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A RIGHT WITHOUT A REMEDY: HOW ONE CINCINNATIAN'S STORY ILLUSTRATES TERRORISM VICTIMS' INABILITY TO OBTAIN COMPENSATION UNDER THE FOREIGN SOVEREIGN IMMUNITIES ACT

*Christopher T. Colloton**

I. INTRODUCTION

On January 2, 2016, officials at Pyongyang Sunan International Airport arrested twenty-one-year-old Otto Warmbier, a native son of Wyoming, Ohio, a quiet suburb of Cincinnati.[1] Abruptly and without explanation, Otto was seized just as he was set to return home from a five-day trip to the Democratic People's Republic of Korea ("DPRK"), the infamously secretive nation more commonly known as North Korea.[2] Warmbier, an honors student at the University of Virginia, was accused of having perpetrated a "hostile act" against the DPRK at the purported behest of the U.S. government.[3] Almost two months passed from the time Otto was initially detained until he was next seen.[4] On February 29, 2016, North Korea's state-run news agency televised Otto "confessing" to his alleged crime: trying to steal a propaganda poster exalting former North Korean dictator Kim Jong-Il from an off-limits area of his hotel.[5] In a series of

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1. Conor Finnegan & Meghan Keneally, *Timeline of Otto Warmbier's Saga in North Korea*, ABC NEWS (June 19, 2017, 5:41 PM), https://abcnews.go.com/Politics/timeline-otto-warmbiers-saga-north-korea-released/story?id=48015088 [https://perma.cc/JU5B-54C5].

2. *Id.*; *see also 2018 Country Reports on Human Rights Practices: Democratic People's Republic of Korea*, U.S. DEP'T. OF STATE, https://www.state.gov/reports/2018-country-reports-on-human-rights-practices/democratic-peoples-republic-of-korea [https://perma.cc/6X9F-Z69M] (referring to the Democratic People's Republic of Korea by the abbreviations "DPRK" or "North Korea"). The author follows this convention and uses the terms "DPRK" and "North Korea" interchangeably in this Comment.

3. Libby Nelson, *North Korea Has Arrested a University of Virginia Student for a "Hostile Act"*, VOX (Jan. 22, 2016, 8:11 AM), https://www.vox.com/2016/1/22/10814022/north-korea-student-arrest-otto-frederick-warmbier [https://perma.cc/T599-BRGQ] (quoting a report by KCNA, North Korea's state-run news outlet, which claimed that Otto had entered the DPRK to bring down the country's "single-minded unity" with the "tacit connivance of the U.S. government").

4. *See Detained US Student Admits 'Very Severe'—And Totally Absurd—Crime in North Korea*, VICE (Feb. 29, 2016, 10:25 AM), https://www.vice.com/en/article/gy985x/north-korea-imprisoned-us-student-confessing-crimes [https://perma.cc/KR36-KBV4].

5. *Id.*; *see also* Choe Sang-Hun, *U.S. Student Runs Afoul of North Korea's Devotion to Slogans*, N.Y. TIMES (Mar. 17, 2016), https://www.nytimes.com/2016/03/18/world/asia/us-student-runs-afoul-of-

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bizarre, outlandish, and verifiably false statements, Warmbier "admitted" to having made "the worst mistake" of his life.[6] His "confession" was replete with preposterous references, an unsettling cadence, and strange malapropisms unlikely to be used by any American.[7] Against this backdrop, Otto's testimony should only be viewed as a blatantly coerced statement, one that was likely made under extreme psychological and physical duress.[8] Then, on March 16, 2016, Otto was convicted of state subversion and sentenced to fifteen years of hard labor after a one hour "trial."[9] It was the last time Otto would be seen for more than a year.[10]

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north-koreas-devotion-to-slogans.html [https://perma.cc/LC3S-9DNR] (noting the slogan read: "Let's arm ourselves strongly with Kim Jong-Il's patriotism!").

6. *Detained US Student Admits 'Very Severe'—And Totally Absurd—Crime in North Korea*, *supra* note 4. In his recorded "confession," Otto stated that a deaconess from the Friendship United Methodist Church in Wyoming, Ohio had offered him a used car in exchange for a "trophy" from North Korea. *Full Press Conference with Otto Frederick Warmbier*, YOUTUBE (Oct. 23, 2017) [hereinafter *Full Press Conference*], https://www.youtube.com/watch?v=eiVLUPLcILU [https://perma.cc/8MH5-YYYK]. Otto also said the Z Society, a secretive organization at the University of Virginia, had encouraged him to take the poster. *Id.* A senior pastor at the Friendship United Methodist Church confirmed Otto was not a member of its congregation, and a spokesperson for the Z Society stated that Warmbier had never contacted the group. *Id.*

7. In one of his most peculiar statements, Otto said he had brought his "quietest boots, the best for sneaking" to commit his crime and repeatedly asserted he had been the "political victim" of the "United States' hostile policies against the DPR Korea." *Full Press Conference*, *supra* note 6. Otto offered another ostensible explanation for his transgression: he stated that if he was detained and could not return from the DPRK, the Friendship United Methodist Church would pay his mother $200,000 to fund his younger siblings' college expenses. *Id.* Sung-Yoon Lee, a professor of Korean studies at Tufts University and an expert on North Korea and its treatment of detainees, testified that in Korean culture, custom demands the eldest child "make great sacrifice[s]" for his younger siblings and subsidize their college tuition. Transcript of Evidentiary Hearing at 108-113, 128-129, Warmbier v. Democratic People's Republic of Korea, 356 F. Supp. 3d 30 (D.D.C. 2018) (No. 18-977), ECF No. 29. Professor Lee opined that Otto's statements were "clumsy North Korean contraptions" and evidence that the DPRK "imposed" this content in his confession. *Id.*

8. Several former North Korean detainees who were forced to give manufactured confessions have recounted their experiences. Anna Fifield, *The Strange Ways North Korea Makes Detainees Confess on Camera*, WASH. POST (Feb. 29, 2016, 9:45 AM), https://www.washingtonpost.com/news/worldviews/wp/2016/02/29/north-koreas-recipe-for-bargaining-detained-westerner-script-tv-cameras/ [https://perma.cc/U7BY-2WVL]. Jeffrey Fowle, an American who was detained by North Korea in 2014, stated that before his first television appearance while in custody, he was encouraged to "put some emotion into it." *Id.* Merrill Newman, a California man arrested in North Korea in 2013, told news outlets he tried to signal that he made his confession under duress by "emphasiz[ing] the strange language that the North Koreans had crafted for me to say." *Id.*

9. Ross Sylvestri, *North Korea Sentences American Student to 15 Years of Hard Labor*, PBS NEWS HOUR (Mar. 16, 2016, 6:14 PM), https://www.pbs.org/newshour/world/north-korea-sentences-american-student-to-15-years-of-hard-labor [https://perma.cc/W4MJ-66VL].

10. Finnegan & Keneally, *supra* note 1; *see also* Deirdre Shesgreen, *Otto Warmbier's Father: 'I Want My Kid Home. He Doesn't Deserve This'*, CINCINNATI ENQUIRER (May 19, 2017, 1:58 PM), https://www.cincinnati.com/story/news/politics/2017/05/19/warmbier-family-marks-another-moment-sons-life-hold/101878248/ [https://perma.cc/YK6U-76DA] (noting that as of May 2017, Warmbier's parents had "no idea where [Otto] [wa]s detained or what his surroundings [we]re like").

The U.S. government, which maintains no formal diplomatic relationship with North Korea,[11] condemned Warmbier's sentence and demanded his immediate release.[12] The fifteen months that followed Otto's trial proceeded in agonizing silence; his family and friends anxiously awaited any information on his whereabouts, but no such update ever came. To make matters worse, tensions between the United States and North Korea escalated to historic levels and experts were uncertain how newly-elected President Donald Trump would approach relations with the elusive country.[13] In the summer of 2017, however, it became clear that the Trump Administration had been working for months to secure the release of every U.S. hostage in North Korea, including Otto.[14] In early June, the State Department's special envoy to the DPRK, Joseph Yun, received an urgent request to meet with North Korea's representative to the United Nations in New York City.[15] There, Yun learned that Otto had been "in a coma" for over a year, allegedly having contracted botulism shortly after his sentence.[16] In the wake of this revelation, U.S. Secretary of State Rex Tillerson directed Yun to travel to the DPRK and secure Otto's release on international humanitarian grounds.[17]

On June 13, 2017, Otto was medically evacuated from North Korea and landed at Cincinnati's Lunken Airport late that evening.[18] A prompt assessment by physicians at the University of Cincinnati Medical Center revealed a grim reality: what was termed a "coma" by his captors was not that at all—rather, Otto was in a state of "unresponsive wakefulness," having suffered "extensive brain damage."[19] His head had been shaved,

11. Bureau of E. Asian & Pac. Affs., *U.S Relations with the Democratic People's Republic of Korea*, U.S. DEP'T OF STATE (Aug. 23, 2021), https://www.state.gov/u-s-relations-with-north-korea/ [https://perma.cc/UX2W-FHKE] (noting that the U.S. relies on Swedish officials to serve as its representatives in Pyongyang).

12. Michele Keleman, *North Korean-U.S. Tensions Play Out in American Student's Arrest*, NPR (Mar. 17, 2016, 5:21 AM), https://www.npr.org/2016/03/17/470776599/north-korean-u-s-tensions-play-out-in-american-student-s-arrest [https://perma.cc/8SY9-STKL] (quoting White House Press Secretary Josh Earnest, who commented that it was "clear that the North Korean government seeks to use these U.S. citizens as pawns to pursue a political agenda").

13. Nash Jenkins, *How Otto Warmbier Made It Out Of North Korea*, TIME (June 14, 2017, 3:02 AM), https://time.com/4817541/otto-warmbier-north-korea-us/ [https://perma.cc/U9M8-C3PT] (acknowledging that in April 2017, geopolitical tensions between the U.S. and DPRK rose to levels not seen since the Korean War amid reports that North Korea was preparing future nuclear missile tests).

14. *Id.* (detailing a report in which Secretary of State Rex Tillerson was instructed to secure the release of all American detainees in the DPRK).

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. Maggie Fox, *Otto Warmbier Has Extensive Brain Damage, Doctors Say*, NBC NEWS (June 16, 2017, 10:11 AM), https://www.nbcnews.com/health/health-news/otto-warmbier-has-extensive-brain-

he was blind, and he was unable to speak or respond to verbal commands.[20] Otto—the "inspiring goofball of a man" who had a knack for underground rap and thrift-store sweaters,[21] whose adventurous spirit and empathy made him "everyone's friend"[22]—had been "systematically tortured."[23] Though his family and friends clung to hopes that he might recover under the care of medical professionals in the U.S., those hopes were shattered on June 19, 2017 when—less than one week after returning to Cincinnati—Otto "completed his journey home."[24] He was twenty-one years old.[25]

In the years since Otto's untimely death, his parents Cindy and Fred Warmbier have worked tirelessly to seek justice for their son and hold the North Korean regime accountable for his barbaric treatment.[26] In April 2018, Otto's parents filed suit against North Korea pursuant to the terrorism exception to the Foreign Sovereign Immunities Act ("FSIA").[27] In December of that year, a federal judge awarded the Warmbiers a default judgment in an amount just over $500,000,000 in punitive and compensatory damages.[28] Still, at the time of the ruling, it was "unclear if the Warmbiers [would] actually receive any money from North Korea from the judgment."[29] Now, almost six years after Otto's death, his

damage-doctors-say-n773036 [https://perma.cc/7TBD-RFBQ] (quoting Dr. Daniel Kanter, who stated Otto's injuries were consistent with cardiopulmonary arrest prohibiting oxygen from reaching the brain).

20. Jason Kurtz, *'He Was On His Deathbed When He Came Home To Us'—Otto Warmbier's Father*, CNN (Sept. 27, 2017, 4:31 AM), https://www.cnn.com/2017/09/26/politics/fred-cindy-warmbier-parents-otto-north-korea-brooke-baldwin-cnn-newsroom-cnntv/index.html [https://perma.cc/ADN3-4RM7].

