the Illinois Court*

The district court in Illinois was first to address the FSIA standing issue. District Judge Blanche M. Manning adopted Magistrate Judge Martin C. Ashman’s report and recommendation.<sup>77</sup> Both agreed that the sovereign immunity conferred by the FSIA was personal to the sovereign and no one else had standing to raise it. Judge Manning thought *Verlinden B.V. v. Central Bank of Nigeria*, cited by both sides, was inapposite for two reasons. First, she thought

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<sup>75</sup> See Ill. Lit., Mem. and Order of 6/22/06 (Docket #163), available at Rubin, 436 F.Supp.2d at 941–43.

<sup>76</sup> See *id.*

<sup>77</sup> Magistrate judges may issue a “report and recommendation” on issues under the authority of 28 U.S.C. § 636(b)(1). A district court judge reviews these “R&Rs” de novo. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b).

its command that a district court evaluate sovereign immunity *sua sponte* was created by 28 U.S.C. § 1330(a), not the FSIA.<sup>78</sup> Since § 1330(a) was relevant in *Verlinden*, but not here, no guidance could be drawn from that part of the opinion. Second, she noted the sovereign immunity afforded under § 1330(a) dealt with immunity from suit, not from the attachment of property.<sup>79</sup> As the FSIA treated immunity from suit differently than immunity from attachment, it was unwise to look at precedents concerning the former to figure out how to treat the latter. Finally, she concluded that since one party generally cannot assert the rights of another,<sup>80</sup> only Iran could assert its affirmative right to sovereign immunity from attachment.

In elaborating further on the last point, the judge noted there were only a limited set of instances where one party could assert another (absent) party's rights. A two-part test must be met: first, the party to litigation must itself have suffered an injury-in-fact; second, prudential considerations must favor permitting the party to assert the other's rights.<sup>81</sup> The Oriental Institute and the Field Museum had presented only weak arguments on the injury-in-fact they were likely to suffer. Perhaps they thought the mere possibility of losing the antiquities in their collections would be such a profound injury as to not warrant elaboration. Yet their failure to show a real injury led Judge Manning to accept the magistrate judge's conclusion that they had not met the first prong of the test.<sup>82</sup> She concluded, "the citation respondents give this court no reason to decline to adopt the magistrate judge's conclusions."<sup>83</sup>

Turning to the prudential considerations, Judge Manning focused on the closeness of the relationship between the museums and Iran, as well as Iran's ability to assert its rights for itself.

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<sup>78</sup> See Ill. Lit., Mem. and Order of 6/22/06 (Docket #163), available at Rubin, 436 F.Supp.2d at 942.

<sup>79</sup> Id.

<sup>80</sup> See generally *Powers v. Ohio*, 499 U.S. 400 (1991).

<sup>81</sup> See Ill. Lit., Mem. and Order of 6/22/06 (Docket #163), available at Rubin, 436 F.Supp.2d at 943 (citing *Powers*, 499 U.S. at 411).

<sup>82</sup> Id.

<sup>83</sup> Id.

Even assuming the Oriental Institute were holding property for Iran as a bailee, that possessory interest alone was insufficient to find the requisite alignment of parties' interests.<sup>84</sup> Since asserting another's rights is so rarely allowed for fear of prejudicing the absentee party or granting relief to a party not entitled to it, the museums had to show their interests regarding the property were almost exactly aligned with Iran's. The argument that neither the museums nor Iran desired the plaintiffs to attach the property was insufficient.

Finally, the court found no reason why Iran could not assert its own right to sovereign immunity in the Illinois court. It cited several recent instances where Iran had made appearances in United States district courts to assert various claims.<sup>85</sup> Moreover, the suggestion that the courts of the United States were hostile to Iran was dismissed as unfounded. Since it was not overly expensive or difficult for Iran to make an appearance in the present litigation to assert its right to sovereign immunity, it was obligated to do so.

#### *Decision of the Massachusetts Court*

When the standing issue came before the district court in Massachusetts three months later, District Judge George A. O'Toole, Jr. came up with a different answer. He held that third parties in possession of sovereign property had standing to assert the property was immune from attachment under the FSIA on behalf of the absent foreign state.<sup>86</sup>

Judge O'Toole began his discussion by focusing on the statute under which the plaintiffs had registered their original judgment: 28 U.S.C. § 1963. He found that section 1963 automatically conferred jurisdiction upon the Massachusetts court to adjudicate claims relating to

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<sup>84</sup> See Ill. Lit., Mem. and Order of 6/22/06 (Docket #163), available at Rubin, 436 F.Supp.2d at 944.

<sup>85</sup> Id. (citing six recent cases).

<sup>86</sup> See Mass. Lit., Mem. and Order of 9/30/06 (Docket #70), available at Rubin, 456 F.Supp.2d at 232–34.

the execution of the previous validly issued judgment.<sup>87</sup> For that reason, he dismissed the trustee process defendants' argument that the FSIA presented a threshold question of subject matter jurisdiction as "largely irrelevant here."<sup>88</sup>

Judge O'Toole then turned to the main issue: did the third-party trustee respondents have standing to assert that the sovereign property at issue was immune from attachment? Without hesitation, he answered in the affirmative.<sup>89</sup> First, on a plain reading of 28 U.S.C. § 1609, there was no indication that raising the immunity question was reserved solely to the foreign sovereign itself. The language states, "the property in the United States of a foreign state" "shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter."<sup>90</sup> If Congress had wanted to limit standing to the foreign sovereign alone, it could have clearly said so. Second, the judge thought the Supreme Court's opinion in *Verlinden* offered little guidance, since the discussion of subject matter jurisdiction there was centered on the FSIA's provisions regarding immunity from suit; neither 28 U.S.C. § 1609 nor execution immunity more generally were addressed.<sup>91</sup> Thus, any statement indicating that immunity was a personal right of the sovereign was inapplicable. Finally, Judge O'Toole reasoned that since subject matter jurisdiction in any particular case turned on the existence of an exception to the general rule of immunity, a district court should determine whether or not immunity was available in every case—whether or not raised by the sovereign.<sup>92</sup>

As required under Rule 69(a), the judge then examined the state law on the issue. He found nothing in Massachusetts' statutes or cases barring third parties from explaining to a court

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<sup>87</sup> Mass. Lit., Mem. and Order of 9/30/06 (Docket #70), available at Rubin, 456 F.Supp.2d at 230–31 (citing 28 U.S.C. § 1963; *U.S.I. Props. Corp. v. M.D. Constr. Co.*, 230 F.3d 489 (1st Cir. 2000)).

<sup>88</sup> Mass. Lit., Mem. and Order of 9/30/06 (Docket #70), available at Rubin, 456 F.Supp.2d at 232 n.3.

<sup>89</sup> Mass. Lit., Mem. and Order of 9/30/06 (Docket #70), available at Rubin, 456 F.Supp.2d at 231–33.

<sup>90</sup> 28 U.S.C. § 1609.

<sup>91</sup> Mass. Lit., Mem. and Order of 9/30/06 (Docket #70), available at Rubin, 456 F.Supp.2d at 232 (citing *Walker Int'l Holdings Ltd. v. Republic of Congo*, 395 F.3d 229, 233 (5th Cir. 2004)).

<sup>92</sup> *Id.*

why property in their possession was immune or exempt from attachment.<sup>93</sup> Therefore, neither state attachment laws nor federal statutes barred a third-party from raising the rights of an absentee foreign sovereign. The MFA and Harvard could assert that the property held in their possession—if found to be owned by Iran—was nevertheless immune from attachment and execution under the FSIA.

### *Conclusions*

Both courts erred in their sovereign immunity analyses. Since the federal appellate courts will review the standing issue *de novo*,<sup>94</sup> they may reach different conclusions than their district court counterparts.

Judge Manning in Illinois was wrong to describe the FSIA's grant of immunity as an affirmative right, exercisable only by the sovereign. The FSIA should be treated like all other jurisdictional provisions of the federal courts: raisable by any party to the suit, including the court itself. Federal courts are courts of limited jurisdiction. Their authority to reach the merits of a case extends only as far as contemplated by Article III of the U.S. Constitution and specifically allocated by congressional statute.<sup>95</sup> Maintaining the delicate balance of power between the national and state governments in our federal system requires every federal court to critically assess whether it properly has subject matter jurisdiction over every case presented to it. It is not a task to be taken lightly. Without the constraining force of this jurisdictional requirement,

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<sup>93</sup> *Id.* (citing Mass. Gen. Laws ch. 223, § 42; *Toomey v. Toomey*, 1997 Mass. App. Div. 181 (Mass. App. Div. 1997)).

<sup>94</sup> See *Lyon v. Agusta S.P.A.*, 252 F.3d 1078, 1082 (9th Cir. 2001), cert. denied, 534 U.S. 1079 (2002).

<sup>95</sup> U.S. Const. art. III, § 1 states, "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." *Id.* § 2 continues, "In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make." See also *Marbury v. Madison*, 5 U.S. (1 Cranch) 147 (1803) ("Congress have not power to give original jurisdiction to the supreme court in other cases than those described in the constitution.").

federal courts could hear every case brought before them, even though the parallel state court system may have more expertise in the particular area of law, more stake in the outcome, or more judicial resources to devote to it.<sup>96</sup> Thus, on numerous occasions, the U.S. Supreme Court has held that subject-matter jurisdiction must be determined in the affirmative before any proceedings on the merits may begin.<sup>97</sup> “As a threshold matter, we must address the question of whether the District Court had subject-matter jurisdiction over appellees’ claims, despite the fact that none of the parties raised this issue and the District Court did not consider it.”<sup>98</sup>

Beyond the overarching policy considerations at stake, the best interpretation of 28 U.S.C. § 1609 also counsels in favor of granting third-parties standing to raise the sovereign immunity issue. First, the provision is in Title 28 of the U.S. Code, which deals with subject matter jurisdiction. As just discussed, an issue of subject matter jurisdiction may be raised by any party to the litigation, including the court.<sup>99</sup> Second, the U.S. Supreme Court, although not totally clear on the point, seems to regard the provision as one which can be raised by any party. In the important *Verlinden* footnote cited by the Rubin plaintiffs, for example, the Court said a district court must decide whether the FSIA applies, “even if the foreign state does not enter an appearance to assert an immunity defense.”<sup>100</sup> Third, the FSIA requires a court to send notice to a defaulting foreign state before applying other provisions of the Act. This shows Congress contemplated a situation where sovereign immunity could attach to certain property under the FSIA, even though the issue was never raised by the foreign sovereign.<sup>101</sup> Although Judge Manning tried to envision a very narrow range of situations in which that provision could apply

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<sup>96</sup> E.g., *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 68–69 (1978); *Liberty Mutual Ins. Co. v. Wetzel*, 424 U.S. 737, 740 (1976).

