Policy Options for the Obama Administration: The Foreign Sovereign Immunities Act as a Tool Against State Sponsors of Terrorism

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The Foreign Sovereign Immunities Act, as amended in 2008, may provide an exploitable policy lever for the Obama administration as it seeks to deal with threats posed by state sponsors of terror such as Iran and Syria. Supporting private causes of action by victims of terror is both just and good policy.

I would like to thank Ambassador John Norton Moore for inviting me to speak at the Sokol colloquium, Professor Moore is an internationally respected scholar on international law, national security law, and the law of the sea. He has been a tireless advocate for the rights of victims of torture and terrorism over the years and his efforts have produced countless dividends for the victims. He has also been my friend and colleague for almost thirty years.

I would also like to introduce the co-author of this presentation paper, Major Gabriel Lajeunesse. Major Gabriel Lajeunesse, USAF, serves in the Joint Strategic Plans and Policy Directorate (J5) of the Joint Staff as a Political-Military Planner with responsibility for the Islamic Republic of Iran and the Levant and is a graduate of Georgetown University Law Center and a Visiting Associate at Georgetown’s Institute for the Study of Diplomacy, where he teaches a class on Radical Islam and the War of Ideas. The views reflected here do not necessarily reflect the views of the Department of Defense or its components. And finally I would like to credit my associate Edward

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MacAllister at my law firm, Perles Law Firm, PC, for pulling together this presentation. Without whose efforts this presentation could never have been pulled together.

This presentation explores whether the vindication of lawsuits against state sponsors of terrorism is able to further U.S. foreign policy goals. The answer is and has been clearly yes. I will provide you with concrete examples to support the hypothesis. First I would like to take some time to fill you in on recent events in anti-state sponsor ship of terrorism litigation.

For advocates representing American victims of international terrorism, 2008 was a year of significant developments. In January 2008, Congress passed the 2008 National Defense Authorization Act (“NDAA”), P.L. 110-181, § 1083, amending the Foreign Sovereign Immunities Act (“FSIA”) to provide an explicit, private right of action against state sponsors of terrorism. The legislation was designed to address a 2004 opinion issued by the United States Circuit Court of Appeals for the District of Columbia Circuit that held that FSIA provided a cause of action against individual agents in their personal capacity only, rather than against the foreign state itself—forcing claimants to seek remedies under domestic state law, if available. The 2008 amendment allowed for recovery of monetary damages to include economic damages, solatium, pain and suffering, and punitive damages; “in any such action, a foreign state shall be vicariously liable for the acts of its officials, employees, or agents.”

An early application of the amended law was seen on September 26, 2008, when Judge Rosemary M. Collyer, of the U.S. District Court for the District of Columbia, handed down a judgment for over $400 million to the survivors of Jack Armstrong or Jack Hensley, two American contractors who were brutally murdered by al-Qa’ida in Iraq
(AQI) in *Gates v. Syrian Arab Republic*. The judgment was rendered against the Arab Republic of Syria—held liable for the murders via the federal cause of action under the amended FSIA for Syria’s material support to Zarqawi and AQI.\(^v\)

The amended FSIA also contains a new provision that judgment may be enforced against any property “titled in the name of any defendant, or titled in the name of any entity controlled by any defendant” expanding the scope of liability to state owned enterprises.\(^vi\) This extension of liability could make FSIA judgments significantly more threatening to state sponsors than they have been previously, particularly if honored in foreign jurisdictions.

In addition to the expanded relief afforded by the amended FSIA, 2008 saw unprecedented support from the political branches of government in holding Libya accountable for its support of terrorism. In January 2008, the U.S. District Court for the District of Columbia ruled on behalf of a group of American families under the FSIA, awarding a $6 billion judgment against Libya in connection with the 1989 bombing of UTA Flight 772.\(^vii\) Libya, anxious to reestablish relations with the United States, was unable to make much progress as State Department officials and member of Congress blocked rapprochement until the claims were satisfied.\(^viii\) In August, the governments of Libya and the U.S. reached an agreement where Libya agreed to pay the U.S. $1.5 billion in settlement of all outstanding claims.\(^ix\) Though many victims were dissatisfied with this result and felt that the U.S. government made a politically expedient settlement at the expense of the victims and survivors, the level of U.S. government participation in the vindication of private causes of action was unique.\(^x\) While it may have been preferable to
see more done on behalf of victims, U.S. government support for the Libyan cases was vital to their eventual settlement.

The executive branch has typically taken a dim view of such private actions against state sponsors of terrorism; viewing them as interfering with the President’s foreign affairs powers: “undermin[ing] the President’s ability to combat international terrorism and other threats to national security by permitting the wholesale attachment of blocked property, thereby depleting the pool of blocked assets and depriving the U.S. of a source of leverage…”

President Clinton’s infamous reversal of policy—on the one hand supporting the creation of the Flatow Amendment which introduced a cause of action against supporters of terrorism, while later fighting against the Flatow family as Iranian judgment creditors in U.S. court on behalf of Iran to protect Iranian assets in located in the United States—provides another example of the kind of political football that can often occur.

