

CLEARING THE ROAD TO HAVANA: SETTLING LEGALLY QUESTIONABLE TERRORISM JUDGMENTS TO ENSURE NORMALIZATION OF RELATIONS BETWEEN THE UNITED STATES AND CUBA

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The Obama Administration has acted decisively to cure a long-standing wound the United States has inherited from the Cold War by seeking to normalize relations with Cuba. However, prospects for full normalization are currently impeded by over four billion dollars in judgments levied against Cuba by politically motivated state courts in Florida under the state sponsor of terrorism (SST) exception to the Foreign Sovereign Immunities Act. These judgments create a serious obstacle and impede Cuba and its companies from transferring any assets into the United States. Because these judgments purport to punish Cuba for acts occurring during and immediately after the Cuban Revolution and Cuba was only placed on the SST list in 1982 for supporting insurgent movements elsewhere in Latin America, the courts manifestly exceeded their subject matter jurisdiction in issuing them. Nevertheless, several federal courts have afforded them full faith and credit and begun to enforce them against Cuba's existing assets in the United States.

This Note therefore argues that the President can and should exercise his power to espouse and settle international claims to resolve these judgments pursuant to a sole executive agreement, whether or not he is able to secure congressional acquiescence for his actions. In doing so, the President can lean on a long record of historical practice affirmed repeatedly by the Supreme Court and buttressed by recent settlements of terrorism claims with Iraq and Libya. Finally, the U.S. government should be able to avoid a takings claim by SST judgment holders after the judgments' resolution by funneling their claims into the Foreign Claims Settlement Commission and providing for some fractional compensation.

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INTRODUCTION

On May 29, 2015, the United States officially removed Cuba from its list of state sponsors of terrorism after the island nation had spent thirty-three years on that list.¹ Part of a broader program of re-establishing diplomatic relations, the action undertaken by President Barack Obama’s administration removed an important barrier to normalized economic relations.² While the longstanding economic embargo remains in place in the absence of congressional action to

¹ Rescission of Determination Regarding Cuba, 80 Fed. Reg. 31,945 (June 4, 2015).

² See Alison Elizabeth Chase, *Legal Mechanisms of the International Community and the United States Concerning State Sponsorship of Terrorism*, 45 VA. J. INT’L L. 41, 52–53 (2004) (discussing bans on foreign assistance, agricultural aid, and export credits as a consequence of placement on the state sponsors of terrorism list).

repeal it, the Obama Administration has amended Office of Foreign Assets Control (OFAC) regulations to allow for greater freedom in travel and remittances and to permit U.S. telecommunications, media, construction, and agricultural companies to establish a physical presence in Cuba.³

However, even if the embargo and all of its associated restrictions were lifted tomorrow, neither the government of Cuba nor any of its state-owned banks or companies could move a single dollar to the United States. This is not because an act of Congress or a presidential determination expressly forbids it. It is, instead, the working of Florida state trial courts in Miami-Dade County, which have issued billions of dollars of default judgments against the Cuban government in summary *ex parte* procedures under the “state sponsor of terrorism” (SST) exception to immunity provided by the Foreign Sovereign Immunities Act (FSIA). Unless these judgments are resolved, any assets which Cuba, its agencies, or its instrumentalities bring into the United States will be liable to attachment in any judicial forum which grants full faith and credit to the Florida judgments. At best, any normalization which could occur while these judgments stand would be wholly one-sided—U.S. products would be able to enter Cuba, but Cuba would remain shut out of the vast U.S. market, a potentially crucial source of foreign exchange.

These judgments are based on a misapplication of the FSIA and are politically explosive. Despite the fact that Cuba was only placed on the SST list in 1982 because of its support of guerrilla movements in Latin America,⁴ the judgments largely concern government conduct towards opponents of the Cuban Revolution and combatants in the Bay of Pigs invasion in the early 1960s and 1970s. As such, not only do they lie outside the subject matter jurisdiction that the FSIA confers, but they lie in the hands of some of the Cuban regime’s most vociferous ideological opponents, making a negotiated settlement with Cuba more difficult. On the legislative side, absent a political shift⁵ or a significant payment from Cuba, Congress may be loath to pass legislation waiving the execution provisions of the FSIA as pertains to these judgments.