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

<sup>98</sup> *Duke Power Co.*, 438 U.S. at 68.

<sup>99</sup> See, *supra*, notes 95–98 and accompanying text.

<sup>100</sup> *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 494 n.20 (1983).

<sup>101</sup> See 28 U.S.C. § 1610(c).

under her reading of the statute,<sup>102</sup> nothing in the text or legislative history reveals why it should be so constrictively construed.

In Massachusetts, District Judge O’Toole erred when he casually assumed that the court acquired jurisdiction over the attachment proceedings as a result of the Registration of Judgments provision in 28 U.S.C. § 1963.<sup>103</sup> Due to special considerations present with judgments arising out of the FSIA, the act of registering a judgment in another district court should not automatically give rise to subject matter jurisdiction in the registering district. While ancillary enforcement jurisdiction under section 1963 would be appropriate in many situations, cases and controversies arising under the FSIA are different.<sup>104</sup> Congress has created a bifurcated jurisdictional scheme with regard to foreign sovereigns that must be respected. For suits against a sovereign, federal court jurisdiction is governed by a presumption in favor of immunity, 28 U.S.C. § 1604, and exceptions to the presumption, *id.* § 1605. For attachment and execution proceedings against a sovereign, jurisdiction is governed by an analogous presumption, 28 U.S.C. § 1609, and exceptions-to-presumption regime, *id.* §§ 1610 and 1611. Unlike other types of actions which proceed through federal court, therefore, suits against a foreign sovereign must be affirmatively checked for subject matter jurisdiction *twice*—once before suit, and again before execution. This is a statutory command and courts are not free to dispense with it.<sup>105</sup> Judge O’Toole erred in failing to question whether jurisdiction over the matter was appropriate under the execution provisions of the FSIA.

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<sup>102</sup> Ill. Lit., Mem. and Order of 6/22/06 (Docket #163), available at Rubin, 436 F.Supp.2d at 945.

<sup>103</sup> Mass. Lit., Mem. and Order of 9/30/06 (Docket #70), available at Rubin, 456 F.Supp.2d at 230–31.

<sup>104</sup> See 28 U.S.C. § 1602.

<sup>105</sup> See generally *FG Hemisphere Associates, LLC v. Republique du Congo*, 455 F.3d 575 (5th Cir. 2006).

The judge suggested that registration of a judgment in his court automatically maintained jurisdiction.<sup>106</sup> The First Circuit case he relied upon correctly noted that since enforcement proceedings were “a continuation of the original action, the federal court retains residual jurisdiction flowing from its original authority to render a judgment in the case.”<sup>107</sup> Overlooked in that opinion, however, was an important qualifier: “The question of whether such [enforcement] jurisdiction should be exercised may well vary with the nature of the underlying basis for federal jurisdiction and the nature of the postjudgment claims made.”<sup>108</sup> In typical enforcement proceedings not involving a foreign sovereign, it is perfectly appropriate and efficient for the enforcement court to maintain jurisdiction on the same basis for which it had been granted for the original claims. For sovereign immunity claims, however, the grant of authority for the court to begin the suit is insufficient for it to reach the sovereign’s property. A new and independent inquiry into the attachment provisions of the FSIA must be conducted. In failing to recognize that, Judge O’Toole’s suggestion that the court acquired jurisdiction as soon as the plaintiffs registered their judgment was mistaken.

Even though Judge O’Toole’s reasoning was flawed, his conclusion was correct. The federal courts must have jurisdiction to hear the plaintiffs’ case. The only two alternatives are an attachment proceeding in state court or no proceeding at all, both of which are untenable outcomes. Due to the international nature of the plaintiffs’ claims, the federal government must be intimately involved. Allowing 50 different state courts to adjudicate claims against foreign sovereigns like Iran—and thereby conduct a form of foreign policy—would be an intrusion into the federal government’s authority to conduct relations with foreign nations. If both the federal and state courts were closed to them, however, plaintiffs would have no remedy at all. Without

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<sup>106</sup> Mass. Lit., Mem. and Order of 9/30/06 (Docket #70), available at Rubin, 456 F.Supp.2d at 230–231.

<sup>107</sup> See *U.S.I. Props. Corp. v. M.D. Constr. Co.*, 230 F.3d 489, 497 (1st Cir. 2000).

<sup>108</sup> *Id.* at 496.

the opportunity to attach and execute upon Iranian assets, their \$90 million judgment would be meaningless. To ensure the plaintiffs are not denied a remedy for their right and to ensure a cohesive foreign policy, the federal district courts must take jurisdiction over this case.

### B. Commercial Use Exception in the Foreign Sovereign Immunity Act

Although the FSIA provides a default rule of attachment immunity for a foreign sovereign's property, the "commercial use" exception can overcome the presumption. Section 1610(a)(7) of Title 28 provides:

The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if . . . the judgment relates to a claim for which the foreign state is not immune under section 1605(a)(7), regardless of whether the property is or was involved with the act upon which the claim is based.

This commercial use exception stems from the notion that a sovereign should be protected against suit when acting in an official governmental capacity, but not when it enters the commercial arena as a market participant.<sup>109</sup> The question presented in the Rubin litigation was whether using the Persian antiquities for research and display in museums, as well as for publication in books sold for profit, constituted "commercial use."

#### *Positions of the Litigants*

The plaintiffs' first main argument sought to establish that the commercial use exception encompassed use of the property by any party, not just the foreign sovereign. Hence, if the Oriental Institute or Harvard University were using the objects commercially, they would fall

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<sup>109</sup> See, e.g., 28 U.S.C. § 1602 (Congress' findings and declaration of purposes for the FSIA).

into the exception to immunity.<sup>110</sup> This argument was textual. Comparing the FSIA’s language describing the exception from immunity *from attachment* with the exception from immunity *from suit* revealed that while the latter specifically referenced activity “by the foreign state,” the former did not.<sup>111</sup> From this, the plaintiffs reasoned Congress had made a deliberate choice to allow all commercially used property owned by the foreign sovereign—regardless of who used it—to be attached and executed upon.<sup>112</sup> The plaintiffs also cited dicta in a district court case in Massachusetts that suggested the commercial use exception would indeed apply to property used commercially by a third party.<sup>113</sup>

The second part of the argument sought to establish that by showcasing the antiquities in question in museums, and publishing and selling books related thereto, the third party respondents had engaged in a commercial activity. It is undisputed that the Illinois respondents have studied and translated the Persepolis and Chogha Mish collections and have published their findings in books.<sup>114</sup> The FSIA provision on this point commands a court to examine the “nature” of the activity, as opposed to its “purpose” to determine if it constitutes commercial use.<sup>115</sup> If the nature of the use is one that a private (non-sovereign) individual could engage in, it is described as commercial. Using this framework, numerous courts have held that publishing and selling academic treatises constitutes commercial activity.<sup>116</sup> Indeed, even a museum displaying art items in the U.S. has been described as commercial in at least one recent

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<sup>110</sup> Ill. Lit., Pls.’ Consol. Mem. in Opp. to Iran’s Mots. for Summ. Judg. and for a Protect. Order (Docket #222) at 11–21.

<sup>111</sup> Compare 28 U.S.C. § 1610(a)(7) (“[property] used for a commercial activity in the United States”) with id. § 1605(a)(2) (“commercial activity carried on in the United States by the foreign state”).

<sup>112</sup> Ill. Lit., Pls.’ Consol. Mem. in Opp. to Iran’s Mots. for Summ. Judg. and for a Protect. Order (Docket #222) at 16 n.11.

<sup>113</sup> Mass. Lit., Mem. and Order of 9/30/06 (Docket #70), available at Rubin, 456 F.Supp.2d at 234 n.5 (discussing *Sesostris, S.A.E. v. Transportes Navales, S.A.*, 727 F.Supp. 737 (D. Mass. 1989)).

<sup>114</sup> See Part I, *supra*, at note 52.

<sup>115</sup> See 28 U.S.C. § 1603(d).

<sup>116</sup> See, e.g., *Sun v. Taiwan*, 201 F.3d 1105, 1109 (9th Cir. 2000).

opinion.<sup>117</sup> Thus, the plaintiffs tried to convince the courts that the commercial use exception could be triggered by third-party use, and that the museums' use of the Persian antiquities at issue was commercial.

Sometime later in the litigation, the plaintiffs advanced a second main argument: the third-party respondents in control of Iranian property were agents of Iran. They argued that nations, by their very nature, must act through human agents.<sup>118</sup> Hence, only agents of a foreign sovereign could engage in any "commercial use" of the sovereign's property. The plaintiffs cited eight specific statements they claimed showed the University of Chicago and its Oriental Institute were agents of Iran.<sup>119</sup> For example, the director of the Institute wrote to the Iranian ambassador, "Looking forward to the opportunity of giving You [sic] a full account of our activities in behalf of Your Government . . . ."<sup>120</sup> Similarly, a member of the Institute wrote to Iran's Minister of Education, "I hoped that our work of the past years had proved our conscientiousness and our eagerness to cooperate loyally with the High Imperial Government."<sup>121</sup> The plaintiffs reasoned that if a court agreed that the third-party respondents were acting as agents of Iran, they would no longer have to prove the more difficult argument that a third-party's commercial use of property placed the property in the FSIA's commercial use exception.

Third-party respondents, Harvard, MFA, Oriental Institute, and Field Museum, asserted that the FSIA's "commercial use" exception only covered the commercial use of property by the

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<sup>117</sup> See *Malewicz v. City of Amsterdam*, 362 F.Supp.2d 298, 314 (D.D.C. 2005).

<sup>118</sup> Ill. Lit., Pls.' Consol. Mem. in Opp. to Iran's Mots. for Summ. Judg. and for a Protect. Order (Docket #222) at 11–21.

<sup>119</sup> *Id.* at 19.

<sup>120</sup> *Id.* at 19 (citing Exhibit C).