21. Susan Svrluga, *'Let's Bring it in': Otto Warmbier's Family and Friends Celebrate His Life at Memorial*, WASH. POST (June 23, 2017, 8:49 AM), https://www.washingtonpost.com/news/grade-point/wp/2017/06/22/lets-bring-it-in-otto-warmbiers-family-and-friends-celebrate-his-life/ [https://perma.cc/RUF9-N5AB].

22. Sallee Ann Ruibal, *My High School Classmate Otto Warmbier—Charming and Deeply Caring*, POST INDEP. (June 19, 2017), https://www.postindependent.com/news/ruibal-column-my-high-school-classmate-otto-warmbier-charming-and-deeply-caring/ [https://perma.cc/G6UW-LE4Q].

23. Kurtz, *supra* note 20.

24. *Heartbreaking Statement from the Family of Otto Warmbier*, @treyyingst, TWITTER (June 19, 2017, 4:41 PM), https://twitter.com/TreyYingst/status/876902866769891328/photo/1 [https://perma.cc/J34D-2WM5].

25. At the time of Otto's capture, he had celebrated twenty-one years of life. Svrluga, *supra* note 21. While he turned twenty-two while detained, the author believes that Otto's inhumane treatment and eventual murder by North Korean authorities should not be accounted for in a twenty-second year.

26. Veronica Stracqualursi, *Otto Warmbier's Parents 'Stand Up to Evil' in Suing North Korea for His Death*, CNN (Dec. 19, 2018, 6:24 PM), https://www.cnn.com/2018/12/19/politics/otto-warmbier-family-north-korea-hearing-civil-case/index.html [https://perma.cc/GD6Z-33TB].

27. Warmbier v. Democratic People's Republic of Korea, 356 F. Supp. 3d 30, 42 (D.D.C. 2018).

28. Chief Judge Beryl Howell of the District Court for the District of Columbia awarded the Warmbiers $501,134,683.80 in total damages. *Id.* at 69.

29. Sarah Brookbank, *Otto Warmbier: Family of American Student Held in North Korea Awarded $500 Million in Lawsuit*, CINCINNATI ENQUIRER (Dec. 24, 2018, 3:52 PM),

parents have collected only a fraction of their award[30] against the hermit kingdom.[31] Unfortunately, their story is not unique in that regard.[32] Families of Americans who have been victimized by terrorism overseas have frequently sought relief under the FSIA's terrorism exception, yet their efforts to actually recover against these rebellious nations have been largely unsuccessful.[33]

This Comment argues that the FSIA's terrorism exception provides victims of state sponsored terrorism[34] with nothing more than a right without a remedy. Section II describes the history and purpose behind the FSIA and its terrorism exception, as well as recent efforts by Congress to strengthen its stated goal of compensating victims. Section II also explores the inherent difficulties of enforcing judgments against state sponsors of terrorism. Through an examination of the Warmbiers' suit against North Korea, Section III of this Comment highlights the inadequacies of the existing compensatory mechanisms and proposes a

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https://www.cincinnati.com/story/news/2018/12/24/u-s-district-judge-awards-family-otto-warmbier-500-million/2407709002/ [https://perma.cc/39DQ-K4P2].

30. In October 2023, the U.S. District Court for the Southern District of New York awarded the Warmbiers $2,203,258.68 in funds deposited in a Bank of New York Mellon account owned by Russia's Far East Bank. The U.S. Treasury Department seized the funds after determining that the Russian bank had "provided banking services to North Korea's state-owned airline, Air Koryo." *See* Joe Smith, *US Court Awards Otto Warmbier's Parents $2.2M in Frozen North Korean Funds*, NK News (Nov. 15, 2023), https://www.nknews.org/2023/11/us-court-awards-otto-warmbiers-parents-2-2m-in-frozen-north-korean-funds/ [https://perma.cc/CD67-MCK9]. In 2022, the U.S. District Court for the Northern District of New York ruled the Warmbier family should receive $240,336.41 in funds that had been seized from a North Korean bank account and is currently held by the State Comptroller of New York. *See* Mychael Schnell, *Court Rules Warmbier Family Should Get $240,000 in Seized North Korean Assets*, HILL (Jan. 19, 2022, 2:19 PM), https://thehill.com/regulation/court-battles/590429-court-rules-warmbier-family-should-be-awarded-240-in-seized-north/ [https://perma.cc/GN2Y-VJEB].

31. Carter Eskew, *The Hermit-in-Chief*, WASH. POST (Jan. 18, 2019, 7:04 PM), https://www.washingtonpost.com/news/opinions/wp/2019/01/18/the-hermit-in-chief/ [https://perma.cc/K7YT-QKCK] ("The term 'hermit kingdom' has become shorthand in the United States for North Korea . . . it evokes North Korea's reclusive, walled-off and isolated nature.").

32. Daveed Gartenstein-Ross, *Resolving Outstanding Judgments Under the Terrorism Exception to the Foreign Sovereign Immunities Act*, 77 N.Y.U. L.J. 496, 499 (2002) (noting that "judgments entered under the terrorism exception uniformly have gone unpaid by the defendant states").

33. *Id.*; *see also* Ilana Arnowitz Drescher, *Seeking Justice for America's Forgotten Victims: Reforming the Foreign Sovereign Immunities Act Terrorism Exception*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 791, 792-96 (2012) (recanting the story of Ira Weinstein, a U.S. citizen who was killed by a suicide bomber in Jerusalem and discussing how the terrorism exception fails to deter state sponsors of terror or compensate victims).

34. The United States government has broadly defined "terrorism" and "act of terrorism." *See, e.g.*, 22 U.S.C. § 2656f (defining "terrorism" as "premeditated, politically motivated violence perpetrated against non-combatant targets by subnational groups or clandestine agents."); Exec. Order. No. 13224, 3 C.F.R. 788 (2002) (stating "terrorism" means "an activity that (i) involves a violent act or an act dangerous to human life . . . and (ii) appears to be intended . . . (B) to influence the policy of a government by intimidation or coercion . . . ."); Terrorism Risk Insurance Act of 2002, Pub. L. 197-207, § 102, 116 Stat. 2323-24 (2002) (defining "act of terrorism" as "any act that is certified by the [Treasury] Secretary, in concurrence with the Secretary of State, and the Attorney General of the United States (ii) to be a violent act or an act that is dangerous to (I) human life; (II) property; or (III) infrastructure . . . .").

redesign of one of the primary sources of compensation to simplify the collection process for individuals who hold judgments against state sponsors of terror. Section IV concludes by reiterating the need for an overhaul of the present system and explaining why the proposed statutory amendment accommodates both the interests of public policy and those who seek to recover from rogue foreign actors.

II. BACKGROUND

The concept of sovereign immunity—that a government cannot be sued without its consent—dates back to before the founding of the United States.[35] And though not originally included in the Constitution's text, a variation of this principle was later enshrined in the Eleventh Amendment, which dictates that federal courts may not exercise jurisdiction over nonconsenting state defendants.[36] While the doctrine of sovereign immunity has repeatedly been subject to fierce criticism by courts and legal scholars alike,[37] it has not only withstood these attacks, but moreover has developed several distinct applications.[38] This Comment focuses specifically on the notion of foreign sovereign immunity and how it has become incorporated into the American legal system.

Part A of this Section explores the history of foreign sovereign immunity in the United States, from early interpretation by the Supreme Court to the current scheme under the FSIA. Part B examines the terrorism exception to the FSIA, the purpose behind its enactment, as well as recent congressional amendments aimed at strengthening its

35. *See, e.g.*, Guy I. Seidman, *The Origins of Accountability: Everything I Know About the Sovereign's Immunity, I Learned from King Henry III*, 49 ST. LOUIS U. L.J. 393, 396 (2005) (referencing the English common law era maxim "the king can do no wrong" and explaining it as providing a backdrop to America's founding generation for its understanding of government accountability); THE FEDERALIST NO. 81, at 487 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (noting that sovereign immunity "is the general sense and the general practice of mankind").

36. U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity . . . against one of the United States . . . ."); *see also* Hans v. Louisiana, 134 U.S. 1, 11 (1890) (indicating that the Eleventh Amendment was ratified in direct response to the "shock of surprise" stemming from the Court's decision in Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), which allowed a South Carolina citizen's suit against Georgia to proceed, flouting the widely held belief that an unwilling sovereign state could be hauled into court by a citizen of a different state).

37. *See, e.g.*, Seminole Tribe v. Florida, 517 U.S. 44, 95 (1996) (Stevens, J., dissenting) (describing the "questionable heritage of the doctrine" and arguing sovereign immunity is "unsuitable for . . . the law of this democratic Nation"); Kenneth Culp Davis, *Sovereign Immunity Must Go*, 22 ADMIN. L. REV. 383, 384 (1970) (positing that "[c]ourts created sovereign immunity"); Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1202 (2001).

38. Katherine Florey, *Sovereign Immunity's Penumbras: Common Law, "Accident," and Policy in the Development of Sovereign Immunity Doctrine*, 43 WAKE FOREST L. REV. 765, 769 (2009) (listing various forms of sovereign immunity, including state, federal, tribal, and foreign).

objectives. Part C then outlines the collection process for individuals who have been awarded judgments under the terrorism exception. Part D examines the lawsuit brought by Otto Warmbier's parents against North Korea and how the judgment they ultimately received illustrates the inherent futility of the current collection procedure for victims of state sponsored terrorism. Finally, Part E summarizes other actions brought by Americans against North Korea and supplies an overview of the similarly hollow outcomes in those cases.

A. History of Foreign Sovereign Immunity in the U.S.

Although the United States Constitution makes no mention of foreign sovereign immunity,[39] the understanding that foreign states are immune from suit in United States courts has nevertheless long been accepted by the American judiciary.[40] The genesis of this doctrine is found in the Supreme Court's decision in *The Schooner Exchange v. McFaddon*, in which Chief Justice Marshall concluded that the United States lacked jurisdiction over a French warship that docked in Philadelphia.[41] In the decades following *Schooner*, the United States embraced a doctrine of absolute foreign sovereign immunity, a theory that reflects the "perfect equality and absolute independence of sovereigns."[42] The notion of "perfect equality" contemplated that, despite every nation possessing full jurisdiction over its territory, all sovereigns had essentially agreed to relax that jurisdictional force with respect to one another.[43] In essence, a sovereign might "degrade the dignity" of his nation by subjecting the nation to the jurisdiction of another.[44] Implicit in the absolutist view of foreign sovereign immunity is the idea that misconduct by international actors is best resolved through diplomacy—and the Executive Branch—instead of the courts.[45]

Not until the mid-twentieth century did the United States begin to withdraw from its strict adherence to the doctrine of absolute foreign

39. *See* U.S. CONST. amend. XI (describing only state sovereign immunity).

40. Florey, *supra* note 38, at 780.

41. 11 U.S. (7 Cranch) 116 (1812).

42. *Id.* at 137.

43. *Id.* ("[A]ll sovereigns have consented to a relaxation in practice . . . of that absolute and complete jurisdiction . . . ").

44. *Id.* ("One sovereign . . . being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another . . . .").

45. *Ex parte* Republic of Peru, 318 U.S. 578, 588 (1943) ("[C]ourts may not so exercise their jurisdiction, by the seizure and detention of property of a friendly sovereign, as to embarrass the executive arm of the Government in conducting foreign relations."); *see also* Clark C. Ciewert, *Reciprocal Influence of British and United States Law: Foreign Sovereign Immunity Law from the Schooner Exchange to the State Immunity Act of 1978*, 13 VAND. J. TRANSNAT'L L. 761, 767 (1980).