³ See Enhancing Support for the Cuban People, 80 Fed. Reg. 56,898 (Sept. 21, 2015) (to be codified at 15 C.F.R. pts. 740, 746, 772) (loosening export and travel controls).

⁴ See *infra* notes 33–36 and accompanying text.

⁵ Congressional Republicans have been highly critical of President Obama’s policy towards Cuba and have vowed to block any efforts to lift the Cuban embargo or permit U.S. tourism to the island. Seung Min Kim, *Why the GOP Could Be Trouble for Obama in Cuba*, POLITICO (July 2, 2015, 5:18 A.M.), <http://www.politico.com/story/2015/07/why-the-gop-congress-could-be-trouble-for-obama-in-cuba-119668>.

This situation neatly exemplifies the flaws with the FSIA's SST provisions, which have been much criticized for violating separation of powers principles⁶ and due process norms,⁷ weakening the Executive's Article II power to conduct foreign affairs,⁸ and leading to an arbitrary and inequitable distribution of the foreign state's resources depending on which party wins the "race to the courthouse."⁹ However, given the failure of attempts to replace FSIA's SST regime with an administrative program similar to that of the Foreign Claims Settlement Commission¹⁰ (FCSC) and the political unpopularity of any move which appears to remove remedies from victims of terrorism, this Note assumes that the FSIA's SST regime is here to stay.¹¹

Instead of proposing a legislative amendment, this Note examines the possibility of sole executive action to resolve these judgments. After examining two cases over the past decade where states have

⁶ The argument is that the FSIA unconstitutionally delegates the power to determine the subject matter jurisdiction of the federal courts to the executive by only permitting suits against those states that the Secretary of State puts on the SST list. See Jeewon Kim, Note, *Making State Sponsors of Terrorism Pay: A Separation of Powers Discourse Under the Foreign Sovereign Immunities Act*, 22 BERKELEY J. INT'L L. 513, 534-39 (2004) (criticizing court decisions rejecting separation-of-powers challenges to the FSIA's SST exception).

⁷ See Keith E. Sealing, "State Sponsors of Terrorism" Are Entitled to Due Process Too: *The Amended Foreign Sovereign Immunities Act Is Unconstitutional*, 15 AM. U. INT'L L. REV. 395, 397-98 (1999) (arguing that due process requires courts to perform a minimum contacts analysis in order to properly assert personal jurisdiction over foreign states).

⁸ See Daveed Gartenstein-Ross, Note, *A Critique of the Terrorism Exception to the Foreign Sovereign Immunities Act*, 34 N.Y.U. J. INT'L L. & POL. 887, 914-30 (2002) (discussing various limitations on presidential power that the SST exception generates).

⁹ Sebastian Caputto, Comment, *Semantic Victory: Why the Enforcement of AEDPA Judgments Should Be Precluded*, 16 EMORY INT'L L. REV. 525, 569-70 (2002) ("[A]llowing attachment of property belonging to rogue foreign states and their 'agents and instrumentalities' in order to execute large compensatory and punitive [SST] judgment awards would engender a winner-take-all race to the courthouse . . .").

¹⁰ The FCSC, originally titled the International Claims Commission, was created by the International Claims Settlement Act of 1949, which sought to allocate funds pursuant to a specific claims agreement with Yugoslavia and establish a procedure for future such claims to be adjudicated. 22 U.S.C. § 1621 (2012). It is a quasi-judicial independent agency under the Department of Justice, which adjudicates and certifies claims of U.S. nationals against foreign governments pursuant to claims settlement agreement or at the request of the Secretary of State. 22 U.S.C. § 1641(b) (2012).