<sup>121</sup> *Id.* at 19 (citing Exhibit E).

sovereign itself.<sup>122</sup> They denied that the slightly different phraseology used in the FSIA provisions covering immunity from suit and immunity from attachment was intended to result in different outcomes; rather, it was simply a stylistic drafting decision. Moreover, the Supreme Court’s analysis of the statute providing immunity from suit, 28 U.S.C. § 1605, should be considered binding in the attachment context, *id.* § 1610.<sup>123</sup> The provisions are so intimately related that precise analogies can be made between them. Since the Court had previously held that property must be used by the sovereign in order to subject the sovereign to suit, the same should be true for subjecting a sovereign’s property to attachment proceedings. Property should fall into the commercial use exception if and only if the sovereign used the property in that manner. In this case, Iran had not used the property at any point since it came to the United States. It had received no money from the display of the antiquities in the museums, or the publication and sale of any books. Therefore, the commercial use exception of the FSIA was not applicable.

The respondents further asserted that as not-for-profit institutions, engaged in scholarly and academic pursuits, their actions in relation to the antiquities should not be considered “commercial.”<sup>124</sup> The antiquities collections were put to a scholarly use—not a “business, trade or traffic” use.<sup>125</sup>

As to the plaintiffs’ agency argument, the third-party respondents denied such a relationship existed. The Oriental Institute characterized the agreement wherein it had accepted

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<sup>122</sup> Ill. Lit., Cit. Resp’ts. Mem. of Law in Supp. of Mot. to Decl. Prop. Imm. from Citation and Execution (Docket #22), at 6; Mass. Lit., Mem. of Law of Harvard Parties in Supp. of Mot. to Quash Summons and to Diss. Attach. by Trustee Process (Docket #17), at 5.

<sup>123</sup> Ill. Lit., Cit. Resp’ts. Mem. of Law in Supp. of Mot. to Decl. Prop. Imm. from Citation and Execution (Docket #22), at 8 (citing *Republic of Argentina v. Weltover*, 504 U.S. 607, 613 (1992)).

<sup>124</sup> *Id.* at 11; Mass. Lit., Mem. of Law of Harvard Parties in Supp. of Mot. to Quash Summons and to Diss. Attach. by Trustee Process (Docket #17), at 5.

<sup>125</sup> Ill. Lit., Cit. Resp’ts. Mem. of Law in Supp. of Mot. to Decl. Prop. Imm. from Citation and Execution (Docket #22), at 11.

delivery and safekeeping of the Persepolis and Chogha Mish antiquities as one of bailment.<sup>126</sup> Bailment occurs “upon the delivery of personal property by one person (the bailor) to another (the bailee) who holds the property for a certain purpose under an express or implied-in-fact contract.”<sup>127</sup> Thus, the Institute characterized its relationship as a normal contractual one wherein one party takes possession of another’s property—in this case, for scholarly study. The Harvard parties, on the other hand, flatly denied any relationship between the Persian antiquities in its collection and the Iranian government.<sup>128</sup> “Harvard has never taken direction from the government of Iran or any of its instrumentalities or officials about the uses to which any of the Iranian antiquities in its collection may be put.”<sup>129</sup>

Shortly after the Illinois court held only Iran had standing to assert its sovereign immunity,<sup>130</sup> Iran entered the proceedings to do so.<sup>131</sup> Iran reiterated the third-party respondents’ position that only property put to commercial use by the sovereign itself could qualify for the exception to immunity in the FSIA.<sup>132</sup> It corroborated the point that neither the National Museum of Iran nor any other instrumentality of Iran had used the antiquities for a commercial purpose in the U.S.; the objects were in the complete possessory control of the Oriental Institute.<sup>133</sup> Finally, Iran noted that the burden of proving the commercial use exception to immunity was on the plaintiffs, not Iran or the third-party respondents.<sup>134</sup>

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<sup>126</sup> Id. at 22.

<sup>127</sup> Black’s Law Dictionary 151–52 (8th ed. 2004).

<sup>128</sup> Mass. Lit., Mem. of Law of Harvard Parties in Supp. of Mot. to Quash Summons and to Diss. Attach. by Trustee Process (Docket #17), at 17.

<sup>129</sup> Id.

<sup>130</sup> See Part II, *supra*, at 16–18.

<sup>131</sup> Ill. Lit., Att’y Appear. for Def., The Islamic Rep. of Iran, by Michael D. McCormick (Docket #169). See also The Islamic Rep. of Iran’s Mem. in Supp. of its Mot. for a Protect. Order (Docket #182), at 2–3.

<sup>132</sup> Ill. Lit., The Islamic Rep. of Iran’s Mem. in Supp. of its Mot. for a Protect. Order (Docket #182), at 6.

<sup>133</sup> Id. at 6–7.

<sup>134</sup> Ill. Lit., The Islamic Rep. of Iran’s Mem. in Supp. of its Renewed Mot. to Decl. Prop. Exempt (Docket #199), at 4.

### *Decision of the Illinois Court*

The court in Illinois sided with the third-party respondents. First magistrate judge Ashman, then district judge Manning, held that foreign property was immune from execution unless used for a commercial purpose *by the foreign sovereign*.<sup>135</sup><sup>136</sup> Examining the text of section 1610(a)(7), they found nothing to support the sweeping construction advocated by the plaintiffs. Allowing property used by anyone—not just a foreign sovereign—to fall within the commercial use exception was not the most reasonable interpretation of the text. Moreover, other courts had already come to the conclusion that only property used commercially by the foreign state should be stripped of its immunity.<sup>137</sup>

They agreed it was sensible, from a policy perspective, for Congress to limit the exception from immunity to property used by the foreign sovereign. If a foreign sovereign did not live up to its business bargain, commercial parties could legitimately expect to attach and execute upon those business assets alone. Moreover, the long-standing international norm existing before the enactment of the FSIA made it more difficult to attach sovereign property than to bring suit against a sovereign.<sup>138</sup> The plaintiffs' interpretation would have reversed that norm, while respondents' position remained faithful to it.<sup>139</sup>

As of this writing, the Illinois court had not ruled on the plaintiffs' agency argument.

### *Decision of the Massachusetts Court*

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<sup>135</sup> The commercial use issue was actually litigated twice in the Illinois court: first, to determine the appropriate scope of any discovery proceedings and second, to determine whether Iran and the third-party respondents were entitled to summary judgment. The order issued in the context of the discovery proceedings was not binding for the case as a whole.

<sup>136</sup> See Ill. Lit., Mem. Op. and Order of 12/01/04 (Docket #32), available at Rubin, 349 F.Supp.2d 1108, 1109 (N.D. Ill. 2004); Ill. Lit., Statement of 3/18/05 (Docket #46), available at Rubin, 2005 WL 783057 (N.D. Ill. 2005), at \*1.

<sup>137</sup> Conn. Bank of Comm. v. Rep. of Congo, 309 F.3d 240, 257 n. 5 (5th Cir. 2002); Flatow v. Islamic Rep. of Iran, 76 F.Supp.2d 16, 23 (D.D.C. 1999).

<sup>138</sup> Id.

<sup>139</sup> See Conn. Bank, 309 F.3d at 252; H. R. Rep. No. 94-1487, reprinted in 1976 U.S.C.C.A.N. at 6626.

In Massachusetts, Judge O’Toole reached the same conclusions as the judges in Illinois. He thought that upon reading the “plain language” of the FSIA, it was clear Congress intended to allow execution upon sovereign property only when the sovereign itself was engaged in its commercial use.<sup>140</sup> He quoted the purpose section of the FSIA, 28 U.S.C. § 1602, to infer that foreign sovereigns “risk losing their sovereign immunity where they themselves engage in commercial activities beyond their borders.”<sup>141</sup> He thought the slightly different language used in section 1605 (suit immunity) and section 1610 (attachment immunity) amounted to “a distinction without a difference.”<sup>142</sup> He burnished his position further by citing the same group of cases as the Illinois court.<sup>143</sup> Finally, he declared that general principles of international law also supported his reading of the statute, providing further evidence of its correctness. Since Iran did not use the property for commercial activity in the U.S., the commercial use exception to the FSIA did not apply. All the antiquities in question remained immune from attachment by the plaintiffs.

### *Conclusions*

In contrast to their analyses of the FSIA standing issue, both courts reached the correct outcome here. Principles of statutory interpretation, as well as considerations of sound policy, support the view that an exception to the default rule of sovereign immunity from attachment exists only where the sovereign itself has used property for a commercial purpose. The first rule of statutory construction is to read a statute in the context of the *corpus juris* of which it is a part,

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<sup>140</sup> Mass. Lit., Mem. and Order of 9/30/06 (Docket #70), available at Rubin, 456 F.Supp.2d at 233–34.

<sup>141</sup> Mass. Lit., Mem. and Order of 9/30/06 (Docket #70), available at Rubin, 456 F.Supp.2d at 234.

<sup>142</sup> Mass. Lit., Mem. and Order of 9/30/06 (Docket #70), available at Rubin, 456 F.Supp.2d at 234 n.5.

<sup>143</sup> Mass. Lit., Mem. and Order of 9/30/06 (Docket #70), available at Rubin, 456 F.Supp.2d at 234 (citing Conn. Bank, 309 F.3d at 251–60; Deletelier, 748 F.2d at 795–98; Flatow, 76 F.Supp.2d at 21–24).

giving each word its plain meaning.<sup>144</sup> In enacting the FSIA, Congress laid out a statutory purpose section at 28 U.S.C. § 1602, which states that international law provides that “commercial property may be levied upon for the satisfaction of judgments rendered against [foreign sovereigns] in connection with their commercial activities,”<sup>145</sup> and that the federal courts should decide sovereign immunity questions “in conformity with” those norms.<sup>146</sup> This is strong evidence that only property used commercially by a sovereign is attachable. Interpreting the commercial use exception to attachment immunity as co-extensive with the commercial use exception to suit immunity is also rational. The provisions implement the same idea: sovereign immunity should be abrogated only where the foreign state engages in commercial activity.

Another seminal code of statutory construction is the clear statement rule, which prescribes that courts should not read statutes in a way that would fundamentally change existing state or international law, absent a “clear statement” Congress intended to do so.<sup>147</sup> Since the background international norm is that sovereign property has immunity from attachment, except when sovereigns themselves engage in commercial activity, a court should not override that rule without a specific congressional command. As discussed, the statutory purpose set forth at the outset of the FSIA indicates Congress intended to codify the existing norm, not change it.<sup>148</sup>

In sum, the difference in language used in the two commercial use exceptions provisions of the FSIA appears to be a “distinction without a difference.” Notwithstanding Congress’ failure to specify that a “commercial use” must be “by the foreign state,” limiting the attachment exception to instances in which the foreign sovereign itself pursues a commercial activity is the most reasonable reading of the provision. In this way, the commercial use exception to

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<sup>144</sup> See, e.g., *Branch v. Smith*, 538 U.S. 254, 281 (2003).