Last year’s resolution of the Libya cases for its state sponsorship of terrorism provides an illustration of how advocates for victims of state sponsorship of terrorism can provide ammunition to the State Department in its advancement of U.S. policy and how the two can work together to achieve their goals. The primary cases that drove the deal with Libya forward were the Lockerbie Pan Am 103 bombing, the LaBelle discotheque bombing case and the UTA Flight 177 bombing. It had been U.S. government policy to bring Libya into the community of law abiding nations on the condition that they take the requisite steps towards responsible governance—giving up their WMD program, ending support to terror and accepting liability for past terrorist actions, and increasing diplomatic and commercial ties between our countries. As isolated as Libya was,
however, the U.S. executive branch had few levers with which to influence their behavior and to bring finalize the resolution of the cases against Libya already mentioned needed to take the final steps to fuller normalization of the ties between Libya and the United States.

Despite this lack of leverage, a unique U.S. private-public partnership succeeded in negotiating the transfer of $1.5 billion in Libyan funds to compensate past victims of Libyan acts of state sponsored terrorism. The partnership was comprised of Jim Kreindler, another presenter here today, and me as the legal counsel for two of the largest groups of victims, and Jonathan Schwartz of the State Department, Deputy Legal Advisor for Near Eastern Affairs. This partnership should serve as a model for future reconciliation with other countries currently outside the community of law abiding nations. Such a partnership doesn’t happen more often because of the absence of an institutional voice for victims of terrorism at the State Department. One way to fix this is to statutorily create an office of for terror victims assistance, (“LTVA”), based upon LCID – which would deal with providing assistance for U.S. victims of terrorism as LCID provides assistance to U.S. companies with foreign investment disputes.

What I will call the “Libya” model worked well because Mr. Schwartz, Mr. Kreindler and I worked so well together, even in difficult times when the partnership was strained by our interests which necessarily diverged at times and that was powerful. Unfortunately such a public private partnership has been an exception but the creation of the LTVA office would lay the groundwork for the future replication of the successful results of the Libya model. The Libya model worked in this case because Mr. Schwartz
took the unusual step of effectively serving as a quasi-institutional voice for victims of Libyan terrorism at State.

It cannot be doubted that the President has the authority to settle claims or take the lead in foreign affairs. Precedents for the President’s power to enter into agreements with foreign nations to settle monetary claims are seen in cases such as *Dames & Moore*, *Garamendi*, *Pink*, and *Belmont*. Nonetheless the executive branch’s constitutional prerogative over these private causes of action does not automatically mean that it is good policy to exercise the power and trump the private claim. In addition to the moral rationale—doing our very best to make victims of horrific acts of terrorism whole—there is a significant public policy reason for supporting these actions. If state sponsors of terrorism come to realize a cost for their malicious activities, they may reevaluate their policies. Even if private causes of action do not cause an immediate shift in state policy, these lawsuits provide another avenue for attacking the malignant influence of state sponsors of terrorism such as Syria and Iran. As recently described by journalist Robin Wright, the U.S. Treasury Department has found that private industry itself provides a significant financial tool against terror.\[xiv\] If industry is convinced that doing business with a state sponsor poses greater risk than benefit, they will simply stop doing business.

Honest bankers and financial institutions also experience difficulty in compliance with anti-money laundering statutes. This will only be exacerbated as financial institutions are forced to adopt unfamiliar internal compliance standards as a result of the wide-ranging extension of anti-money laundering regulations by the Patriot Act.

Fact patterns become interesting when a terrorist atrocity is committed in combination with evidence of a violation of an anti-terrorist, anti-money laundering,
criminal statute by a financial institution. The victims of the terrorism act could allege that their injury was a foreseeable result of the breach of the criminal statute by the financial institution. While the plaintiffs would have to overcome several obstacles, no financial institution would welcome the prospect of having to litigate against victims of terrorism.

In June 2003, I constructed a path of hypothetical financial institution liability for the Journal of Bank and Lender Liability. In 2004 that hypothetical became a reality. Scores of claims were brought against the Arab Bank of Jordan, located in Brooklyn, New York, and headquartered in Amman, Jordan. The case is captioned *Litle v. Arab Bank* and was brought in the Eastern District of New York. The following is an excerpt from a Wall Street Journal article written by Glen Simpson on April 20, 2005.

NETANYA, Israel – Two blocks from the beach on a spring day here in March 2003, a 20-year-old Palestinian named Rami Ghanem walked up to the London Cafe and blew himself up, shattering the cafe's 15-foot-high windows and seriously wounding more than 35 people.