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sovereign immunity. In 1952, the State Department promulgated a new policy in the Tate Letter,[46] in which the Department indicated it would adopt a new "restrictive" posture toward foreign sovereign immunity.[47] Under this approach, foreign governments would remain immune for "purely governmental" acts but would be liable for private or commercial misconduct.[48] The Tate Letter and its restrictive approach was largely aimed at facilitating and protecting free trade between American companies and foreign countries during a time in which the global economy was becoming increasingly interconnected.[49] The letter, however, offered sparse guidance for distinguishing between public and private acts,[50] and likewise suggested an overly cumbersome process to determine who would be immune from legal action.[51] In addition, because the policy existed within the State Department, it remained inherently susceptible to political impropriety and undue influence.[52] As a result, determinations of foreign sovereign immunity were inconsistent and often made in a puzzling, case-by-case manner.[53]

1. The Foreign Sovereign Immunities Act of 1976

Congress responded to the unpredictable application of sovereign

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46. Jack Tate, acting legal adviser to the Department of State, wrote a letter to the Attorney General announcing a new, restrictive theory of foreign sovereign immunity. *See* John M. Niehuss, *International Law—Sovereign Immunity—The First Decade of the Tate Letter Policy*, 60 MICH. L. REV. 1142, 1142 (1962).

47. *Id.*

48. *Id.*; *see also* New York & Cuba Mail S.S. Co. v. Republic of Korea, 132 F. Supp. 684, 686 (S.D.N.Y. 1955) (in which the State Department characterized the damage done to the libellant's steamship by a Korean barge during the unloading of a cargo of rice as "commercial").

49. *See* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 699 (1976) (noting that the "policy supporting the restrictive view . . . is to assure those engaging in commercial transactions with foreign sovereignties that their rights will be determined in courts whenever possible."); *see also* E. Perot Bissell V & Joseph R. Schottenfeld, *Exceptional Judgments: Revising the Terrorism Exception to the Foreign Sovereign Immunities Act*, 127 YALE L.J. 1890, 1893 (2018).

50. Drescher, *supra* note 33, at 798.

51. The two-step process for resolving a foreign state's claim of immunity was as follows:

> [T]he diplomatic representative of the sovereign could request a "suggestion of immunity" from the State Department. If the request was granted, the district court surrendered its jurisdiction. But "in the absence of recognition of the immunity by the Department of State," a district court "had authority to decide for itself whether all the requisites for such immunity existed." . . . [A] district court inquired "whether the ground of immunity is one which it is the established policy of the [State Department] to recognize."

Samantar v. Yousuf, 560 U.S. 305, 311-12 (2010) (quoting *Ex parte* Republic of Peru, 318 U.S. 578, 581, 587 (1943) and Republic of Mexico v. Hoffman, 324 U.S. 30, 36 (1945)).

52. Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 487 (1983) (recognizing that "political considerations led to suggestions of immunity" where immunity would otherwise not have been available under the restrictive theory).

53. *Id.* at 488; *see also Samantar*, 560 U.S. at 312.

immunity by enacting the FSIA in 1976.[54] As a general rule, the FSIA prohibits American citizens from bringing a lawsuit against foreign states and their instrumentalities[55] in federal and state courts.[56] In effect, the statute codified the restrictive theory of foreign sovereign immunity and reassigned the responsibility of resolving "claims of foreign states to immunity" from the Executive to the Judicial Branch.[57] Further, notwithstanding the historical circumscription of foreign sovereign immunity—from a wholly absolutist approach to a more flexible, albeit variable, standard—the FSIA's starting point remains a presumption that foreign actors are exempt from liability in U.S. courts.[58]

Still, the FSIA enumerated several exceptions to this general premise of immunity, including: (1) waiver, (2) commercial activity, (3) expropriation of property in violation of international law, (4) noncommercial torts occurring within the United States, (5) international agreements, and (6) certain counterclaims.[59] Notably absent from this list is any exception for acts of state sponsored terrorism committed against U.S. citizens on foreign soil.[60] Thus, as originally enacted, the FSIA precluded American citizens who had been victimized by terrorist activities abroad from filing suit against the foreign states responsible.[61] As U.S. courts regularly dismissed such actions, many individuals were denied the opportunity for meaningful redress; one prominent example was the families of the victims of the 1988 bombing of Pan Am Flight 103 over Lockerbie, Scotland.[62]

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54. Opati v. Republic of Sudan, 140 S. Ct. 1601, 1605 (2020).

55. The FSIA defines instrumentality as "any entity (1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and, (3) which is neither a citizen of a State of the United States . . . nor created under the laws of any third country." 28 U.S.C. § 1603.

56. 28 U.S.C. § 1604 ("[A] foreign state shall be immune from the jurisdiction of the courts of the United States and of the States . . . .").

57. *Samantar*, 560 U.S. at 313 (quoting 28 U.S.C. § 1602).

58. 28 U.S.C. § 1602 ("The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice . . . ."); *see also* Drescher, *supra* note 33, at 799-800.

59. 28 U.S.C. § 1605(a); *see also* Daveed Gartenstein-Ross, *A Critique of the Terrorism Exception to the Foreign Sovereign Immunities Act*, 34 N.Y.U. J. INT'L L. & POL. 887, 895 (2002).

60. Gartenstein-Ross, *supra* note 32, at 502-03 ("There was no exception allowing suit against nation-states for acts of terrorism . . . .").

61. *Id.*

62. Drescher, *supra* note 33, at 801 (noting that U.S. courts "routinely dismissed" cases brought against foreign states by American citizens who alleged violations of human rights); *see also* Smith v. Socialist People's Libyan Arab Jamahiriya, 101 F.3d 239, 247 (2d Cir. 1996) (concluding that, notwithstanding the "horrific" act of terrorism at issue, the district court properly identified it lacked jurisdiction over Libya under the FSIA).

B. The Terrorism Exception to the Foreign Sovereign Immunities Act

In 1996, Congress responded to public outcry by adding the "terrorism exception" to the FSIA as part of the Antiterrorism and Effective Death Penalty Act ("AEDPA").[63] The terrorism exception provides that

> [a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act.[64]

Additionally, the exception establishes a private right of action that enables U.S. nationals to seek monetary damages against culpable foreign states.[65]

To invoke this exception under the FSIA, a U.S. citizen-plaintiff must satisfy the following four elements: (1) the foreign state was designated as a state sponsor of terrorism either at the time of the act or was so designated as a result of the act and remains so designated when the suit is filed; (2) either the claimant or the victim was a U.S. national at the time of the act; (3) if the act occurred in the defendant foreign state, the claimant gave the foreign state a reasonable opportunity to arbitrate the claim; and (4) the act or the provision of material support for the act was performed by an official, employee, or agent of the foreign state acting within the scope of their duty.[66]

Under this exception to the FSIA, the initial baseline for subjecting a foreign state to the jurisdiction of U.S. courts is a determination that the foreign state has been designated as a State Sponsor of Terrorism ("SST"). The State Department—specifically, the Secretary of State— is responsible for identifying and classifying SSTs.[67] Because the Executive

63. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221, 110 Stat. 1214, 1241 (codified as amended at 28 U.S.C. § 1605); *see also* Gartenstein-Ross, *supra* note 59, at 896 (noting that Congress passed AEDPA in large part to provide recourse for the victims of the Lockerbie disaster who had earlier been denied recompense, as well as to address the subsequent murder of Alisa Flatow, a U.S. college student who was killed by a suicide bomber in Israel).

64. 28 U.S.C. § 1605A(a)(1).

65. 28 U.S.C. § 1605A(c) (allowing for economic damages, solatium, pain and suffering, and punitive damages). The FSIA's terrorism exception gives the term "national of the United States" the meaning as defined by the Immigration and Nationality Act. 28 U.S.C. § 1605A(h). *See also* Mohammadi v. Islamic Republic of Iran, 782 F.3d 9, 14 (D.C. Cir. 2015) (quoting 8 U.S.C. § 101(a)(22) of the Immigration and Nationality Act to define "U.S. national" as either a "citizen of the United States" or a person who, though not a U.S. citizen, "owes permanent allegiance to the U.S.").

66. 28 U.S.C. § 1605A(a)(2).

67. The State Department designates a country as an SST if the government of that country has "repeatedly provided support for acts of international terrorism." *Country Reports on Terrorism 2021*, U.S. DEP'T OF STATE, https://www.state.gov/reports/country-reports-on-terrorism-2021/

Branch controls this threshold requirement, a potential plaintiff's availability to sue a foreign nation depends largely on political considerations.[68] Consequently, before a plaintiff can even initiate a lawsuit, they must often engage in costly, time-consuming lobbying efforts—some that span multiple presidencies—to have the particular foreign state categorized with the requisite SST label.[69] As of April 2023, the U.S. has designated just four countries as SSTs: Cuba, Iran, Syria, and North Korea.[70]

Congress's efforts to actually implement the terrorism exception have not been without difficulty.[71] Just five months after the AEDPA's passage, Congress passed the Civil Liability for Acts of State Sponsored Terrorism Act, more commonly known as the Flatow Amendment, which clarified that the terrorism exception (1) allowed for private causes of action[72] and (2) enabled plaintiffs to recover punitive damages, which had previously been unavailable under the statute.[73] As victims of terror began to bring legal actions against SSTs under the newly amended FSIA, several important questions emerged.[74] First, had Congress merely abrogated the immunity of foreign states for instances of state sponsored

[https://perma.cc/MRC5-BRAT]. Once a country has been designated, it remains as such until the classification is removed in accordance with statutory criteria requiring the certification of the President. *Id.*; *see also State Sponsors of Terrorism*, U.S. DEP'T OF STATE, https://www.state.gov/state-sponsors-of-terrorism/ [https://perma.cc/4TUJ-739K] (indicating the Secretary of State derives their authority to designate countries as SSTs from three laws: § 1754(c) of the National Defense Authorization Act for FY 2019, § 40 of the Arms Export Control Act, and § 620A of the Foreign Assistance Act of 1961).

68. Jocelyn Trainer, *To Designate or Not? Russia and SST Status*, LAWFARE (Nov. 29, 2022, 9:45 AM), https://www.lawfareblog.com/designate-or-not-russia-and-sst-status [https://perma.cc/G5WP-Q7AL] (noting "there is scant political support from the White House or the State Department to label Russia as an SST" and illustrating the inherently political calculations that go into such classifications).

69. *See* Deirdre Shesgreen, *Otto Warmbier's Parents Push Lawmakers, White House For North Korea Terror Designation*, USA TODAY (Oct. 4, 2017, 7:12 PM), https://www.usatoday.com/story/news/nation-now/2017/10/04/otto-warmbiers-parents-push-north-korea-terror-designation/733831001/ [https://perma.cc/3JGM-RXEY] (detailing efforts by the Warmbiers and a bipartisan group of twelve senators, led by Sen. Rob Portman (R-OH) and Sen. Mark Warner (D-VA), to add North Korea back on the list of countries that the U.S. considers to be SSTs).

70. *State Sponsors of Terrorism, supra* note 67.

71. Drescher, *supra* note 33, at 801 (acknowledging that the FSIA terrorism exception has been modified several times).

72. *Id.* at 802 (noting that the Flatow Amendment "allows for private causes of action"); *see also* JENNIFER K. ELSEA, CONG. RSCH. SERV., RL31258, SUITS AGAINST TERRORIST STATES BY VICTIMS OF TERRORISM 1 (2008), https://sgp.fas.org/crs/terror/RL31258.pdf [https://perma.cc/75N6-QWUU] (stating that the Flatow Amendment was intended to create a cause of action after a court found the initial terrorism exception did not, by itself, create a right to a private cause of action).

73. Joseph Keller, *The Flatow Amendment and State-Sponsored Terrorism*, 28 SEATTLE U.L. REV. 1029, 1031 (2005) (describing Congress's amendment as a result of the lobbying efforts of Stephen Flatow, the father of Alisa Flatow, an American woman who was killed in a terrorist attack in the Gaza Strip).