<sup>145</sup> 28 U.S.C. § 1602.

<sup>146</sup> *Id.*

<sup>147</sup> See generally *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119 (2005).

<sup>148</sup> 28 U.S.C. § 1602.

attachment immunity is harmonized with the exception for suit immunity. Here, both district courts followed the weight of authority in reaching this sensible outcome.

### C. Recovery under the Terrorism Risk Insurance Act

Soon after the terrorist attacks of 9/11, Congress enacted the Terrorism Risk Insurance Act of 2002 (TRIA).<sup>149</sup> Section 201 created a new way for individuals who obtained judgments against terrorist parties for acts of terrorism to collect on those judgments. Subsection (a) reads,

Notwithstanding any other provision of law, and except as provided in subsection (b), in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, or for which a terrorist party is not immune under section 1605(a)(7) of title 28, United States Code, the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to, execution or attachment in aid of execution in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable.<sup>150</sup>

Subsection (b) deals with consular property and is not applicable here. Because of the relatively new mint of the statute, few courts have pronounced upon its various provisions. At issue in the Rubin litigation was whether the Persian antiquities sought by the plaintiffs fell within the definition of “blocked assets,” thereby making them amenable to attachment.

#### *Positions of the Litigants*

The plaintiffs first argued that, as a threshold matter, the plain language of TRIA § 201(a) revealed that it overrode the sovereign immunity provisions of the FSIA. The phrase “notwithstanding any other provision of law” is as clear a statement as Congress can make to indicate its desire to have the provision enter with full force.<sup>151</sup> Given Congress’ desire to ensure

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<sup>149</sup> Pub. L. No. 107-297, 116 Stat. 2322.

<sup>150</sup> TRIA § 201(a).

<sup>151</sup> Ill. Lit., Pls.’ Consol. Mem. of Law (Docket #105), at 4 (quoting Hill v. Republic of Iraq, 2003 WL 21057173 (D.D.C. 2003), at \*2).

terrorist states could not injure American citizens with impunity, the plaintiffs argued TRIA should be read to grant relief to individuals who obtained valid judgments based upon terrorist attacks—notwithstanding other impediments to attachment. Thus, even if the district courts thought the FSIA barred recovery, the plaintiffs ought to recover under the TRIA.

Having established that § 201 of the TRIA could provide them a remedy even where the FSIA could not, the Rubin plaintiffs further asserted that the antiquities at issue met the statutory and regulatory definitions of “blocked assets.”<sup>152</sup> Section 201(d)(2) of the TRIA provides that “blocked assets” means “any asset seized or frozen by the United States under . . . sections 202 and 203 of the International Emergency Economic Powers Act [(IEEPA)].”<sup>153</sup> Under the authority of the IEEPA, Executive Order 12170 froze all assets owned by the Iranian government in the United States in 1979.<sup>154</sup> The plaintiffs maintained that notwithstanding Executive Order 12281, passed two years later in 1981<sup>155</sup> and unblocking nearly all the assets originally blocked by Executive Order 12170, the Persian antiquities held by the third-party respondents remained frozen.<sup>156</sup> Executive Order 12281 was implemented by the Treasury Department in 31 C.F.R. 535.215, which provides,

[A]ll persons subject to the jurisdiction of the United States in possession of control of properties, as defined in § 535.333 of this part, not including funds and securities owned by Iran or its agencies, instrumentalities or controlled entities, are licensed, authorized, directed and compelled to transfer such properties held

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<sup>152</sup> Id. at 6.

<sup>153</sup> Id. at 6 (quoting TRIA § 201(d)(2)).

<sup>154</sup> 44 Fed. Reg. 65729 (Nov. 14, 1979). See also *Hegna v. Islamic Republic of Iran*, 376 F.3d 485, 488 n.8, 493 n.32 (5th Cir. 2004).

<sup>155</sup> 46 Fed. Reg. 7923 (January 19, 1981). Exec. Order No. 12281 was designed to unfreeze most assets blocked by President Carter’s 1979 Exec. Order No. 12170 (financial assets owned by Iran, for example, were specifically excluded). Exec. Order No. 12281 was necessitated by the Declarations of the Government of the Democratic and Popular Republic of Algeria dated January 19, 1981 (“Algiers Accords”), the agreement signed by the U.S. and Iran to end tensions that had arisen after Iranian extremists seized the U.S. Embassy in Tehran. The Algiers Accords called for the creation of an Iran-U.S. Claims Tribunal to arbitrate outstanding issues that had arisen since 1979 between the two nations and citizens thereof. For the text of the Algiers Accords, see 20 Int’l L. Mat. 224 (1981), also available at [www.iusct.org/general-declaration.pdf](http://www.iusct.org/general-declaration.pdf).

<sup>156</sup> 46 Fed. Reg. 7923, at 7 (Jan. 19, 1981).

as January 18, 1981 as directed after that day by the Government of Iran, acting through its authorized agent.<sup>157</sup>

Section 535.333, referenced therein, states, “The term properties as used in § 535.215 means all uncontested and non-contingent liabilities and property interests of the Government of Iran, its agencies, instrumentalities, or controlled entities, including debts.”<sup>158</sup>

The Rubin plaintiffs argued that since the third-party respondents claimed they owned the antiquities at issue<sup>159</sup>—when, in fact, Iran did<sup>160</sup>—the assets were “contested” within the meaning of § 535.333 and thus remained “blocked assets” for purposes of attachment under TRIA § 201(a). The key fact for the plaintiffs is that an Iranian export restriction law passed in 1930 forbids the export of cultural property without proper governmental authority.<sup>161</sup> Since legal title to objects taken in violation of the law remains with Iran, so the argument went, the third-party respondents never acquired valid title to the antiquities.<sup>162</sup>

The third-party respondents contended that the plaintiffs’ TRIA analysis was incorrect in several ways. First, they asserted the antiquities at issue were never blocked assets in the first place (and hence could not be blocked assets today), either because they were not owned by Iran or because they were not covered by the statutory grant of authority under which Executive

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<sup>157</sup> 31 C.F.R. 535.215(a).

<sup>158</sup> 31 C.F.R. 535.333.

<sup>159</sup> University of Chicago’s Oriental Institute is the only third-party respondent that concedes Iran has some ownership interest in the property. Even its antiquities, however, fall into the “contested” category, because it has maintained that Iran does not have full ownership, “only partial title.” See 31 C.F.R. § 535.333(c). The Field Museum, MFA, and Harvard all assert that they have complete ownership of the antiquities.

<sup>160</sup> This is a contested factual issue between the Rubin plaintiffs and the third-party respondents. For purposes of preliminary discovery motions, however, the third-party respondents assumed *arguendo* that Iran had ownership. See Part IV, *infra*, for an analysis of the factual determination of who owns the antiquities in question.

<sup>161</sup> Ill. Lit., Pls.’ Consol. Mem. of Law (Docket #105), at 10 (“In sum, if (as plaintiffs intend to prove) the properties at issue do in fact belong to Iran, then those properties will [be] subject to attachment and execution by plaintiffs in satisfaction of their judgment under § 201 of TRIA.”). See also Law Concerning the Preservation of Nat. Antiquities, Approved on 3 Nov. 1930 (Iran) [hereinafter “Iranian Export Law of 1930”], reprinted in UNESCO, *The Protection of Movable Cultural Property, Collection of Legislative Texts: Iran* (1988).

<sup>162</sup> Iranian Export Law of 1930, *supra* note 159, art. 1. See also Part III, *infra*.

Order 12170 was promulgated.<sup>163</sup> The factual issue of whether the antiquities were owned by Iran is explored further in Part III, *infra*. As noted above, the authority under which President Carter issued Executive Order 12170 consisted of sections 202 and 203 the International Emergency Economic Powers Act (IEEPA). The IEEPA granted the president authority to seize or freeze a wide range of Iranian goods. Specifically excluded by a later amendment, however, were “information or informational materials,”<sup>164</sup> which are described as items “including but not limited to” “photographs, microfilms, microfiche, tapes, compact disks, CD ROMS, artworks, and news wire feeds.”<sup>165</sup> Respondents referenced this non-exclusive list to show that Congress’ clear intent was to allow the import and export of items which spread knowledge about one culture to another.<sup>166</sup> Surely, they reasoned, that purpose would be materially enhanced by including within the category of “informational materials” the Persian antiquities at issue, which provide knowledge about the ancient culture of Persia.<sup>167</sup>

Second, even if the antiquities were originally blocked under Executive Order 12170, the respondents argued that Executive Order 12281 unblocked them.<sup>168</sup> The purpose behind Executive Order 12281 was to implement the Algiers Accords, which were signed by the United States and Iran in order to begin normalizing relations between the two countries following the overthrow of the Shah, the detention of American hostages, and the freezing of Iranian assets in

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<sup>163</sup> Ill. Lit., Field Museum’s Reply in Supp. of its Mot. for Entry of Protect. Order (Docket #110), at 4–5; Ill. Lit., Cit. Resp’ts. Mem. of Law in Supp. of Mot. to Decl. Prop. Imm. from Citation and Execution (Docket #22), at 19.

<sup>164</sup> Ill. Lit., Cit. Resp’ts. Mem. of Law in Supp. of Mot. to Decl. Prop. Imm. from Citation and Execution (Docket #22), at 19 (quoting 50 U.S.C. § 1702(b)(3)). The 1994 amendments can be found at Pub. L. 103-236, Title V, § 525(c)(1), 108 Stat. 474. See also, *infra*, notes 184–89 and accompanying text.

<sup>165</sup> Ill. Lit., Cit. Resp’ts. Mem. of Law in Supp. of Mot. to Decl. Prop. Imm. from Citation and Execution (Docket #22), at 19–21.

<sup>166</sup> *Id.* at 19–21. For legislative history on the 1994 amendments, see S. R. No. 103-107, H. Conf. R. No. 103-482, and 1994 U.S. Code Cong. and Adm. News 302.