A few weeks afterward, Mr. Ghanem's father received at least $14,000 from an account at Jordan's Arab Bank PLC -- money that was delivered thanks to a local Islamic charity, according to Israeli documents.

The *Litle* lawsuit is based upon the transfer of almost 100 million dollars from various fundraisers in Saudi Arabia and elsewhere to charitable front groups for terrorist organizations and families of Palestinian suicide bombers. During the Second Intifada, or Palestinian uprising, any Palestinian suicide bomber who blew himself or herself up, or was imprisoned while trying, was eligible to receive a cash amount from Middle Eastern donors, usually from Saudi Arabia. The Arab Bank funneled a majority of these funds through its New York branch, where the funds were converted to U.S. dollars, to the Bank’s Palestinian branches where family members could present martyr certificates and
collect their martyr subsidy. Palestinians knew that their families would be paid $5300.00 dollars should they perform a suicide bombing. This funding scheme was nothing short of a solicitation for murder.

The Arab Bank’s 12(b) Motion to Dismiss in this case has been denied and discovery is in its final stages. The matter is expected to go to trial in late 2009.

Numerous lawsuits based upon the similar fact patterns against two banks separate from the Arab Bank have been brought by a number of the Arab Bank plaintiffs. *Strauss v. Credit Lyonnais* and *Weiss v. National Westminster Bank*. Motions to dismiss in the United States District Court for the Eastern District of New York have likewise been denied in both cases. The Comptroller of the Currency has fined the Arab Bank for lax anti-money laundering programs at its Brooklyn branch, which serves us another example of how civil litigation compliments the work of governmental bank regulators. The financial services industry is closely monitoring the Arab Bank litigation. If civil litigators can strike at banks that facilitate the movement of funds to terrorist groups, perhaps, like governmental actors, we can help deter future acts of terrorism.

Lawsuits that target commercial facilitators of acts of terrorism, whether the facilitation was inadvertent or not, will make banks look harder at suspicious transactions, which will make banks less useful for moving funds for these purposes. This applies to banks that move money for Iran or Syria or for other state sponsors of terrorism as well. Cutting these states off from the global economy in this manner could have greater impact on their decision making calculus than other sanctions activity—sparking the kind of internal debate that could drive change, as described by former Under Secretary of the Treasury Stuart Levy. xv
The amended FSIA provides leverage in this arena by providing an expansion of means to recover from foreign state owned assets and enterprises. The threat of a judgment attaching to such properties would make industry wary of doing business with state sponsors of terror, particularly in countries which provide for full faith and credit to foreign civil judgments. While the Libyan desire for rapprochement provided a unique point of leverage, U.S. officials can still do much to aid in cases with unrepentant state sponsors of terror by simply taking a non-obstructive posture towards civil actions, and allowing private judgment creditors to pressure the state sponsors of terrorism. Further, the U.S. government could help by identifying state owned assets in the United States and (in conjunction with U.S. allies) abroad. These properties are often hidden in a web of front companies that victims would have difficulty identifying.xvi

Should the executive branch follow the Libya model, thereby reversing its trend of resisting the successful resolution of private actions against state sponsors of terrorism, and choose to use these private suits as levers against state sponsors, the FSIA could have an impact in not only compensating victims, but causing state sponsors of terror to recalculate the costs of their behaviors. The Obama administration should seriously consider the value of this potential tool in the continued struggle against violent extremists and the states that support them.

The Obama Administration should consider another example of the benefits that flow from cooperation with advocates for victims of state sponsored terrorism. As a result of efforts by private claimants, the state sponsor of the Khobar towers bombing was publicly exposed by trial lawyers after the FBI was prevented from investigating the attack by the Saudi government. As Louis Freeh detailed in a Wall Street Journal op-ed
in July 2006, the United States government decided not to pursue the investigation into the Iranian angle due to prevailing geopolitical considerations. President Clinton was supporting the rise of then Iranian President Khatami, the Iranian reformist in hopes (in retrospect, unfounded) that Khatami could usher in a new era of US-Iranian relations. The executive branch is constitutionally privileged to sacrifice private interests in the pursuit of foreign policy and national security objectives of the U.S. Luckily for the Khobar towers victims and the U.S. government, the FSIA allows for lawsuits against those designated as state sponsors of terrorism. Here, a law firm took the case and pursued it—resulting in a judgment against Iran. This allowed for the public exposure of that regime’s guilt, something the Clinton Administration could not afford to do at the time. Nonetheless, because of the FSIA incentives, victims of that horrendous attack and their counsel were able to investigate the attack and bring its perpetrators before the world. This allowed the U.S. government to disclaim responsibility in its dialogue with the Iranian government as President Clinton pursued rapprochement.