74. *Id.* at 1031 (indicating that courts struggled to interpret the precise meaning of the Flatow Amendment); *see also* Opati v. Republic of Sudan, 140 S. Ct. 1601, 1606 (2020).

terrorism, or had it *truly* gone further to create a new "federal cause of action" to address acts of terror?[75] Similarly, courts contemplated whether the Flatow Amendment had created a private cause of action against a foreign state itself or only against an official, employee, or agent of a foreign state.[76] Ultimately, the U.S. Court of Appeals for the District of Columbia Circuit concluded in *Cicippio-Puleo v. Islamic Republic of Iran* that establishing a cause of action against foreign states *themselves* was a step "Congress ha[d] yet to take."[77] After the court's decision in *Cicippio-Puleo*, Congress amended the FSIA again, this time as part of the National Defense Authorization Act ("NDAA") for Fiscal Year 2008.[78] The NDAA moved the state sponsored terrorism exception from its original statutory home to a new section of the U.S. Code and created an explicit federal cause of action against foreign states for acts of terror.[79]

Under the terrorism exception and its clarifying amendments, courts have awarded American terror victims billions of dollars in damages against various foreign states.[80] Most of these judgments have come by way of default, as the defendant nations usually refrain from appearing in court to challenge the claims against them.[81] To be sure, it is no surprise that these countries, who routinely flout international law and commit brazen acts of terror, also choose not to comply with the rules of the American legal system.[82] Nonetheless, the FSIA's terrorism exception accounts for this reality and expressly allows courts to enter default judgments where a plaintiff establishes their "claim or right to relief by

75. *Opati*, 140 S. Ct. at 1606.

76. *Compare* Price v. Socialist People's Libyan Arab Jamariyah, 294 F.3d 82, 87 (D.C. Cir. 2002) (acknowledging "there is a question . . . whether the FSIA creates a federal cause of action for torture and hostage taking *against foreign states*"), *and* Roeder v. Islamic Republic of Iran, 195 F. Supp. 2d 140, 171 (D.D.C. 2002) ("What the 1996 Anti-terrorism Act did *not* do was create a private cause of action for the victims of state-sponsored terrorism. . . . [V]ictims . . . had to look to other laws to provide a cause of action against the foreign state.") (emphasis added), *with* Cronin v. Islamic Republic of Iran, 238 F. Supp. 2d 222, 231 (D.D.C. 2002) ("[T]he Court holds that the Flatow Amendment does provide victims . . . with a cause of action against the culpable foreign state.").

77. 353 F.3d 1024, 1034 (D.C. Cir. 2004) (holding that the 1996 amendments to the FSIA only established a private right of action against the officials, employees, and agents of a foreign state and not against the foreign state *itself*).

78. *Opati*, 140 S. Ct. at 1606 (describing the 2008 amendment to the FSIA); *see also* National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1083, 122 Stat. 3, 338 (codified as amended at 28 U.S.C. § 1605A).

79. *Opati,* 140 S. Ct. at 1606 (stating that § 1083 of the 2008 NDAA replaced 28 U.S.C. § 1605(a)(7)—the former terrorism exception—with 28 U.S.C. § 1605A); *see also* ELSEA, *supra* note 72, at 40-41 (noting that President Bush vetoed the initial version of the 2008 NDAA, but signed a later version that Congress reworked to authorize the Executive to waive all provisions of § 1083 with respect to Iraq).

80. Bissell & Schottenfeld, *supra* note 49, at 1890, 1897 (stating that as of 2018, American plaintiffs had received at least $50 billion in judgments against Iran alone).

81. *Id.* at 1897.

82. *Id.*

evidence satisfactory to the court."[83] But while American plaintiffs have typically been able to meet this burden and win judgements against SSTs, their efforts to actually collect on their awards have proven far more difficult.[84]

C. The Collection Procedure for Victims of State Sponsored Terror

Just as the FSIA presupposes that foreign states are immune from the reach of U.S. courts, the FSIA also confers an initial grant of immunity from attachment or execution.[85] In this way, the FSIA affords foreign sovereigns two primary forms of immunity: jurisdictional and execution.[86] Yet, it is settled that Americans may bring legal actions against foreign countries under the terrorism exception to the FSIA. Because any such efforts would be pointless without a corresponding ability to recoup from the defendant states, the FSIA once again departs from its presumptive rule that property owned by foreign sovereigns is immune from attachment and execution.[87]

Section 1610 of the FSIA enumerates several conditions under which property owned by a foreign state that is "used for a commercial activity in the United States" is stripped of its immunity from attachment or execution.[88] In particular, the statute permits plaintiffs who receive a judgment under Section 1605A—the terrorism exception—to seek to attach to a foreign sovereign's property in an effort to collect on their award.[89] In addition, any property owned by a foreign state's "agency or instrumentality" can be subject to attachment or execution in judgments handed down under the terrorism section.[90] Yet in practice, these provisions have proved largely unworkable for victims of state sponsored terror.[91] This impracticality exists primarily for two reasons.[92] First,

83. 28 U.S.C. § 1608(e).

84. ELSEA, *supra* note 72, at 2 (acknowledging that as of 2008, American victims of terrorism had been awarded more than $19 billion against state sponsors of terrorism but that most of the money "remain[ed] uncollected").

85. 28 U.S.C. § 1609 (stating that "the property in the United States of a foreign state shall be immune from attachment, arrest, and execution except as provided in [Section] 1610 . . . of this chapter").

86. Republic of Argentina v. NML Capital, Ltd., 573 U.S. 134, 142 (2014).

87. 28 U.S.C. § 1610 (listing the exceptions to general attachment and execution immunity).

88. *Id.*

89. *See* § 1610(a)(7) (stating that judgments rendered under Section 1605A can be satisfied through attachment and execution on property of a foreign state "regardless of whether the property is or was involved with the act upon which the claim is based").

90. *See* § 1610(b).

91. ELSEA, *supra* note 72 ("The limited availability of defendant States' assets for satisfaction of judgments has made collection difficult.").

92. Alyssa N. Speichert, *The Persepolis Complex: A Case for Making the Collections Process*

foreign state sponsors of terror often own little property that is both located within the United States and used for commercial activity so as to satisfy Section 1610's requirements.[93] Furthermore, any assets that *do* meet those requirements are commonly blocked or frozen by the U.S. government itself to accomplish foreign policy objectives.[94] As a result, the terrorism exception leaves American victims with nothing more than a right without a remedy—the federal government "promis[es] with one hand what it takes away with the other."[95]

1. Congressional Amendments to Facilitate the Collection Process

As plaintiffs amassed judgments without any real means for recovery, Congress, on several occasions, attempted to ease the collection process.[96] In 1999, Congress created a new exception that allowed assets of foreign nations that had been blocked by the U.S. government pursuant to economic sanctions[97] to be subject to attachment or execution in aid of judgment satisfaction.[98] This new exemption further mandated that the Treasury Secretary and the Secretary of State "make every effort to fully, promptly, and effectively assist any judgment creditor . . . in identifying, locating, and executing against the property" of a foreign SST against whom a judgment had been issued.[99] Facing opposition by the Clinton Administration, however, Congress addressed the then-President's

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Easier Under Section 1610(g) of the Foreign Sovereign Immunities Act for Victims of State-Sponsored Terrorism, 2017 MICH. ST. L. REV. 547, 573.

93. *Id.*

94. *Id.*; *see also* OFF. OF FOREIGN ASSETS CONTROL, U.S. DEP'T OF THE TREASURY, TERRORIST ASSETS REPORT 12-14 (2020), https://ofac.treasury.gov/media/912651/download?inline [https://perma.cc/LGR5-4GZV] (declaring that as of December 31, 2020, assets blocked due to their association with SSTs included $140.76 million in funds, encompassing rental proceeds from certain diplomatic and consular property, as well as other real and tangible property).

95. *In re* Islamic Republic of Iran Terrorism Litig., 659 F. Supp. 2d 31, 55 (D.D.C. 2009).

96. Bissell & Schottenfeld, *supra* note 49, at 1897 ("Congress has passed a variety of laws allowing victims to get partial payouts of their judgments . . . .").

97. The plaintiffs in *Flatow v. Islamic Republic of Iran*, 76 F. Supp. 2d 16 (D.D.C. 1999) and *Alejandre v. Republic of Cuba*, 996 F. Supp. 1239 (S.D. Fla. 1997) sought to attach Iranian and Cuban assets in the U.S. that had been frozen by the U.S. government. ELSEA, *supra* note 72, at 7. Iran's assets had been blocked under the International Emergency Economic Powers Act ("IEEPA") during the 1979 Iran Hostage Crisis and Cuba's assets had been blocked since the 1960s under the Trading with the Enemy Act ("TWEA"). *Id.* Notably, President Clinton opposed these efforts on foreign policy grounds, arguing that they were necessary strategic tools to resolve disputes with other countries and that using blocked assets to compensate victims of state sponsored terrorism might leave the U.S. susceptible to similar treatment by other countries around the world. *See id.*

98. *In re* Islamic Republic of Iran Terrorism Litig., 659 F. Supp. 2d at 55-56; *see also* Omnibus Consolidated and Emergency Supplemental Appropriations Act for Fiscal Year 1999, Pub. L. No. 105-277, § 117, 112 Stat. 2681-1, 2681-491 (codified at 28 U.S.C. § 1610(f)(1)(A)).

99. ELSEA, *supra* note 72, at 8 (quoting the language of 28 U.S.C. § 1610(f)(1)(A)).

concerns about diminished diplomatic leverage by providing that the President may waive any provision "in the interest of national security."[100] Frustrated by this waiver authority, the next Congress in 2000 passed the Victims of Trafficking and Violence Protection Act, which directed the U.S. Treasury to compensate plaintiffs with judgments against Iran or Cuba out of a specially-created fund.[101]

Then, in 2002, Congress enacted the Terrorism Risk Insurance Act ("TRIA").[102] Section 201 of the TRIA bypassed objections by the Clinton and Bush Administrations and requires frozen assets of terrorist States be used to pay the compensatory portion of victims' judgments.[103] But while the TRIA finally addressed many of the problems that "previously plagued victims," its progress was somewhat incomplete.[104] Terrorism judgment holders still could not use blocked assets to satisfy punitive awards, and the President retained the power to make "asset-by-asset" determinations that a waiver of attachment was necessary for national security purposes.[105]

To help end the "long, bitter, and often futile quest for justice"[106] endured by the many victims of state sponsored terrorism, Congress in 2008 added Section 1610(g) to the FSIA, which allows attachment of and execution against property owned by a foreign SST or any of its agents or instrumentalities regardless of the five enumerated factors (the "Bancec factors") that courts had previously considered.[107] Several courts and numerous legal scholars understood Section 1610(g) as establishing an

100. *Id.* (noting that President Clinton, upon signing the legislation, immediately exercised his waiver authority); *see also* 28 U.S.C. § 1610(f)(3).

101. *In re* Islamic Republic of Iran Terrorism Litig., 659 F. Supp. 2d at 56-57; *see also* ELSEA, *supra* note 72, at 12.

102. Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, § 201, 116 Stat. 2322, 2337 (codified as amended at 28 U.S.C. § 1610).

103. *See, e.g.*, *In re* Islamic Republic of Iran Terrorism Litig., 659 F. Supp. 2d at 57-58. The federal government frequently blocks assets through economic sanctions. *See* North Korea Sanctions Regulations, 31 C.F.R. § 510.201 (listing prohibited transactions involving blocked property).

104. Estate of Heiser v. Islamic Republic of Iran, 807 F. Supp. 2d 9, 15 (D.D.C. 2011).

105. Drescher, *supra* note 33, at 804 (noting that the President "continued to prevent the unfreezing of assets"); *see also* Terrorism Risk Insurance Act § 201. While the Executive maintained power to waive attachment of blocked assets, the TRIA limited this authority to "any property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular relations"—in other words, diplomatic properties could *not* be used to satisfy judgments. *Id.*

106. *In re* Islamic Republic of Iran Terrorism Litig., 659 F. Supp. 2d at 46.