<sup>167</sup> *Id.* at 21 (“The exchange of these informational materials has allowed U.S. scholars to gain an expertise in Elamite unmatched in the world, and has provided considerable information about important aspects of the operation of the ancient Persian empire, and thus about the earliest forms of organization of human civilization.”).

<sup>168</sup> *Id.*

the U.S.<sup>169</sup> Executive Order 12281 was designed to undo much of the freeze brought about by Executive Order 12170 and place Iranian and American parties “in the position they were in prior to November 14, 1979.”<sup>170</sup> The third-party respondents argued that the exception in Executive Order 12281 for “contested or contingent liabilities and property interests” did not apply in this case for the obvious reason that ownership was not contested between the third-party respondents *and Iran*.<sup>171</sup> Indeed, the language of the implementing regulation provides, “property interests shall not be deemed to be contested solely because they are subject to an attachment, injunction, or other similar order.”<sup>172</sup> The respondent parties thought the plaintiffs had put forth an absurdly literal reading of the regulations implementing Executive Order 12281. Applying it would mean any individual could assert (without proving) that a piece of property in the U.S. was owned by Iran, even though the legitimate U.S. owner was in possession, and through that assertion alone transform the property into a “blocked asset” subject to execution under the TRIA.

The Oriental Institute further argued that the Persepolis Fortification archives could not be a “blocked asset,” because some of it had recently been licensed for shipment back to Iran. By allowing the Institute to transport the archives to Iran, the Department of Treasury necessarily concluded they were not blocked assets, i.e. “seized or frozen” under Executive Order 12170.<sup>173</sup>

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<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> Ill. Lit., Field Museum’s Reply in Supp. of its Mot. for Entry of Protect. Order (Docket #110), at 6–8; Mass. Lit., Mem. of Law of Trustee Process Resp’ts. in Supp. of their Mot. for Recons. (Docket #73), at 3–6. See also Ill. Lit., The Islamic Rep. of Iran’s Renewed Mot. to Declare Prop. Imm. (Docket #199), at 8–10.

<sup>172</sup> 31 C.F.R. § 535.333(d) (quoted in Mass. Lit., Mem. of Law of Trustee Process Resp’ts. in Supp. of their Mot. for Recons. (Docket #73), at 11 n.7).

<sup>173</sup> Ill. Lit., Cit. Resp’ts. Mem. of Law in Supp. of Mot. to Decl. Prop. Imm. from Citation and Execution (Docket #22), at 17–19. The Respondents point out an important distinction between the Iranian “Blocking Regulations” promulgated in connection with Exec. Order No. 12170 (1979) and the Iranian “Transactions Regulations” promulgated under Exec. Order No. 12613 (1987). The Transactions Regulations, 31 C.F.R. § 560, were initially issued under the authority of section 505 of the International Security and Development Cooperation Act of 1985 (“ISDCA”), Pub. L. No. 99-83, 99 Stat. 190, 221 (1985). They imposed an import embargo on Iranian goods and services because of its support of terrorism. Later, the broader power given by the IEEPA was also invoked. See *id.*

Finally, the respondents put forth an argument based on (what they termed) simple logic.<sup>174</sup> They first noted that, by stipulation, the Persian antiquities at issue were owned either by the museums or Iran. If owned by the museums, they were not subject to attachment because the plaintiffs only had a judgment against Iran. If owned by Iran, they were not subject to attachment because both the Illinois and Massachusetts courts had held the FSIA barred the plaintiffs from attaching property not commercially used by Iran. Therefore, whether the museums or Iran owned the property, plaintiffs could not levy upon it and section 201 of TRIA was moot.<sup>175</sup>

#### *Decision of the Illinois Court*

As of this writing, the litigants had not sufficiently developed their TRIA argument to the point where either Magistrate Judge Ashman or District Judge Manning was ready to rule. This was largely due to the focus on Iran entering the proceedings.<sup>176</sup> Once it appeared, Iran filed a flurry of motions to assert its rights to have its sovereign property declared immune from attachment under the FSIA and be exempt from discovery under Rule 69(a). The court busied itself dealing with those motions and memos, to the exclusion of the TRIA issue. Even if the Illinois court declared the property at issue immune under the FSIA (which looks likely), it might still decide to grant plaintiffs' plea to reach the TRIA issue.

#### *Decision of the Massachusetts Court*

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at 17–18. See also Exec. Order Nos. 12613 (October 29, 1987), 12957 (March 16, 1995), 12959 (May 6, 1995), and 13059 (August 19, 1997). Whereas the Blocking Regulations created “blocked assets” which were “seized or frozen” in the U.S., the Transactions Regulations only required that goods traveling into or out of Iran be licensed.

<sup>174</sup> Mass. Lit., Mem. of Law of Trustee Process Resp'ts. in Supp. of their Mot. for Recons. (Docket #73), at 6.

<sup>175</sup> Id.

<sup>176</sup> See, supra, note 131 and accompanying text.

The district court in Massachusetts agreed with the Rubin plaintiffs that TRIA § 201 was potentially available to them, since it allowed recovery against a terrorist state’s blocked assets for injuries sustained in an act of terrorism.<sup>177</sup> Judge O’Toole first noted it was indisputable that plaintiffs had obtained their judgment under the “terrorist act exception” to the FSIA, 28 U.S.C. § 1605(a)(7), and that Iran had been designated a “terrorist party.”<sup>178</sup> He then turned to the question of whether the antiquities held by the MFA and Harvard could be deemed “blocked assets.”

Judge O’Toole agreed with the plaintiffs’ argument that only “uncontested and non-contingent” property interests of Iran had been unblocked by Executive Order 12281.<sup>179</sup> He then concluded that since Harvard and the MFA had “[f]rom the commencement of this action” argued that they—not Iran—owned the items in question, those items were, in fact, “contested” and therefore remained blocked assets for purposes of TRIA § 210(d)(2).<sup>180</sup> If plaintiffs could successfully establish that the antiquities belonged to Iran, then the assets would be subject to attachment and execution under TRIA § 201(a).<sup>181</sup> Only a factual hearing on the issue could determine whether Iran, in fact, owned the pieces. The third-party respondents could not extinguish the lawsuit at this preliminary stage.

After the court’s decision, the MFA and Harvard motioned the court to reconsider its TRIA holding.<sup>182</sup> They contended that the court misinterpreted TRIA § 201 and the relevant Department of Treasury regulations. In the event the court would not reconsider, they moved it

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<sup>177</sup> Mass. Lit., Mem. and Order of 9/30/06 (Docket #70), available at Rubin, 456 F.Supp.2d at 235.

<sup>178</sup> Id.

<sup>179</sup> Id.

<sup>180</sup> Mass. Lit., Mem. and Order of 9/30/06 (Docket #70), available at Rubin, 456 F.Supp.2d at 235–36.

<sup>181</sup> Id.

<sup>182</sup> See Mass. Lit., Mem. of Law of Trustee Process Resp’ts. in Supp. of their Mot. for Recons. (Docket #73).

to certify the question of the proper interpretation of TRIA § 201 to the United States Court of Appeals for the First Circuit.<sup>183</sup> As of this writing, no action had been taken by the district judge.

### *Conclusions*

Judge O’Toole seems to have erred in his analysis of TRIA § 201. By accepting the plaintiffs’ reading, he swept into the category of “blocked assets” property Congress likely had never considered would be labeled as such. In essence, Judge O’Toole held that an asset owned by a United States citizen could become a “blocked asset,” and hence liable for attachment to satisfy a judgment against Iran, simply if the judgment creditors could make a plausible claim of Iranian ownership. No actual proof of Iranian ownership was required. In this case, for example, the plaintiffs merely alleged “upon information and belief” that objects in Harvard’s and the MFA’s collection were owned by Iran. This allegation was sufficient to allow the plaintiffs to continue conducting depositions and discovery proceedings, as well as to obtain a trial with witnesses and experts. The upshot, of course, is that the longer the case drags on, the more incentive the museums have to settle out-of-court, thereby saving legal fees and eliminating the risk of an unfavorable trial result.

The Massachusetts judge was wrong for three main reasons. First, it is likely the Persian antiquities at issue could not be “blocked assets” under the International Emergency Economic Powers Act (IEEPA). Although originally enacted in 1976, the IEEPA was amended in 1994 to create an important exception to the types of property that could be deemed “blocked assets.” As the Illinois third-party respondents noted, Congress specifically excluded from the President’s

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<sup>183</sup> See *id.* at 13–19 (arguing the court’s order involved a “controlling question of law,” “substantial ground for difference of opinion about the legal question at issue existed,” and “immediate appeal from the order may materially advance the ultimate termination of the litigation”).

grant of authority to block assets, “any information or informational materials.”<sup>184</sup> The non-exclusive list following that description of the category included photographs, artworks, and publications.<sup>185</sup> There is a strong argument that the Persian antiquities at issue in this litigation should be deemed “information materials.”

Congress clearly intended the list of items mentioned in the statute to be non-exclusive. It evidenced this intent by using the phrase “including but not limited to.”<sup>186</sup> Thus, even if the Persepolis Fortification archive, the Chogha Mish materials, and the objects housed at Harvard and the MFA were not deemed “artworks,” they could still be considered part of the un-enumerated list of “informational materials.”<sup>187</sup> One of the defining characteristics of cultural property is its ability to convey information about a past culture.<sup>188</sup> Persian governmental seals, painted pottery shards, and sculptures are valuable precisely because they provide insight into the way people in that society lived. If the objects were excavated in an archaeologically precise manner (as the Persepolis and Chogha Mish collections were), they can tell even more about how a civilization evolved over time. Since Congress’ intent in enacting the list of exclusions to the IEEPA was to preserve the free flow of information across cultures,<sup>189</sup> the antiquities fit squarely within it.

The Department of Treasury’s regulations and practices implementing the IEEPA also lend support to the idea that the Persian antiquities are not “blocked assets.” Within the

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<sup>184</sup> See 50 U.S.C. § 1702(b)(3). This amendment came into effect under the Foreign Relations Authorization Act, Pub. L. 103-236, 108 Stat. 382 (1994).

<sup>185</sup> *Id.*

<sup>186</sup> See *id.*

<sup>187</sup> See generally Ill. Lit., *Cit. Resp’ts. Mem. of Law in Supp. of Mot. to Decl. Prop. Imm. from Citation and Execution* (Docket #22), at 19–21.