Several of my cases have publicized the state sponsors of infamous attacks where the U.S. government was unwilling or unable to devote resources to the investigation, or where geopolitical considerations constrained overt their involvement. We successfully brought a case in the District Court for the District of Columbia against Iran for its complicity in the 1983 Marine barracks bombing in Beirut, Lebanon that caused the death of over 240 servicemen, captioned Peterson v. the Islamic Republic of Iran. Judge Royce Lamberth authored a May 30, 2003 opinion that adjudged Iran liable based upon the clear and convincing evidence linking Iran to the 1983 attack. Subsequently, Judge Lamberth entered a judgment against Iran in excess of $2.6 billion.
This important case exposed Iran’s involvement in the attacks. While those in intelligence circles were aware of Iran’s complicity, that fact hadn’t reached wider public circulation until the court awarded this judgment and the news was carried on cnn.com and went around the world. Frankly it happened so long ago that some people forget, but this is an important terrorist attack to remember for another reason. Bin Laden was inspired to bomb the two U.S. embassies in Africa in 1998 by the Marine barracks bombing. American soldiers are “paper tigers,” Osama bin Laden told ABC News in 1998. “The Marines fled after two explosions.” Our withdrawal from Lebanon led Bin Laden to believe that he could blast the United States out of Africa to protect his then home base in the Sudan. And while Bin Laden himself withdrew from the Sudan in the late 1990s, Al Qaeda activity in the horn of Africa remains a top U.S. concern.

Another potential claim that we are examining is the case of Peter Burks, who was tragically killed while serving his country in Iraq. His death was caused by a unique IIED that fires a copper molten slug at armored vehicles to penetrate the armor and cause catastrophe. The Army was able to recover these IIEDs and their discharged rounds after an attack that left Peter Burks dead. It is now conclusive that these rounds are manufactured inside Iran for the sole purpose of killing American troops in armored vehicles in Iraq and are transported across the Iranian border and given to insurgent groups for that purpose. This is accomplished with Iranian government knowledge and facilitation. The Burks case is the perfect example of where advocates for victims of state sponsored terror are willing and able to go farther in a public and overt nature more than their government is able, at the present time. I would like to mention that Peter’s
father Alan Burks is with us today and I would like to acknowledge his presence and the steep sacrifice that his family has made for this country.

    Alan tells me that Pete’s life continues to inspire people to good acts. Alan and Pete’s fiancée run a non-profit foundation, their website is [www.unsungherofund.org](http://www.unsungherofund.org). The foundation has sent care packages to soldiers in Iraq and Afghanistan and provides humanitarian supplies for use in building connections with local citizens in Iraq and Afghanistan, including school supplies, soccer balls and clothing. “Anything that can help to close the gap of understanding between their young people and us.” Since December, they have sent more than three tons of supplies to soldiers throughout Iraq and Afghanistan with money raised for the Unsung Hero Fund. American Airlines actually donated a flight on April 8 this year to the foundation to allow for the delivery of an airplane full of charitable goods for American soldiers and the Iraq people. My firm is preparing to file a case on Mr. Burk’s behalf to address Iran’s arming of illegal combatants to sponsor terrorist attacks against U.S. nationals, in this case in Iraq.

    These types of cases significantly increase the cost of state sponsorship of terror through punitive and compensatory damages and expose what would otherwise be secret networks for the facilitation of terror. These case also make doing business more difficult, as financial institutions increasingly scrutinize transactions. These cases may act as a type of private sanction—forcing corporations doing business with state sponsors of terror to think twice if their actions could make them liable in U.S. courts. Based upon past experience, the Obama administration should cooperate, even if in an unofficial capacity, because these lawsuits further U.S. government foreign policy goals, by creating serious disincentives for continuity of state sponsorship of terror.
Congress passed the law after providing for Presidential waiver authority to the application of the law to the Government of Iraq following a veto over concerns of how the legislation would affect the fledgling democracy in Iraq.


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


For background see Families Who Sued Libya See Their Victory Voided U.S. Pact Nullifies $6 Billion Award in ’89 Bombing Over Africa By Kimberly Kindy Washington Post Staff, Tuesday, December 23, 2008


For background see Clinton Shields Iran from U.S. Justice Blocks Restitution to Families of Victims Murdered By State-Sponsored Terrorists, Western Journalism Center, 28 Sep 2000 available online at http://www.wnd.com/news/article.asp?ARTICLE_ID=20214


For example, a high rise in New York City was recently seized by US authorities—owned on paper by the Assa Corporation but which acted on behalf of the Treasury designated terror facilitator, Iran’s Bank Melli. See Lee Ross, Feds Seize New York Office Building Tied to Iranian Government, Fox News, 17 Dec 08, available online at http://www.foxnews.com/story/0,2933,468804,00.html