107. 28 U.S.C. § 1610(g)(A)–(E), also known as the "Bancec factors," originated from *First National City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983), and were used to determine if a foreign state and its agents or instrumentalities were sufficiently "alter egos" of one another such that any property of the agent or instrumentality could be attached to compensate victims of state sponsored terrorism attacks. *Id.* at 619. In adopting § 1610(g), Congress deliberately repealed these factors to make it easier for plaintiffs to satisfy their judgments. *See* Sam Dougherty, *What Then Must We Do?: Why* Rubin v. Islamic Republic of Iran *Leaves Victims of State Sponsored Terror Attacks with Few Good Options*, 60 B.C. L. REV. 1453, 1463 (2019).

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independent exception to attachment and execution immunity for *all* property under the FSIA, as it makes no requirement that the property be used for a commercial purpose.[108] Other courts reached a contrary conclusion—that Section 1610(g) is not a freestanding exception to attachment and execution immunity for terrorism judgments, and that plaintiffs must still satisfy the commercial activity requirements denoted elsewhere in Section 1610.[109] Despite readily accessible evidence demonstrating that Congress not only wanted to expand the number of assets available for attachment, but also the *type* of assets that could be used,[110] the Supreme Court endorsed the latter view in *Rubin v. Islamic Republic of Iran*, concluding that Section 1610(g) must be employed in conjunction with the rest of the statute.[111]

Recognizing that American victims of terrorism, especially those who hold judgments against foreign states whose assets are primarily located *outside* the U.S., continue to face daunting collection efforts, Congress most recently established the Justice for United States Victims of State Sponsored Terrorism ("USVSST") Fund.[112] The USVSST Fund is financed by (1) penalties or fines stemming from violations of U.S. economic sanctions and (2) the sale of property seized by the U.S. government as part of its sanctions enforcement.[113] Since the first payout

108. *See, e.g.*, Bennett v. Islamic Republic of Iran, 825 F.3d 949, 960 (9th Cir. 2016), *abrogated by* Rubin v. Islamic Republic of Iran, 138 S. Ct. 816 (2018); Wyatt v. Syrian Arab Republic, 800 F.3d 331 (7th Cir. 2015) (permitting plaintiffs to attach to funds owned by the Syrian government held by a U.S. bank), *overruled by* Rubin v. Islamic Republic of Iran, 830 F.3d 470 (7th Cir. 2016); Calderon-Cardona v. Democratic People's Republic of Korea, 723 F. Supp. 2d 441, 458 (D.P.R. 2010) (stating that § 1610(g) "significantly eases enforcement of judgments" entered under the terrorism exception); Dougherty, *supra* note 107, at 1463; Speichert, *supra* note 92, at 581.

109. Rubin v. Islamic Republic of Iran, 830 F.3d 470, 487 (7th Cir. 2016) (holding that §1610(g) is not itself an exception to execution immunity for terrorism-related judgments, but instead only abrogates the Bancec factors).

110. *See, e.g.*, H.R. REP. NO. 110-477, at 1001 (2008) (Conf. Rep.) ("[Section 1610(g)] would also expand the ability of claimants to seek recourse against the property of that foreign state . . . by permitting any property in which the foreign state has a beneficial ownership to be subject to execution of that judgment."); 154 CONG. REC. 500 (2008) (statement of Senator Frank Lautenberg, one of the authors of § 1610(g)) ("Another purpose of my provision is to facilitate victims' collection of their damages from state sponsors of terrorism."); *Bennett*, 825 F.3d at 961 ("That [legislative] history suggests that § 1610(g) was meant to allow attachment and execution with respect to any property whatsoever . . . .").

111. 138 S. Ct. at 827 (2018). After the Seventh Circuit denied the Rubin plaintiffs' request to enforce their $72 billion judgment against Iran by attaching to ancient Persian artifacts owned by Iran but housed at the Chicago Field Museum, a split was created with the Ninth Circuit, which interpreted § 1610(g) more broadly to allow attachment irrespective of the commercial activity requirements. *See* Dougherty, *supra* note 107, at 1468-69. The Court resolved the split by affirming the Seventh Circuit's view, "declin[ing] to read into the statute a blanket abrogation of attachment and execution immunity for § 1605A judgment holders absent a clear indication of Congress'[s] intent." *Rubin*, 138 S. Ct. at 825.

112. 34 U.S.C. § 20144; *see also* U.S. VICTIMS OF STATE SPONSORED TERRORISM FUND, http://www.usvsst.com/ [https://perma.cc/3JKK-F68K].

113. 34 U.S.C. § 20144(e); *see also* Daniel Wertz, *Private Litigation Against the North Korean Government: Overview and Policy Implications*, THE NAT'L COMM. ON NORTH KOREA (Aug. 2021),

in 2017, the USVSST Fund has made four distributions to eligible claimants, totaling over $3 billion.[114] Each of these occurred on a pro rata basis.[115]

In a controversial move, the USVSST Fund was split in half in 2019, when Congress empowered family members of 9/11 victims, who had been excluded from making claims out of the USVSST Fund, to seek disbursements.[116] With the pool of eligible claimants widened, the USVSST Fund's already limited resources were instantly spread more thin.[117] While this measure had the unfortunate effect of inflaming tensions between victims of state sponsored terrorism and 9/11 families, it also had a more immediate result: further prolonging all of the victims' prospects of complete financial recovery.[118]

Generally speaking, there is a shared consensus among Americans that compensating victims of terrorism is an appropriate and worthy remedy.[119] Indeed, Congress's assortment of legislation aimed at simplifying the collection process for these victims mirrors this sentiment. Even so, the terrorism exception to the FSIA does not, by its own terms, aid the collection process. To the contrary, the FSIA's abrogation of

https://www.ncnk.org/resources/briefing-papers/all-briefing-papers/private-litigation-against-north-korean-government [https://perma.cc/FPP5-ARXA].

114. The Fund compensates: (1) parties who hold final judgments against SSTs, (2) hostages held in the U.S. embassy in Iran from 1979 to 1981 and their spouses and children, and (3) personal representatives of a deceased individual in one of the first two categories. *Frequently Asked Questions*, U.S. VICTIMS OF STATE SPONSORED TERRORISM FUND, http://www.usvsst.com/faq.php [https://perma.cc/4P33-5DAA]; *see also* DEP'T OF JUST., SPECIAL MASTER'S REPORT REGARDING THE FOURTH DISTRIBUTION 5 (Jan. 2023), http://www.usvsst.com/docs/USVSSTFundCongressionalReport_Jan2023.pdf [https://perma.cc/4QWR-R3RJ].

115. The USVSST Fund is administered pro rata—based on the amounts outstanding and unpaid on eligible claims, until such amounts have been paid in full or the Fund is closed. DEP'T OF JUST., SPECIAL MASTER'S REPORT REGARDING THE FOURTH DISTRIBUTION, *supra* note 114, at 2. Presently, the Special Master, the individual who administers the Fund, divides the total amount of the Fund in half, with 50% going to non-9/11 related victims of terrorism and the other 50% going to victims harmed by 9/11. *Id.* at 8. The Fund is currently scheduled to sunset in 2039. *See* 34 U.S.C. § 20144.

116. David Lerman, *An Agonizing Dispute Among Terror Victims*, ROLL CALL (Jan. 16, 2020, 5:00 AM), https://rollcall.com/2020/01/16/an-agonizing-dispute-among-terror-victims/ [https://perma.cc/WJU3-2TZA] (explaining that victims of state sponsored terrorism and 9/11 families have been pitted against each other); *see also* JENNIFER K. ELSEA, CONG. RSCH. SERV., JUSTICE FOR UNITED STATES VICTIMS OF STATE SPONSORED TERRORISM ACT: ELIGIBILITY AND FUNDING (2023), https://crsreports.congress.gov/product/pdf/IF/IF10341 [https://perma.cc/NYT8-U2N6] (noting that in 2019, Congress extended eligibility for the USVSST Fund to families of 9/11 victims, who had previously been barred from payment from the USVSST Fund because they had already been compensated out of the September 11th Victim Compensation Fund).

117. Lerman, *supra* note 116 (explaining that "the greater number of claims made on the fund, the longer each recipient must wait to collect . . . . Tensions among victims seemed all but inevitable.").

118. *Id.*

119. *See generally* Deborah Mostaghel, *Wrong Place, Wrong Time, Unfair Treatment? Aid to Victims of Terrorist Attacks*, 40 BRANDEIS L.J. 83-4 (2001) (positing that the definition of "victim" should be broadened to guarantee more just compensation following acts of terror).

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attachment immunity is much narrower—and independent from—its general exception to jurisdictional immunity for foreign sovereigns who terrorize Americans.[120] By hinging collection on a separate statutory provision within the FSIA, American victims' already fraught path to recovery evolves into a seemingly impenetrable "legal maze."[121] Consequently, many American victims of terrorism have failed to acquire anything beyond a judgment on paper.

D. Warmbier v. Democratic People's Republic of Korea

"How can anybody be quiet when this is going on?"[122] Otto Warmbier's mother, Cindy, posed this question to a United Nations symposium in May 2018, just a week after she and her husband filed a lawsuit against North Korea for their son's hostage taking, torture, and eventual death.[123] Predictably, North Korean officials did not appear in court to dispute the Warmbiers' claims.[124] Thereafter, Otto's parents moved for default judgment, supported by multiple exhibits and testimony presented at a heart-wrenching evidentiary hearing.[125] As experts familiar with North Korean interrogation methods testified to Warmbier's probable treatment while in custody, Otto's friends—many of whom had traveled across the country for the hearing—wiped away tears.[126] Relying on that testimony, Chief Justice Beryl Howell of the U.S. District Court for the District of Columbia determined that the Warmbiers had conclusively shown that North Korea brutalized their son and used his protracted imprisonment as political leverage against the United States.[127] The court awarded Cindy and Fred Warmbier more than $500

120. Republic of Argentina v. NML Capital, Ltd., 573 U.S. 134, 142 (2014) ("The exceptions to [attachment immunity] are narrower.").

121. *Foreign Relations Law—Foreign Sovereign Immunities Act Terrorism Exceptions—Seventh Circuit Holds That FSIA Does Not Provide Freestanding Basis to Satisfy Judgement Against State Sponsors of Terrorism.*—Rubin v. Islamic Republic of Iran, 830 F.3d 470 (7th Cir. 2016), 130 HARV. L. REV. 761, 766 (2016) [hereinafter *Foreign Relations Law*] ("[V]ictims of terrorism" often have to "navigate the legal maze of exceptions to the FSIA . . . .").

122. Edith M. Lederer, *Otto Warmbier's Mom Now Speaking Out to Embarrass NKorea*, AP NEWS (May 3, 2018, 9:57 PM), https://apnews.com/article/united-nations-donald-trump-us-news-ap-top-news-north-korea-c5cc4637876a45fe8ce0a4b641cf6963 [https://perma.cc/R8HT-R8YW].

123. Warmbier v. Democratic People's Republic of Korea, 356 F. Supp. 3d 30, 36 (D.D.C. 2018) (Otto's parents sued North Korea under the terrorism exception to the FSIA).

124. *Id.* at 47.

125. *Id.*; *see also* Susan Svrluga, *In Emotional Hearing, Otto Warmbier's Family Seeks To Hold North Korea Accountable For His Death*, WASH. POST (Dec. 19, 2018, 7:30 PM), https://www.washingtonpost.com/education/2018/12/20/emotional-hearing-otto-warmbiers-family-seeks-hold-north-korea-accountable-his-death/ [https://perma.cc/Q95A-9HPT].