<sup>188</sup> See, e.g., Eric A. Posner, *The International Protection of Cultural Property: Some Skeptical Observations*, Univ. of Chicago Pub. Law Working Paper No. 141 (2006), available at <http://ssrn.com/abstract=946778>.

<sup>189</sup> See, e.g., H. Conf. R. No. 103-482, reprinted in 1994 U.S.C.C.A.N. 398, 482 (“The provisions of [the Act] seek to protect the constitutional rights of Americans to educate themselves about the world by communicating with peoples of other countries in a variety of ways, such as by sharing information and ideas with persons around the world, traveling abroad, and engaging in education, cultural and other exchanges with persons from around the world.”)

Department, the Office of Foreign Assets Control determines whether certain assets fit within the restricted class and publishes guidance to help U.S. nationals comply with its orders.<sup>190</sup> In 2004, the OFAC issued a ruling which clarified that, “transactions relating to [Iranian] informational materials that are reproduced, translated (including both literal and idiomatic translation) or dubbed by U.S. persons for dissemination within the United States are exempt transactions”<sup>191</sup> for purposes of the IEEPA.<sup>192</sup> Using this ruling, the museums would again have a strong argument that the Persian antiquities in their collections, used for study and publication for an American audience, would be exempt as “informational materials.”

Second, even if the antiquities were at one time blocked under the IEEPA and Executive Order 12170, they were later unblocked by Executive Order 12281. Although the plaintiffs contended that ownership of the objects was “contested,” and therefore the objects were never unblocked, this argument should be rejected. The simple reason is that ownership was never contested by Iran. The plaintiffs’ alternate reading of the regulations, adopted by the Massachusetts court, is not the most reasonable interpretation. Section 535.33 of C.F.R. part 31, which declared that only “uncontested and non-contingent liabilities and property interests of the Government of Iran” were unblocked and amenable to return to Iran, was intended to protect American interests in contested property.<sup>193</sup> Where both U.S. and Iranian parties claimed ownership of an asset, the U.S. parties were not forced to accede to Iran’s claims; they could continue to dispute the matter. By adopting the plaintiffs’ reading, Judge O’Toole turned this

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<sup>190</sup> See U.S. Dept. of Treasury, Office of Foreign Assets Control, Interpretive Rulings, <http://www.treas.gov/offices/enforcement/ofac/rulings/index.shtml>.

<sup>191</sup> Office of Foreign Assets Control, Interpretive Ruling 040706-FARCL-IA-16, available at <http://www.treas.gov/offices/enforcement/ofac/rulings/ia070604.pdf>.

<sup>192</sup> Although the opinion was discussing an exemption to the Iranian Transactions Regulations, 31 C.F.R. 560, the same language is used in the Iranian Blocking Regulations promulgated under the authority of the IEEPA.

<sup>193</sup> Indeed, this provision later became an issue at the U.S.-Iran Claims Tribunal. Iran claimed the provision protected American interests too much and that more property should be returned to it. The issue was eventually adjudicated in Iran’s favor.

regulation on its head: instead of protecting the putative American owner's interest in contested property, it opened up the property to claims by even more parties! That is, instead of simply battling Iran for possession, the putative owner would have to battle unknown judgment creditors of Iran as well.

It is, of course, entirely possible Congress intended this outcome when it passed the TRIA in 2002. Congress's goal seemingly was to make additional, appropriate assets available to satisfy judgments against terrorist parties such as Iran. In section 201(b)(2), for example, Congress allowed for the collection of judgments against certain diplomatic properties owned by terrorist states in the U.S., "that ha[ve] been used by the United States for any nondiplomatic purpose."<sup>194</sup> Yet, common sense dictates that Iran's judgment creditors should only recover against assets over which Iran has actual or claimed title. If Iran has never claimed ownership of an asset, it is unclear how its ownership could be deemed "contested." The salutary goal of allowing judgment creditors to vindicate their claims would be contorted out of shape by plaintiffs' construction of 31 C.F.R. § 535.333. Allowing a third-party to create a controversy over ownership would create ruinous litigation, especially for museums and other entities that possess Persian antiquities with incomplete provenances.

Finally, the third-party respondents' construction of the regulations at issue is supported by the weight of authority. In a recent Second Circuit opinion interpreting TRIA § 201, the court disagreed with the argument that Congress had "appropriated" all blocked assets in the U.S. for the use of satisfying judgments obtained against terrorist states.<sup>195</sup> It rejected the expansive reading of the statute and held, "we do not believe that TRIA § 201 is an appropriation."<sup>196</sup> The court instead read the statute to allow attachment only in certain limited situations. Even earlier,

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<sup>194</sup> TRIA § 201(b)(2), Pub. L. No. 107-297, 116 Stat. 2322.

<sup>195</sup> *Smith ex rel. Estate of Smith v. Federal Reserve Bank of New York*, 346 F.3d 264, 270 (2d Cir. 2003).

<sup>196</sup> *Id.*

in a case arising shortly after the issuance of the regulations at issue and interpreting their scope for the first time, the Fifth Circuit held that “we reject [plaintiffs’] attempt to create artificial distinctions as not in keeping with the purpose of the [Algerian] Declarations.”<sup>197</sup> The general purpose of the Algiers Accords, of course, was to put all American and Iranian parties in the same position they were before Iranian assets had been frozen in the U.S. in 1979. In this case, that previous position was one of uncontested ownership of all the Persian antiquities by the respective museums, with the exception of the Persepolis Fortification archive which was uncontestedly owned by the National Museum of Iran.

In sum, the plaintiffs’ TRIA argument fails for three reasons. First, the statutory scheme which governs Iranian “blocked assets” specifically excludes “informational materials.” This likely includes Persian antiquities that help spread knowledge about the cultural history of the Iranian people. Second, the regulatory provisions which implemented Executive Order 12281 unblocked all non-financial assets of Iran which were “uncontested and noncontingent.” Since ownership of the Persian antiquities has never been contested as between the museums and Iran, they are not “blocked assets.” Finally, the statutes and regulations controlling Iranian assets in the U.S. must be read in conjunction with the Algiers Accords and international law norms. Under a comprehensive analysis, the policy goals animating the “blocked assets” provisions support an outcome whereby Persian antiquities in the U.S. since the 1930s should remain with their current owners.

### **Part III. The Factual Issue: Who Owns The Persian Antiquities?**

Nearly all of the litigants’ preliminary motions and memoranda focused on the legal issues discussed in Part II, *supra*. During that time, both sides assumed *arguendo* that the

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<sup>197</sup> Gulf Ports Crating Co. v. Ministry of Roads and Transp., 674 F.2d 318, 319–20 (5th Cir. 1982).

antiquities were owned by Iran. This put the legal issues to the foreground, allowing the contested factual matter of actual ownership to be postponed for a later date. The third-party respondents pursued this strategy with the hope that they could end the litigation based solely on legal grounds. That outcome would avoid the litigation of factual matters, which might reach conclusion only after a lengthy trial. Unfortunately for the third-party respondents, neither the Illinois court nor the Massachusetts court was prepared to dispose of the case on purely legal grounds. Therefore, the factual question would almost certain require extensive briefing and, perhaps, a hearing or trial.

As of this writing, neither court had yet ordered extensive briefing on the factual issues. By carefully examining the litigants' papers, however, the key issues which would likely need resolution can be deciphered. The first issue would likely be determining who had standing to assert Iran's ownership interest in the antiquities. The second would center on the proper application of the choice of law rules and related procedural matters. For the courts could only reach the actual question of ownership after they knew the controlling legal framework. These issues will be discussed in sequence.

#### A. Standing to Assert Iranian Ownership

A threshold question for any court is whether the parties before it have standing to assert their various claims. "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues."<sup>198</sup> Thus, although the issue of standing to assert sovereign immunity under the FSIA was discussed in Part II.A, *supra*, a new inquiry must be undertaken to determine whether the Rubin plaintiffs could raise a claim that Iran owns the Persian antiquities in question.

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<sup>198</sup> Warth v. Seldin, 422 U.S. 490, 498 (1975).

### *Positions of the Litigants*

Since the factual issue of Iranian ownership was not yet before either the Illinois or Massachusetts courts, the plaintiffs had not yet fully briefed the issue. If pressed, however, their biggest hurdle would likely be overcoming the notion that they were barred by the “general prohibition on a litigant’s raising another person’s legal rights.”<sup>199</sup>

The plaintiffs’ best strategy might focus on an analogy to the law of fraudulent conveyances. A fraudulent conveyance is, “A transfer of property for little or no consideration, made for the purpose of hindering or delaying a creditor by putting the property beyond the creditor’s reach.”<sup>200</sup> Judgment creditors typically have standing to make a claim that certain assets have been disposed of by the judgment debtor simply to avoid their payment to the rightful taker—the judgment creditor.<sup>201</sup> Using this doctrinal hook, the Rubin plaintiffs might claim that Iran’s decision to not vigorously pursue its claims against the museums *at this point in time*, was done simply to keep the plaintiffs’ rightfully owned assets from falling into their hands. Thus, the plaintiffs’ should have standing to protect their creditor rights to the Iranian-owned property.

Sensing the fight to come, the third-party respondents had begun questioning quite early the plaintiffs’ ability to assert Iranian ownership of the antiquities. Their first argument was the unsurprising: only Iran can assert Iran’s rights.<sup>202</sup> Article III of the U.S. Constitution presents a vague standing limitation by forcing a plaintiff to show he has a valid “case or controversy”

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<sup>199</sup> See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984) and citing *Sec. of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 955–56 (1984).

<sup>200</sup> *Black’s Law Dictionary* 687 (8th ed. 2004).

<sup>201</sup> See Ill. Code of Civ. P. § 2-1402.

<sup>202</sup> See, e.g., Ill. Lit., *Field Museum’s Reply in Supp. of its Mot. for Entry of Protect. Order* (Docket #110), at 9 (“Plaintiffs are improperly attempting to use a supplementary proceeding as a means to adjudicate some unpled claim that the Field Museum did not acquire valid title to the Herzfeld Collection.”)

against the defendant.<sup>203</sup> This has subsequently been construed to require that a “federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court.”<sup>204</sup>

This Article III standing requirement could be used by the museums in two ways. First, they could argue that the Rubin plaintiffs are not challenging the museums’ actions, but the actions of Iran in failing to assert its rights to the antiquities. Since Iran’s actions are those of a “third party not before the court,” the issue cannot reach proper resolution. Relatedly, the museums could argue that only Iran is hurt by any potentially culpable behavior by the museums in purchasing, receiving, and displaying the Persian antiquities.<sup>205</sup> That is, the plaintiffs should not stand in the shoes of Iran to attack the museums’ activities, for there is a real possibility that if the plaintiffs’ lose, Iran’s claims could be barred by the doctrines of res judicata and collateral estoppel.<sup>206</sup> To avoid prejudicing the absent party, only Iran should assert Iran’s claims.