126. Svrluga, *supra* note 125.

127. *Warmbier*, 356 F. Supp. 3d at 47 ("[P]laintiffs have satisfactorily established that North Korea

Colloton: A Right Without a Remedy: How One Cincinnatian's Story Illustrate

million in compensatory and punitive damages.[128]

Yet, enforcing that judgment has proved extraordinarily challenging. The Warmbiers, like many terrorism judgment creditors before them, have been forced to resort to atypical recovery efforts. For example, the Warmbiers, along with the relatives of Kim Dong-shik—another American victim of the DPRK regime—claimed an interest in a North Korean cargo ship seized by the U.S. in 2019 for violation of U.N. sanctions.[129] A judge ordered the sale of the vessel for the benefit of the Warmbiers and Kim Dong-shik's relatives, but proceeds of the auction were never disclosed.[130] Two years later, Otto's parents finally secured payment toward their judgment when a federal judge in New York ordered that they receive $240,336.41 in assets seized from a North Korean bank.[131] Most recently, in October 2023, another federal court awarded the Warmbier family $2,203,258.68 in funds deposited in the Bank of New York Mellon and owned by Russia's Far East Bank.[132] The U.S. Treasury Department seized the funds after it determined the Russian Bank was an instrumentality of the North Korean government and had provided banking services to the DPRK's state-run air carrier, Air Koryo.[133] To date, these two awards are the Warmbiers' only known recoveries and amount to less than 0.5% of their total judgment.[134]

E. Other Lawsuits Filed Against North Korea Under the Terrorism Exception

The Warmbiers are not the only Americans to have sued North Korea

more likely than not barbarically tortured Otto and . . . used [his] lengthy sentence against the United States to further [its] own foreign policy objectives.").

128. *Id.* at 60 ("North Korea is liable for . . . the total damage [of] $501,134,683.80.").

129. *Id.*; *see also Seized North Korean Cargo Ship Sold to Compensate Parents of Otto Warmbier, Others*, NAVYTIMES (Oct. 9, 2019), https://www.navytimes.com/news/your-navy/2019/10/09/seized-north-korean-cargo-ship-sold-to-compensate-parents-of-otto-warmbier-others/ [https://perma.cc/2N6X-RCFR] (noting that the ship was sold at an auction overseen by U.S. Marshals, but that the winning bid amounts and identity of the buyers were not disclosed).

130. Whether Cindy and Fred Warmbier ever received payment from the sale of the ship remains unknown. *See Seized North Korean Cargo Ship Sold to Compensate Parents of Otto Warmbier, Others, supra* note 129.

131. Ethan Jewell, *US Court Awards Family of Otto Warmbier $240K Seized from North Korean Bank*, NK NEWS (Jan. 17, 2022), https://www.nknews.org/2022/01/us-court-awards-family-of-otto-warmbier-240k-seized-from-north-korean-bank/ [https://perma.cc/9J6S-EZL6] (explaining that the U.S. Treasury Department's Office of Foreign Assets Control ("OFAC") initially seized the funds from the Korea Kwangson Banking Corporation, which was determined to be an "agency or instrumentality" of the DPRK under the TRIA).

132. Smith, *supra* note 30.

133. *Id.*

134. The sum of the Warmbiers' awards from seized bank funds is $2,443,595.09. Of their total $501,134,683.80 judgment, $2,443,595.09 is 0.004874, or 0.4874%.

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without any meaningful recovery.[135] In 2008, former crew members of the U.S.S. Pueblo who were captured by the North Korean government in 1968 brought an action under the FSIA terrorism exception for their kidnapping, imprisonment, and torture.[136] The naval servicemen and their family members were awarded $66 million, marking the first successful lawsuit against North Korea in a U.S. court.[137] Other past cases include an action brought by victims injured in a Hezbollah rocket attack who claimed that North Korea provided material support to the perpetrators,[138] as well as a lawsuit brought by the families of Americans killed by the Japanese Red Army, facilitated by a North Korean intelligence agency, in the 1972 Lod Airport attack.[139] Most recently, Kenneth Bae, an American missionary who spent two years in a North Korean prison, filed suit in federal court seeking $250 million in compensation for his hostage-taking and torture.[140]

These lawsuits, along with others not discussed, have resulted in U.S courts awarding American victims over $3.7 billion in judgments against North Korea.[141] But across all of these actions, the result has been almost identical: measly, if any, recovery from what is perhaps the world's most totalitarian and repressive regime.[142] And as is clear from the Warmbiers' diligent attempts at collection, the likelihood of Pyongyang voluntarily paying recompense to these claimants is remote at best.[143] Consequently, these unresolved legal awards occupy a primarily prophylactic role, serving as significant economic leverage for the future:[144] if relations between the U.S. and North Korea *do* ever normalize, and the North Korean government *does* wish to do business in the U.S., any assets or property associated with such efforts would instantaneously become subject to attachment.

135. Wertz, *supra* note 113 (detailing private litigation efforts against the DPRK).

136. Massie v. Gov't of the Democratic People's Republic of Korea, 592 F. Supp. 2d 57 (D.D.C. 2008).

137. Wertz, *supra* note 113.

138. *Id.* (describing Kaplan v. Hezbollah, 213 F. Supp. 3d 27 (D.D.C. 2016)).

139. *Id.* (describing Calderon-Cardona v. Democratic People's Republic of Korea, 723 F. Supp. 2d 441 (D.P.R. 2010)).

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* (arguing that had the U.S. and Cuba continued to normalize relations during the Obama administration, "outstanding [terrorism] judgments would likely have presented a significant impediment to Cuban business activities in the United States").

III. DISCUSSION

The terrorism exception to the FSIA was enacted to meet three stated objectives: (1) to compensate victims of terrorism for their harm, (2) to punish foreign states that sponsor terrorist groups and actions, and (3) to broadly protect the American public by deterring terrorism.[145] In many ways, these goals are inextricable and impossible to discuss apart from one another. For that reason, this Comment focuses only on the first objective of FSIA's terrorism exception, and seeks to illustrate the inadequacy of the current statutory scheme to compensate victims as it applies to nations like North Korea, whose assets are almost exclusively located outside the U.S. and meticulously shielded from identification.

Part A of this Section considers the bevy of public policy concerns that have been lobbed at the terrorism exception to the FSIA and its goal of compensating victims. Part B argues that these public policy grounds, while sincere, should not be mutually exclusive with American victims obtaining their rightful remedy for the harm they have endured. Part B proceeds by clarifying that there must be a consequence to U.S. foreign policy—specifically, a more coherent system of victim compensation that bridges the gap between the ability to sue and the potential for recovery. However, Part B also offers a frank admission: unless and until the federal government radically overhauls its decades-long approach to rogue foreign regimes, victims of state sponsored terrorism who hold judgments under the FSIA will continue to languish in their quest for relief. Part B concludes by arguing that, despite the improbability of the U.S. government's revamping of its overarching foreign policy strategy, there is at least one more immediate—albeit imperfect—measure that can help rectify the plight of those terrorized by foreign states, including the Warmbier family.

A. Public Policy Concerns Surrounding Compensating Victims of Terrorism

Since Congress enacted the FSIA's terrorism exception, efforts to actually compensate victims of state sponsored terrorism, though well-intended, have proceeded in a piecemeal fashion.[146] What has been described by one legal scholar as a "checkerboard system of victim compensation"[147] has left judgment holders with an array of avenues from

145. 139 CONG. REC. S8344 (1993) (statement of Senator Arlen Specter).

146. *See supra* Parts II.B, II.C.

147. Sean K. Mangan, *Compensation for "Certain" Victims of Terrorism Under Section 2002 of the Victims of Trafficking and Violence Protection Act of 2000: Individual Payments at an Institutional*

which to possibly recover, though each presents its own uncertainties. In large part, the fragmented nature of the present collection scheme reveals the lingering tension between the formidable domestic political pressure to hold rogue foreign states accountable and the federal government's broader foreign policy agenda.[148]

Beginning with the FSIA's codification of the restrictive view of foreign sovereign immunity, the Executive Branch's traditional role in making policy determinations began to wane. This reduction in authority corresponds to the foremost critique of the terrorism exception: that, by its very nature, the exemption impinges upon the President's ability to effectively conduct foreign relations by allowing private plaintiffs to exert legal pressure on foreign states.[149] Thus, many commentators have argued that Congress acted with too much haste—prioritizing the interests of terror victims at the expense of potentially disastrous effects on U.S. foreign policy.[150] It has been suggested that awarding plaintiffs punitive damages under this scheme could jeopardize normalization between the U.S. and the defendant nations.[151] For example, some worried that unexecuted judgments against Iran might hinder the country's return to the global economic community following the nuclear deal between the U.S. and Iran.[152] Others have advised that foreign states whose assets are subject to attachment in this manner may retaliate with their own legislation—thereby putting American assets located abroad at risk.[153] Courts themselves have nodded to this concern, with the Supreme Court most recently, in *Rubin,* affirming the Seventh Circuit's acknowledgement that the legal barriers to attachment of foreign state assets reflect the predominant view that attachment is a "serious affront"

Cost, 42 VA. J. INT'L L. 1037, 1064 (2002).

148. *See Sovereign Immunity: Past, Present, and Future*, BROOKINGS (May 11, 2022), https://www.brookings.edu/research/sovereign-immunity-past-present-and-future/ [https://perma.cc/P26U-Z898].

149. Bissell & Schottenfeld, *supra* note 49, at 1896.

150. *See, e.g.*, Naomi Roht-Arriaza, *The Foreign Sovereign Immunities Act and Human Rights Violations: One Step Forward, Two Steps Back?*, 16 BERKELEY J. INT'L L. 71, 82 (1998) (suggesting that outstanding judgments against countries designated as SSTs may impede efforts by the U.S. to normalize relations with such states); *Sovereign Immunity: Past, Present, and Future*, *supra* note 148 (noting that many international legal experts fear that the U.S., which itself benefits from sovereign immunity around the world, may be subject to reciprocal measures by foreign states).

151. *Foreign Relations Law*, *supra* note 121, at 767 ("[F]oreign assets present in the United States are useful leverage in negotiations . . . and countries facing seizure of their property by U.S. courts might retaliate with their own similar legislation, putting American assets abroad at risk.").

152. Bissell & Schottenfeld, *supra* note 49, at 1900-01 (explaining that in 2018, the roughly $30 billion in outstanding punitive judgments against Iran represented almost a third of the amount of sanctions relief that Iran had been promised, threatening to undermine the entire agreement).

153. *Foreign Relations Law*, *supra* note 121, at 767 ("[C]ountries facing seizure . . . might retaliate with their own similar legislation . . . .").

to the defendant state's autonomy.[154]

For its own part, the Executive Branch has not sat idly by, but instead has been keen to act on these foreign policy concerns.[155] Several presidential administrations, across both major political parties, have repeatedly resisted comprehensive efforts to use foreign assets to satisfy terrorism judgments.[156] In *Alejandre v. Republic of Cuba*, for example, plaintiffs tried to collect on their terrorism judgement by attaching to Cuban assets located in the U.S. that had been blocked by the federal government since the 1960s.[157] The Clinton Administration argued that the frozen assets belonged to the United States and were useful tools to navigate diplomatic disputes with the Cuban government.[158] Consequently, unless the U.S. government waived sovereign attachment immunity (which it did not), the blocked assets could not be liquidated to satisfy private civil judgments.[159] And as explained earlier, Congress's efforts to permit attachment of these frozen assets by limiting the President's waiver authority have been relatively unavailing.[160]

Today, the same concerns of improper interference with the Executive's authority to dictate foreign policy strategy remain.[161] The Office of Foreign Assets Control ("OFAC"), housed within the U.S. Treasury Department, is responsible for administering and enforcing economic sanctions against targeted countries, including those labeled as state sponsors of terrorism.[162] OFAC is the government body that seizes assets of targeted foreign countries, thereby prohibiting them from being utilized in a variety of economic transactions.[163] With the power to freeze certain assets also comes the ability to release those assets.[164] OFAC can

154. Rubin v. Islamic Republic of Iran, 138 S. Ct. 816 (2018) (affirming the judgment of the Seventh Circuit in Rubin v. Islamic Republic of Iran, 830 F.3d 470 (7th Cir. 2016), where the court stated "seizing a foreign state's property is a serious affront to its sovereignty").

155. *Foreign Relations Law*, *supra* note 121, at 767 (pointing out that the Obama, Bush, and Clinton Administrations all opposed efforts to seize certain foreign assets to satisfy terrorism judgments).

156. *Id.*

157. 996 F. Supp. 1239 (S.D. Fla. 1997).