### *Decisions of the Illinois and Massachusetts Courts*

Neither court has yet addressed this preliminary wrinkle to the factual question of ownership of the antiquities. Both have attempted to dispose of the litigation on the purely legal grounds. It is unclear how either judge would rule on this important standing issue.

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<sup>203</sup> U.S. Const., art. III.

<sup>204</sup> *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41–42 (1976) (quoted in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)).

<sup>205</sup> Cf. *Warth v. Seldin*, 422 U.S. at 498–99 (noting that “the standing question is whether the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court’s remedial powers on his behalf” (citation omitted)).

<sup>206</sup> Cf. *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323, 336 n.16 (2005) (“Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case.”).

## *Conclusions*

The plaintiffs' request that the Massachusetts and Illinois courts allow them to assert, as a factual matter, that Iran owns the Persian antiquities at issue should be denied. In this situation, the federal courts should not—and, perhaps, may not—exercise any jurisdictional authority.

The standing limitations prescribed by the U.S. Constitution probably govern this case. Article III's "cases and controversies" requirement is an important safeguard, because it ensures that only actual disputes between two sufficiently incentivized parties will be litigated in the federal courts. Our judicial system works best when both sides of an issue are adequately presented to a court before it makes a final determination. Additionally, the "cases and controversies" requirement protects the rights of absent third-parties by not allowing other litigants to assert those third-parties' valuable, personal rights.

In addition to these Constitutional dimensions of standing, there is a further judge-made limitation on the ability of litigants to bring issues into federal court termed "prudential standing."<sup>207</sup> In its most recent exposition of the area, the Supreme Court attempted to elucidate the doctrine,

Although we have not exhaustively defined the prudential dimensions of the standing doctrine, we have explained that prudential standing encompasses 'the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked.'<sup>208</sup>

This case squarely presents all three of the issues which trigger the concerns of prudential standing. First, as noted above, Iran might be prejudiced by allowing the Rubin plaintiffs' to assert its rights of ownership. For whatever reason, Iran has not asserted any claims against the museums. It might be barred from doing so in the future, if the Rubin plaintiffs are allowed to do

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<sup>207</sup> Eg., *Elk Grove*, 542 U.S. at 12.

<sup>208</sup> *Id.*

so now. Second, Iranian governmental assets in the U.S. have been subject to extensive regulation by Congress and the president over the past thirty years. Numerous statutes, executive orders, and administrative regulations have been issued to prescribe the rights and responsibilities of U.S. individuals who have relations with Iran.<sup>209</sup> For that reason, courts should not intervene in a dispute thought “more appropriately addressed in the representative branches.”<sup>210</sup> Finally, to the extent the plaintiffs are relying upon a 1930 Iranian statute which forbids export of Iranian cultural objects without governmental permission, they are likely outside the “zone of interests protected by the law invoked.”<sup>211</sup> The only parties protected by that law are the Iranian government and Iranian people who have sought to preserve their cultural heritage from export.

In sum, for both Article III and prudential standing reasons, the courts should find that the Rubin plaintiffs lack standing to argue that Iran owns the Persian antiquities held by the third-party respondent museums. This outcome would preserve Iran’s rights to those arguments, as well as remove from the federal courts issues they do not properly have authority to decide.

## B. Other Procedural Issues

Besides the standing issue, questions surrounding the proper choice of law, burden of proof, and statute of limitations would likely arise. Since none of these have been more than cursorily argued by the litigants, it is too early to speculate about the claims that would likely emerge. The only thing that can be said for sure is that the burden of proof argument will be one

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<sup>209</sup> See, e.g., TRIA § 201; IEEPA §§ 202 and 203. Exec. Order Nos. 12170 and 12281. 31 C.F.R. §§ 525.215 and 525.333.

<sup>210</sup> Indeed, the United States has intervened in the Illinois litigation to introduce two “Statements of Interest.” See Ill. Lit., Statement of Int. of the United States of Am. (Docket #20); Second Statement of Int. of the United States of Am. (Docket #145).

<sup>211</sup> See, *infra*, notes 216–220 and accompanying text.

of the most contentious and important. As respondents noted, the fact of Iranian ownership is one which has been “taken as true at this [preliminary] stage of the litigation and which Plaintiffs must establish in order to prevail at judgment.”<sup>212</sup>

The Supreme Court has held that the appropriate burden of proof shifts over the course of litigation:

At the pleading stage, general factual allegations of injury resulting from the defendant’s conduct may suffice . . . . In response to a summary judgment motion, however, the plaintiff can no longer rest on such ‘mere allegations,’ but must ‘set forth’ by affidavit or other evidence ‘specific facts,’ . . . . And at the final stage, those facts (if controverted) must be ‘supported adequately by the evidence adduced at trial.’<sup>213</sup>

This exposition serves as a roadmap for the increasing burden of proof that must be met by the Rubin plaintiff to prevail in this case.

### C. Reaching the Merits

In the highly unlikely event that the courts do not resolve the litigation on either the legal issues presented by the FSIA and the TRIA, or the procedural issues just discussed, some kind of factual hearing would commence. A fact-finder would be called upon to adjudicate, under the appropriate legal framework, whether Iran or the museums actually owned the antiquities in question.

The case of the Persepolis Fortification archive and the Chogha Mish collections would be different, of course. Both Iran and the Oriental Institute have agreed that the collections are owned by an instrumentality of Iran, either the National Museum of Iran or the Iranian Cultural

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<sup>212</sup> Mass. Lit., Reply Mem. of Law of Trustee Process Resp’ts. in Supp. of their Mot. for Recons. (Docket #79), at 5.

<sup>213</sup> Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992).

Heritage Organization.<sup>214</sup> They have stipulated that the Persepolis Fortification collection is on long-term loan from the 1930s. The Institute is obligated to return, and has in fact returned some portions of, the collection to these Iranian entities. Likewise, the Chogha Mish collection has been on long-term since the 1960s and must ultimately be returned to Iran.<sup>215</sup>

Thus, the factual issue of ownership need only be resolved regarding the Field Museum's Herzfeld Collection and Harvard's and the MFA's more sprawling Persian antiquities collections. A key issue would likely be the applicability and scope of an Iranian law from 1930 which regulates the export of national antiquities. It is entitled, "Law concerning the preservation of national antiquities," and covers, "[a]ll works of art and movable and immovable creations which have been produced in Iran, as well as all historical sites."<sup>216</sup>

### *Positions of the Litigants*

The 1930 law is a powerful weapon for the plaintiffs. Its clear object is to protect and preserve for Iran all "national antiquities," which is defined very broadly.<sup>217</sup> Several of the specific provisions may well have been violated by Dr. Herzfeld or other archaeologists working in Iran after 1930. Article 13, for example, provides, "Excavations on land belonging to private individuals may be undertaken only with the authorization of the State and the consent of the owner."<sup>218</sup> Similarly, Article 17 prescribes, "Persons wishing to trade in antiquities must obtain a State license. A State license is also required to export antiquities." As record keeping at that

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<sup>214</sup> Ill. Lit., The Islamic Rep. of Iran's Mem. in Supp. of its Mot. for a Protect. Order (Docket #182), at 1–2.

<sup>215</sup> Id.

<sup>216</sup> Iranian Export Law of 1930, *supra* note 159.

<sup>217</sup> Id.

<sup>218</sup> Id., art. 13.

time was weak and the Iranian government's bureaucracy fledgling,<sup>219</sup> it could be extremely difficult to ascertain whether these provisions were adhered to.

Pointing to these provisions and others, the plaintiffs would likely have a strong case that individuals who removed "national antiquities" after the law's passage did so illegally. In that case, those objects would remain "under the protection and control of the State."<sup>220</sup>

The third-party respondents might contest the law's applicability in several ways. First, they might argue that all the objects in their collection were excavated from Iran before 1930. Harvard has already argued, for example, that certain Persian reliefs in its collection were donated to it by Grenville L. Winthrop on his death in 1937.<sup>221</sup> It might also have evidence that Mr. Winthrop did not collect during the last seven years of his life. Similarly, the Field Museum may argue that Dr. Herzfeld, from whom it purchased the Herzfeld Collection, acquired his objects before the law went into effect.

The museums might also argue that even if the objects were excavated and exported after 1930, the law's requirements were complied with. It is up to the plaintiffs, they would argue, to prove that the collectors did not obtain the proper governmental permits.<sup>222</sup> The fact that Iran has never contested ownership of the property would further support the museums' claims. Indeed, it is conceivable that Iran possesses copies of the appropriate records or has some particularized knowledge of the collectors' actions. If no documents were discovered, the burden of proof would be important. Whoever needed to carry the burden would have a difficult time doing so.

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<sup>219</sup> Reza Khan (more commonly known as Reza Shah) took power following a military coup in 1921.

<sup>220</sup> Iranian Export Law of 1930, *supra* note 159, art. 1.

<sup>221</sup> See Part III, *supra*, note 67. See also Mass. Lit., Mem. of Law of Harvard Parties in Supp. of Mot. to Quash Summons and to Diss. Attach. by Trustee Process (Docket #17), at 2.

<sup>222</sup> See Ill. Lit., Field Museum's Reply in Supp. of its Mot. for Entry of Protect. Order (Docket #110), at 9 ("If the Plaintiffs believe that they have some claim to the Herzfeld Collection, they must identify the basis for that claim. They must then carry the burden of proving that claim, whatever it may be.").