158. ELSEA, *supra* note 72, at 7 n.30 (explaining that when the Cuban assets were frozen in the early 1960s, TWEA gave the President the power to regulate economic activities with foreign states during times of war and during "times of national emergency").

159. *Id.*; *see also* Mangan, *supra* note 147, at 1045.

160. *See supra* Section II.C.

161. *See About OFAC*, OFF. OF FOREIGN ASSETS CONTROL, https://ofac.treasury.gov/about-ofac [https://perma.cc/7JZ8-M6PD] (explaining that the use of sanctions and the blocking of certain assets can accomplish foreign policy and national security goals).

162. *Id.*

163. *Id.*

164. *See North Korea Sanctions*, OFF. OF FOREIGN ASSETS CONTROL https://ofac.treasury.gov/sanctions-programs-and-country-information/north-korea-sanctions [https://perma.cc/3AJY-Z5RF] ("OFAC issues general licenses . . . to authorize activities that would otherwise be prohibited with regard to North Korea.").

therefore issue licenses to authorize otherwise forbidden activities with respect to blocked assets of SSTs—namely, attachment or execution of property in aid of satisfying an outstanding judgment.[165] Thus, unless the Executive Branch directs OFAC to grant a license to attach to blocked assets, a private plaintiff acting under the terrorism exception cannot attach to this property to satisfy their favorable judgment.[166] This foreign policy calculus—embodied in a very complex statutory and regulatory scheme—has produced a confounding result for victims of state sponsored terrorism: the U.S. government has created a system that simultaneously gives victims a right to sue and obtain a legal determination of fault against a foreign SST and blockades their ability to actually satisfy their judgments by attaching to frozen assets.[167]

Critics of the FSIA's compensatory structure have also questioned the role of the federal judiciary in compensating victims of state sponsored terrorism.[168] This criticism generally represents two underlying fears. First, some worry that the terrorism exception has improperly blurred the boundaries of the coequal branches of government and thus violated separation of powers principles by giving federal courts excessive authority in these instances.[169] Second, some have suggested that the frequency with which these cases are disposed of by default judgment may itself erode the legitimacy of the U.S. court system.[170]

Legal scholars have argued that the jurisdictional grant provided by the terrorism exception to the FSIA improperly forces the judiciary to wade into foreign relations, an area in which "it is ill suited" and does not belong.[171] This fear relates to a desire to ensure separation of powers boundaries are not improperly muddled and to avoid legal actions from becoming "mini foreign policy councils."[172] Some also assert that the "minimal evidentiary standard" required of plaintiffs in these types of lawsuits might lead to awards being doled out based on blatant political

165. *See* 31 C.F.R. § 510.202(e) ("Unless licensed pursuant to this part, any attachment, judgment . . . execution . . . or other judicial process is null and void with respect to any property . . . blocked pursuant to §510.201.").

166. *Id.*

167. Mangan, *supra* note 147, at 1047.

168. *Sovereign Immunity: Past, Present, and Future*, *supra* note 148 ("[T]here is good reason to doubt whether U.S. courts are well-equipped to manage disputes over conduct that largely takes place overseas"); *see also* Bissell & Schottenfeld, *supra* note 49, at 1906 (remarking that "[l]arge punitive-damages awards thrust courts into the role of foreign policy decisionmaker").

169. Mangan, *supra* note 147, at 1072.

170. *Id.*

171. *Id.* at 1073 (arguing that these cases amount to nothing more than "political determinations").

172. *Id.*; *see also* Anne-Marie Slaughter & David Bosco, *Plaintiff's Diplomacy*, 79 FOREIGN AFFS. 114 (2000) ("[C]ourts that regularly adjudicate cases against 'terrorist states' run the risk of becoming . . . political tools. The very basis of jurisdiction over foreign states in these cases . . . is itself a political decision that the court endorses.").

motivations rather than substantive legal analysis.[173] Because so many determinations in terrorism exception cases depend on lengthy and often distressing evidentiary exhibits introduced by the victims, some feel that plaintiffs often have no trouble getting a judge to make a policy determination to condemn a particular state.[174] As a result, the victims have become engaged in what has been termed "plaintiff's diplomacy," whereby the federal courts fasten an economic penalty to SSTs in furtherance of the plaintiff's own foreign policy objectives.[175] Yet, these aims may not be at all aligned with those of the entire federal government; indeed, they may be directly opposed.

Moreover, many commentators suggest that counterterrorism litigation's tendency to result in default judgments against SSTs undermines the purported deterrent function of the terrorism exception itself.[176] As discussed, the defendant foreign sovereigns who are subjected to federal court jurisdiction rarely appear in court.[177] Even though their absence is entirely foreseeable, and arguably irrelevant to the outcome of the suit, some have stressed that decisions handed down in this way begin to lose credibility due to the lack of additional scrutiny that a challenged complaint ordinarily receives.[178] In addition, foreign governments classified as SSTs by the U.S. routinely refuse to acknowledge the legitimacy of the courtroom proceedings and any subsequent judgments.[179] Because the SSTs at issue are government bodies themselves, as opposed to individual defendants who might be hauled into court more easily, defendant nations remain mostly untouchable. Just as judgments for plaintiff-victims amount to mere symbolic victories, so, too, are they fleeting and inconsequential for the countries at fault.[180] In this way, one could mistake these judgments as carrying the "imprimatur of impartiality," when in reality they might be little more than tacit

173. Bissell & Schottenfeld, *supra* note 49, at 1906-07 (noting that judges in terrorism exception cases sometimes appear to be "responding to the pressures" of the electorate).

174. Mangan, *supra* note 147, at 1073.

175. Slaughter & Bosco, *supra* note 172, at 107-11 (describing lawsuits brought against Japanese corporations who had allegedly used slave labor during World War II and litigation initiated in a U.S. federal court by victims of the 1984 chemical spill in Bhopal, India to illustrate the "plaintiff's diplomacy" phenomenon).

176. Drescher, *supra* note 33, at 810-11 ("Defendants' distance and autonomy from the United States, combined with the limitations on attaching their assets, cause SSTs to remain undeterred . . . .").

177. *Id.* at 811 ("[A] defendant from over six-thousand miles away will [typically] fail to answer the complaint or make a court appearance").

178. *Id.* (commenting that these "judgement[s] therefore lack[] the legitimacy of a fully litigated case"); *see also* Bissell & Schottenfeld, *supra* note 49, at 1897 (remarking that defendant SSTs are "deprived" of the opportunity to dispute potential misrepresentations of law or fact).

179. Drescher, *supra* note 33, at 811 (explaining that a default judgment was essentially a "dead end," as courts could not force a defendant SST to answer a complaint).

180. *Id.* (noting that plaintiffs often received court "victor[ies]," but no meaningful recourse otherwise).

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endorsements of a larger geopolitical policy agenda by the American justice system.[181]

These policy concerns continue to buttress the legal scaffolding of the FSIA's terrorism exception. And as a result, a not insignificant number of American victims are left to confront a difficult truth—that, while they might have a right to sue their foreign assailant, their prospects of meaningful recovery may stand in the way of the policy interests of the U.S. government. Though seemingly in direct conflict, these ambitions do not—and should not—have to exist at the expense of one another.

B. The False Choice Between Upholding U.S. Foreign Policy or Compensating Victims

That the Warmbiers have so far recovered only a meager portion of their $500 million judgment is—without question—no fault of their own. The hard truth is that until the U.S. government wants victims of SSTs to be made whole, the present collection and compensation scheme remains incompatible with straightforward relief. Paradoxically, this is due, largely, to the dizzying array of amendments passed by Congress to facilitate terror victims' recovery.[182] Plaintiffs like the Warmbiers could theoretically pursue several avenues in an attempt to satisfy their judgment.[183] But in reality, none of these mechanisms are "practically available, fair, or reliable."[184] To a great degree, the disjointed nature of the current compensatory structure exists because of the significant policy concerns of executive encroachment and judicial impropriety—ones that are harbored not only by certain legal scholars, but also by the U.S. government itself.

It is nevertheless possible to recognize the legitimacy and validity of the U.S.' interest in retaining control over its foreign affairs, especially as they pertain to relations with state sponsors of terrorism, without necessarily endorsing (or disparaging) such interests. In other words, whatever one might think about the federal government's decision to prioritize its own interest in cultivating international diplomacy over the

181. Mangan, *supra* note 147, at 1072 ("[F]oreign nations may see little distinction between U.S. courts and the political branches of government").

182. *See supra* Section II.C (discussing the collection procedure for victims of state sponsored terrorism).

183. Wertz, *supra* note 113 (explaining that judgment holders could use provisions under the FSIA or the TRIA to attach to North Korean assets, while the USVSST Fund provides yet another (incomplete) remedy).

184. Dougherty, *supra* note 107, at 1471 & n.114 (describing how grouping different plaintiffs from multiple attacks to provide relief can be ineffective and how diplomatic agreements between SSTs often exclude victim compensation); *see also Foreign Relations Law supra* note 121, at 768 (portraying the collection process as a "costly legal maze").

efforts of private citizens to hold SSTs to account, the reality is that the U.S. government is unlikely to reverse course. Until it does, this Comment argues that there must be a consequence to the current foreign policy approach. So long as the broader foreign policy initiatives of the federal government work to undermine terrorism judgement holders' attempts at recovery, there must be a corresponding outlet that endeavors to make these individuals whole.

1. A Reimagined USVSST Fund

The most satisfactory and efficient solution would be to establish a permanent fund dedicated to compensating American victims of state sponsored terrorism. While the USVSST Fund occupies a similar role, its shortcomings are sizeable. Presently, the Fund's financing model revolves solely on economic sanctions levied upon foreign actors.[185] This configuration means that funding for terror victims is not only indeterminate, but also subordinate to overwhelming regulatory constraints. If OFAC, and, by extension, the federal government, has seized certain assets of a foreign SST, it need not *necessarily* liquidate those assets and deposit the proceeds into the Fund. Only if it *chooses* to release any blocked assets will the funds associated with the sale of that property be directed into the Fund. Victims of terror deserve a redesigned source of compensation that relies less on the vagaries of sanctions enforcement and foreign policy disposition of the federal government.

The superior alternative would be to create a permanent fund that is financed like previous sources of compensation: by taxpayers. At first glance, such a proposal might seem controversial. One might question: why should the everyday American be required to pay for the wholly private choices of someone else who just so happened to pay the ultimate price? In Otto's case, this same query was posed repeatedly.[186] But two important considerations demonstrate that a permanent, taxpayer-funded source of victim compensation for terror victims would not be unprecedented.

First, Congress has created similar funds before.[187] Perhaps the closest

185. *See supra* Part II.C.

186. Derek Hawkins, *Professor Who Said 'Clueless White Male' Otto Warmbier Got 'What He Deserved' Won't Be Rehired*, WASH. POST (June 26, 2017, 3:17 AM), https://www.washingtonpost.com/news/morning-mix/wp/2017/06/26/professor-who-said-clueless-white-male-otto-warmbier-got-what-he-deserved-wont-be-rehired/ [https://perma.cc/PUB3-LCBT] (describing an inflammatory Facebook post made by a former University of Delaware professor, in which she referred to Otto as a "clueless white male" who "deserved" his fate).

187. September 11th Victim Compensation Fund of 2001, Pub. L. No. 107-42, § 406, 115 Stat. 240 (it is "the obligation of the Federal Government to provide for the payment of amounts for compensation under this title").

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analogue is the 9/11 Victim Compensation Fund, which provides compensation to individuals or representatives of deceased individuals impacted by the September 11th terror attacks.[188] Another example is the workers' compensation system—a widely known and integral part of the American labor force.[189] Though each state has its own compensation system for workers hurt on the job, the federal government's standard is found in the Federal Employees' Compensation Act, which is financed by congressional appropriations and guarantees payment to all federal workers who are injured or fall ill during the course of their employment.[190] Both in acknowledgement of 9/11's unprecedented horror and the rapid growth of workplace hazards and related injuries, Congress responded by articulating separate approaches to victims' compensation in these areas. In so doing, Congress made a fundamental observation: that under extraordinary circumstances, to treat certain persons as "normal" judgment creditors and subject them to the same collection procedures as typical tort victims is not only inappropriate, but also ineffective.