A third argument would be that once the objects left Iran, they were no longer governed by Iranian law. It was up to the Iranian customs agents to stop the objects' export if that export violated Iranian law. Once the objects were outside of Iran, the importing nation's border agents had no obligation to enforce Iranian law.<sup>223</sup> Although it is true under American law that "a thief cannot pass good title,"<sup>224</sup> the collectors are not thieves unless U.S. law imposes a penalty for those who break foreign export laws.<sup>225</sup>

#### *Decisions of the Illinois and Massachusetts Courts*

Neither court has adjudicated the merits of Iran's potential ownership of the antiquities. Applying the Iranian export law of 1930 would be an interesting endeavor for a federal district court, as no American court has yet to do so. Doctrines of private international law would serve as the touchstone for the courts.<sup>226</sup>

#### *Conclusions*

The ultimate determination of whether Iran still holds title to the Persian antiquities is, of course, highly dependent on the evidence presented by both sides. More information would undoubtedly be produced concerning the original excavation and exportation of the antiquities from Iran. It is doubtful any individuals who participated would still be alive to testify about the events surrounding the excavations, which took place in the early part of the 20th century. The outcome would, therefore, more likely turn on contemporaneously written notes in journals and

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<sup>223</sup> Cf. Posner, *supra* note 186 (arguing that only exporting nations can enforce their export restrictions, as importing nations will not bother).

<sup>224</sup> E.g., *Hammer v. Thompson*, 129 P.3d 609, 613 (Kan. Ct. App. 2006); *Cochran v. Jones*, 707 So.2d 791, 793 (Fla. Ct. App.4th 1998); *Mattson v. Commercial Credit Business*, 723 P.2d 996, 998–99 (Ore. 1986).

<sup>225</sup> See, e.g., Paul M. Bator, *An Essay on the International Trade in Art*, 34 *Stan. L. Rev.* 275, 287 (1982) (arguing that "The fact that an art object has been illegally exported does not in itself bar it from lawful importation into the United States . . .").

<sup>226</sup> See generally 44B *Am. Jur. 2d International Law* § 1 (2007).

the examination of any relevant Iranian export licenses. Iran's help in searching its archives would be of enormous help.

The museums' first two potential arguments, if sufficiently supported, might prove persuasive. It is likely that if the museums could produce evidence of a general nature that indicated much of their collection came from certain excavations that took place prior to 1930, or from excavations conducted thereafter with the consent of the government, a fact-finder would rule in their favor. They would not have to establish in detail the provenance of every item in their Persian collections. The burden of attempting that nearly impossible feat would seem too much.

The third potential argument—that Iran's export laws don't apply outside of its sovereign territory—would almost certainly carry the day for the museums. International law is quite clear that importing nations are under no obligation to enforce the export laws of foreign nations.<sup>227</sup> Although a UNESCO treaty from 1970<sup>228</sup> and subsequent Congressional legislation<sup>229</sup> have taken the edge off this hard rule, neither was in effect when the museums were collecting their Persian antiquities. Hence, the museums were under no obligation to refrain from purchasing the objects, even if they were illegally exported.

This final argument showcases the gulf that sometimes exists between moral intuitions and the realities of international law. It seems wrong *morally* for the museums to argue that a rich country like America should not help enforce the export laws of a poorer nation like Iran. One can forcefully argue that Americans should not turn a blind eye to the unlawful pillaging of

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<sup>227</sup> See generally Bator, *supra* note 222, at 287 (“The fundamental general rule is clear: The fact that an art object has been illegally exported does not in itself bar it from lawful importation into the United States . . .”).

<sup>228</sup> UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231 (1972), 10 Int'l Legal Materials 289 (1971).

<sup>229</sup> Convention on Cultural Property Implementation Act, 19 U.S.C. §§ 2601 through 2613 (1982), Pub. L. No. 97-446, 96 Stat. 2329, approved January 12, 1983; as amended by Pub. L. No. 100-204, 101 Stat. 1331, approved December 22, 1987

Persian heritage. Yet *legally* there is no such duty. International law—especially before the 1970 UNESCO treaty—creates no obligation to enforce the cultural property export laws of foreign nations. Even after the passage of UNESCO and other treaties, enforcement of foreign export law is usually a matter of bilateral negotiations.<sup>230</sup>

#### **Part IV. Conclusion**

The legal and factual issues presented by the Rubin litigation are novel, interesting, and complex. It should be no surprise, then, that the Illinois case has been pending since December 29, 2003, and the Massachusetts litigation since February 10, 2005. As of this writing, neither has reached conclusion at the district court level. Moreover, once Judge Manning in Illinois and Judge O’Toole in Massachusetts issue their final decisions, respectively, the parties will undoubtedly continue their struggle for several more years in the federal courts of appeals. As discussed above,<sup>231</sup> there is considerable reason to believe that certain legal holdings of each judge could be overturned in those appeals.

The implications of these decisions are likely to spread quite quickly through the rest of the antiquities world. Dealers, private collectors, museums, auction houses, and even nation-states have an interest in the Rubin litigation, as the fate of these important Persian antiquities could be a harbinger of things to come. A final outcome in which the Rubin plaintiffs are free to assert Iranian ownership of the museums’ objects, attach them in a court of law, and order their auction to the highest bidder in satisfaction of their judgment would have profound consequences for all cultural property located in the United States. That outcome—highly unlikely under the

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<sup>230</sup> E.g., Importation of Pre-Columbian Monumental or Architectural Sculpture of Murals, Pub. L. No. 92-587, 66 Stat. 1296 (codified at 19 U.S.C. §§ 2091–2095 (1976)).

<sup>231</sup> See Part II, *supra*.

correct application of U.S. and international law—would be especially shocking to those who think “cultural property” should be treated differently than other kinds of assets.

Cultural property has been defined as “property that has some special relationship with a particular culture or nation state.”<sup>232</sup> A more detailed attempt describes it as “object[s] that embody the culture—principally archaeological, ethnographical and historical works of art, and architecture.”<sup>233</sup> The proper way to think about cultural property has been hotly debated in the modern era since at least the time of Napoleon.<sup>234</sup> The issue has surfaced most recently with respect to claims stemming from Nazi art seizures during World War II<sup>235</sup> and Italy’s efforts to recover antiquities looted during the last century.<sup>236</sup> The debate over the “specialness” of cultural property rages between two main camps: those in favor of its free movement and those in favor of its tight control.<sup>237</sup>

In the context of the Rubin litigation, those favoring free trade in antiquities would likely argue that the Persian collections should be treated like all other assets. If found to be owned by

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<sup>232</sup> Posner, *supra* note 186, at 1.

<sup>233</sup> John Henry Merryman, *The Public Interest in Cultural Property*, 77 Cal. L. Rev. 339, 341 (1989). For an even more detailed definition, see UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231, 234–36. See also B. Burnham, *The Protection of Cultural Property: Handbook of National Legislation* (B. Burnham ed. 1974).

<sup>234</sup> See John Henry Merryman, *The Free International Movement of Cultural Property*, 31 N.Y.U. J. Int’l L. & Pol. 1, 1 (1998).

<sup>235</sup> See, e.g., Carol Kino, *Stolen Artworks and the Lawyers Who Reclaim Them*, N.Y. Times, Mar. 28, 2007, at H28 (describing several recent Nazi-restitution cases); Nicholas Glass, *Paintings from the Goudstikker Collection, looted by the Nazis, are Finally Being Returned to Their Rightful Owners—And Dutch Museums are Feeling Their Loss*, Financial Times, Nov. 25, 2006, at 42 (describing the return of the Goudstikker Collection, worth \$300 million, to various heirs); Talya Halkin, *New Web Site to Help Heirs, Museums Identify Art Looted by the Nazis*, The Jerusalem Post, June 5, 2006, at 4 (describing the Swift-Find Looted Art Project).

<sup>236</sup> See, e.g., Elisabetta Povoledo, *Italy Recovers Rare Marbles*, N.Y. Times, Jan. 25, 2007, at E2 (describing the recovery of 12 marble panels); Peter Popham, *U.S. Museum Returns Looted Antiquities as Italians Stand-up for Lost Heritage and Pride*, The Independent, Oct. 1, 2006, at N15 (describing return of 13 looted pieces by Boston’s MFA); Tracy Wilkinson, et al., *Getty to Return Artworks to Italy*, L.A. Times, June 22, 2006, at A1 (describing deal between J. Paul Getty Museum and Italy for the return of “a number of very significant pieces”); Elisabetta Povoledo, *Italy and U.S. Sign Antiquities Accord*, N.Y. Times, Feb. 22, 2006, at E1 (describing return to Italy of the Euphronios krater); Tracy Wilkinson, *Getty Curator’s Trial is Delayed*, L.A. Times, July 19, 2005, at E1 (describing Italian prosecution of former-Getty curator for antiquities, Marion True).

<sup>237</sup> Professor Merryman describes “discourses” from the international free traders, the acquirers, the cultural internationalists, the source nations, and the archaeologists. See Merryman, *supra* note 230, at 9–13.

Iran, they should be immediately made available to the plaintiffs to execute upon in satisfaction of their judgment. This would lead to the salutary outcomes of plaintiffs-judgment creditors receiving funds owed them and antiquities being transferred to whoever values them the most (as judged by purchase price). For the free traders, it wouldn't matter whether the purchaser were a private collector or a museum.

Those in favor of more control over antiquities would feel affronted by the sale of the historically significant objects on the open market. While they might think it bad enough that American museums own the objects without verifiable provenances, a sale would be even worse. The collections could be split and scattered around the globe; they could be damaged or lost during shipment; and they would almost certainly never make their way back to Iran. By selling the Persian antiquities at auction, the group ownership and moral connections embodied within them would be rudely ignored.

There is no right answer to the debate between the free traders and the group preservationists. Cultural property undoubtedly has a unique place in many people's minds; whether it warrants special treatment in American courts of law is much less clear. The courts who must decide the fate of the Persian antiquities in the Rubin litigation are unlikely to reach that difficult issue, though. There are sufficient legal and factual grounds upon which they can hold that the antiquities should remain precisely where they are—in the hands of the museums. Yet even if the museums win this round, they will likely face more litigation in the future.<sup>238</sup> Sympathetic, innocent plaintiffs like those involved in this litigation can make a strong case that their rights to recovery, whether because of terrorist acts or previous thefts, should trump any more nebulous, sociological ownership claims. *Rubin v. Islamic Republic of Iran* may be only

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<sup>238</sup> See, e.g., Rebecca Mead, Den of Antiquity: The Met Defends Its Treasures, *The New Yorker*, Apr. 9, 2007, at 52–61 (showing that the Met's curator of the Greek and Roman Department, Carlos Picón, was more interested in justifying the provenance of items in his sprawling collection than discussing the new wing that housed them).

the opening salvo in a new round of litigation concerning “rightful ownership”—both moral and legal—of antiquities in the U.S.