Second, a compensation fund configured in this way would not necessarily carry with it an implicit license of the particular actions of one victim or another, as some have been keen to suggest.[191] Instead, it would help fill the gap in terrorism victims' present inability to collect on their judgments—an impediment caused directly by the policy choices of the federal government. As a result, the U.S. would be free to operate its preferred method of international diplomacy, complete with all the attendant regulatory and statutory constraints needed to effectuate its foreign policy vision. But critically, families like the Warmbiers, who were unspeakably terrorized by the wanton actions of a global pariah, would no longer be treated like ordinary judgment creditors. This is especially true in cases involving a general scarcity of attachable assets in

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188. *Id.*

189. *See generally* SCOTT D. SZYMENDERA, CONG. RSCH. SERV., R42107, THE FEDERAL EMPLOYEES' COMPENSATION ACT (FECA): WORKERS' COMPENSATION FOR FEDERAL EMPLOYEES (2023), https://sgp.fas.org/crs/misc/R42107.pdf [https://perma.cc/JA9C-BGUU].

190. *Id.*

191. Brittney Griner, an American women's basketball star who spent ten months in a Russian prison after being convicted of "drug smuggling," faced immense backlash from her own countrymen, ostensibly because of her alleged drug possession. *See* Meredith Cash & Barnaby Lane, *The Scientific Theory of Why Some Americans Didn't Want Brittney Griner to Come Home from a Russian Prison*, INSIDER (Dec. 8, 2022, 10:45 AM), https://www.insider.com/brittney-griner-russia-prison-release-pushback-deservingness-heuristic-2022-8 [https://perma.cc/VD5L-A6D9] (noting that "some Americans were rooting against [Griner's] return" because of the "deservingness heuristic," a phenomenon in which "how someone came to be in need of assistance affects whether or not the public thinks that person should receive [that assistance]."). Though Russia is not presently listed as an SST, the criticism levied at Griner parallels Otto Warmbier's experience. *Id.* Those who objected to U.S. efforts to bring Griner home because of her purported misconduct might also feel as though compensating her or her family would amount to condoning her choices. *See* Hawkins, *supra* note 186.

the U.S. Instead of battling the many bureaucratic barriers to payment, people like Cindy and Fred Warmbier could finally receive some measure of remuneration for their inconceivable suffering.

While a reimagined USVSST Fund is perhaps the best solution to the insufficiency of the current collection process for victims of state sponsored terrorism, this Comment recognizes the multitude of institutional interests at play that make the likelihood of such a redesign decidedly small. To be sure, the Warmbiers' herculean efforts over the past six years to satisfy their outstanding judgment against North Korea illustrates this unfortunate reality.

Though they were ultimately awarded almost $2,500,000[192]from seized bank funds, those payouts came after repeated subpoenas of OFAC, from which the Warmbiers were only able to identify information leading them to *possible* attachable assets.[193] In addition, U.S. courts have provided varying interpretations of the statutory provisions relevant to these claims—namely the FSIA's terrorism exception and the TRIA—that have severely frustrated plaintiffs' ability to seize assets blocked by sanctions.[194] Finally, while the USVSST Fund has successfully distributed several payouts to victims of state sponsored terrorism, the number of outstanding claimants far exceeds the current amount of funds available.[195] Congress exacerbated this problem in December 2022 by enacting legislation providing victims of the 9/11 terrorist attacks eligibility to submit claims from the Fund.[196]

Likewise, the Executive Branch of the U.S. government, under the guise of diplomacy, has implemented additional procedural and legal barriers that unduly thwart the collection process. Victims of terrorism cannot exercise the FSIA's private right of action unless the U.S. first

192. *See* Jewell, *supra* note 131; *see* Smith, *supra* note 30.

193. *See* Unopposed Motion on Behalf of Office of Foreign Assets Control for Protective Order Authorizing Disclosure of Information Subject to the Trade Secrets Act at 1, 2, 4, Warmbier v. Democratic People's Republic of Korea, 356 F. Supp. 3d 30 (D.D.C. 2018) (No. 1:18-cv-00977).

194. *See, e.g.*, Calderon-Cardona v. Bank of New York Mellon, 770 F.3d 993, 1000-01 (2d Cir. 2014) (finding that funds which plaintiffs sought to attach could not be seized because they belonged to an "intermediary bank" and were not "owned by" North Korea for purposes of the TRIA or the FSIA § 1610(g)); Rubin v. Islamic Republic of Iran, 138 S. Ct. 816 (2018) (denying plaintiffs' request to attach to a collection of Iranian antiquities at the University of Chicago under § 1610(g) because the artifacts were not "commercial" in nature and thus did not meet the Section's other requirements, thereby strictly limiting the number and type of assets that could be used to satisfy judgments).

195. As of April 2023, there are 15,769 eligible claimants seeking payment from the USVSST Fund and $100 million available for the current round of distributions. *See* U.S. VICTIMS OF STATE SPONSORED TERRORISM FUND, *supra* note 112, If all claimants were compensated equally, each would receive a total of $6,300—far less than their average awarded judgment. *Id.*

196. *Id*; *see also* Fairness for 9/11 Families Act, Pub. L. No. 117-328, 136 Stat. 6106 (2022).

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designates the targeted foreign sovereign as an SST.[197] Because this decision is controlled by the Department of State and, by extension, the President, extensive lobbying efforts are frequently required to achieve such a classification.[198] For the same reasons, the SST designation can also change from one administration to the next; indeed, North Korea was named as an SST from 1988 until 2008, when its terrorist status was removed by President Bush in hopes the decision would spur denuclearization efforts on the Korean peninsula.[199] After costly and tiresome lobbying efforts by Otto Warmbier's parents, in 2017 President Trump relisted North Korea as an SST, clearing the way for their lawsuit.[200] Confoundingly, the sanctions imposed on North Korea by the U.S. expressly prohibit claimants from utilizing any frozen assets to satisfy their judgment without first obtaining a license from OFAC.[201] The federal government thus completes an incongruous two-part act. First, under the FSIA's terrorism exception, the government allows U.S. citizens harmed by international terror to vindicate their rights in court.[202] But then, it imposes sanctions that render that jurisdictional grant entirely useless.[203] In short, plaintiffs can sue terrorist nations, but they cannot recover from them.

Taken together, these institutional hindrances have caused many victims, the Warmbiers included, to become understandably exhausted and skeptical of the American justice system. Unless the U.S. uproots decades of foreign policy precedent and determinations, there can be no comprehensive solution that provides victims with a clear-cut path to recovery from SSTs. In the interim, though, Congress does have the ability to make incremental progress in this endeavor.

2. Amending the Terrorism Risk Insurance Act of 2002

Congress should promptly amend Section 201(a) of the TRIA to

197. *State Sponsor of Terrorism Designations*, BROOKINGS. (Dec. 29, 2022), https://www.brookings.edu/research/state-sponsor-of-terrorism-designations [https://perma.cc/UP9Y-KHQU] ("SST designation is an exception to . . . immunity and thereby opens a gate to suits . . . .").

198. *See supra* note 69.

199. Adam Taylor, *North Korea's on-Again-off-Again Status as a State Sponsor of Terrorism*, WASH. POST (Nov. 20, 2017, 5:08 PM), https://www.washingtonpost.com/news/worldviews/wp/2017/11/20/north-koreas-on-again-off-again-status-as-a-state-sponsor-of-terrorism/ [https://perma.cc/4LDP-3TBK].

200. Peter Heinlein, *Trump: US to Redesignate North Korea as a State Sponsor of Terror*, VOA (Nov. 21, 2017, 8:10 AM), https://www.voanews.com/a/north-korea-once-again-on-us-terror-list/4127943.html [https://perma.cc/H8LG-SD2K] (noting that "effort[s] to reinstate North Korea to the terror list intensified after American college student Otto Warmbier died in June [2017]").

201. *See North Korea Sanctions Regulations*, *supra* note 103.

202. *See* Part II.B.

203. *See, e.g.*, Part II.C; *see e.g.*, Part III.A.

remove the President's authority to waive attachment of diplomatic or consular property. Even if it only applies to North Korea, an authoritarian country that pays no mind to international law or basic human rights,[204] this modification to the TRIA would provide an important step in the right direction. Not only would such an amendment more faithfully effectuate the TRIA's stated purpose, but it would also represent a commonsense victory for individuals like the Warmbiers, who have been stymied by their own government in attempts to seek justice for their loved ones.

Despite its strained relationship with the global theater, North Korea maintains a headquarters for its diplomatic efforts in the heart of New York City.[205] North Korea's permanent mission to the United Nations is ostensibly dedicated to advancing the reclusive nation's diplomacy interests.[206] Yet, the so-called "New York channel"[207] belies the fact that the United States and North Korea have no formal diplomatic ties.[208] It is incoherent, then, that the federal government allows this designated state sponsor of terrorism to operate a de facto embassy in our nation's largest city. Regardless of its purported function to facilitate North Korean communication with the U.N., the building is, for all practical purposes, a diplomatic embassy.[209] As such, a sizeable North Korean asset hides in plain sight. Yet, it presently enjoys immunity from attachment under the TRIA's presidential waiver provision. If the U.S. proclaims not to engage with terrorist nations, why should *this* one be allowed to find shelter within our borders? Otto Warmbier's parents have stood up to evil.[210] The U.S. government is miserably overdue in doing the same.

IV. CONCLUSION

Exactly a year and a half after his son passed away at the hands of the North Korean regime, Fred Warmbier made a solemn plea to the U.S. District Court for the District of Columbia: "I'm here to ask the United

204. Phil Robertson, *Death of Otto Warmbier Highlights North Korea Rights Abuses*, HUM. RTS. WATCH (June 20, 2017, 11:34 AM), https://www.hrw.org/news/2017/06/20/death-otto-warmbier-highlights-north-korea-rights-abuses [https://perma.cc/7SBC-3CYF].

205. Foster Klug, *For North Korea, UN Membership Is a Key Link to Larger World*, AP NEWS (Sept. 24, 2020), https://apnews.com/article/embassies-diplomacy-new-york-north-korea-asia-d829a4fa8d26ecdbee407004a626ce03 [https://perma.cc/PW3U-GPF3] ("[T]he North also has a permanent mission at the United Nations in New York . . . .").

206. *Id.*

207. *Id.*

208. *See supra* note 11.

209. Klug, *supra* note 205 ("[T]he North's U.N. mission in New York is something of a substitute for an official embassy in Washington").

210. Stracqualursi, *supra* note 26 (quoting Cindy Warmbier: "There's nothing more evil than North Korea.").

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States of America and this court to do justice for Otto."[211] Today, only that court has lived up to Mr. Warmbier's demand. And while no remedy—legal or otherwise—can supplant reuniting victims of state sponsored terrorism with their loved ones, the terrorism exception to the FSIA serves a critical role. It exists as the singular jurisdictional vehicle for individuals like Cindy and Fred Warmbier to seek justice for indescribable acts of terrorism. To fully realize its purpose, however, plaintiffs must have ample opportunity to hold rogue foreign actors accountable—both in the interests of compensation and deterrence. Unfortunately, the current enforcement mechanisms are woefully inadequate and present an indomitable barrier to recovery. Because these obstacles are firmly grounded in delicate, likely-immovable U.S. foreign policy concerns, the likelihood of complete relief is minimal. Nevertheless, by confronting North Korea and its unspeakable treatment of their son, the Warmbiers have bravely demonstrated how seeking justice for such atrocities is a uniquely American pursuit. The United States government should honor that effort—and Mr. Warmbier's request—by amending Section 201(a) of the TRIA so that blocked assets can be more readily used to satisfy terrorism judgment holders' well-deserved awards.

211. Svrluga, *supra* note 125.