¹¹ For example, in 2001, Sen. Richard Lugar (R-Ind.) proposed a bill which would have barred further civil suits and created a program administered by the State Department with authority to directly compensate victims of terrorism. The bill never reached a vote. Benefits for Victims of International Terrorism Act of 2003, S. 1275, 108th Cong. (2003). The payment formula was tied to the amount available under the Public Safety Officers' Benefits Program, 42 U.S.C. § 3796 (2012), to families of public officers who are killed in the line of duty. If approved, the amount of the benefit would have been a maximum of about \$262,000, subject to adjustment for inflation. JENNIFER K. ELSEA, CONG. RESEARCH SERV., RL31258, SUITS AGAINST TERRORIST STATES BY VICTIMS OF TERROR 38 n.125 (2005).

been delisted from the SST list, I propose that the Executive has inherent power to settle all U.S. nationals' claims against Cuba under the SST exception, even in the absence of congressional action. Such an action, if undertaken pursuant to a sole executive agreement with Cuba, would nullify all judgments still outstanding. The judgments could be evaluated by the FCSC, and, if any meritorious claims are found, consolidated with the property claims certified for payment.

Part I of this Note provides a brief historical overview of the FSIA's SST exception to sovereign immunity and Congress's progressive expansion of the types of attachable assets and procurable damages in FSIA terrorism lawsuits. Part II discusses Cuba-related FSIA terrorism litigation, describing the deeply problematic history of the Florida state court judgments and the relative success of plaintiffs' attempts to secure full faith and credit for these judgments in federal courts. Part III analyzes recent cases of claims settlement of terrorism judgments and argues that the Executive has both the legal authority and the responsibility to act unilaterally in the absence of congressional authorization to reach an agreement with Cuba, which would prevent execution of the Florida judgments in U.S. courts, and offers several potential defenses to Takings Clause challenges which may arise as a result.

I

THE FOREIGN SOVEREIGN IMMUNITIES ACT STATE SPONSOR OF TERRORISM EXCEPTION

A. *History of Sovereign Immunity in the United States*

Throughout most of its history, the United States has ascribed to the doctrine of absolute sovereign immunity, which prevented foreign governments from being haled into court in virtually all cases. In *The Schooner Exchange v. McFaddon*, Chief Justice John Marshall stated that a nation's "full and absolute territorial jurisdiction . . . would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects."¹² Absent a statement by the legislative branch to the contrary, sovereigns enter into U.S. territory "only under an express license, or in the confidence that the immunities belonging to his independent sovereign station . . . are reserved by implication."¹³

¹² 11 U.S. 116, 137 (1812).

¹³ *Id.* It should be noted that, as per Marshall's opinion, sovereign immunity was not an immutable rule; it was a matter of international comity, not a doctrine compelled by constitutional mandate. As such, it could be modified by the clear intention of Congress or the Executive. In this period the Court regularly deferred to the Executive's preference of whether to take jurisdiction over actions. *See, e.g., Ex parte Peru*, 318 U.S. 578 (1943) (accepting State Department's certification that Peru should be immune from jurisdiction).

The United States began to follow international trends in shifting to a restrictive conception of sovereign immunity after 1952. In a famous communication to the Acting Attorney General, a legal advisor for the Department of State, Jack Tate, urged the government to adopt a conception that distinguished between foreign nations' "public acts" and "private acts"; essentially, nations or their instrumentalities would be liable to suit when they acted in a commercial capacity similar to that of private companies.¹⁴ Adopting these recommendations, the Executive began a practice of deciding whether or not foreign sovereign immunity should be granted on a case-by-case basis. This process was criticized as inconsistent and subject to diplomatic pressure.¹⁵

In 1976, Congress codified the Tate Letter's restrictive theory of sovereign immunity in the FSIA. Under the FSIA, states generally retain sovereign immunity¹⁶ unless the cause of action falls within a specifically enumerated exception.¹⁷ As to these claims, foreign sovereigns were liable to the same degree that any other entity would be, except that punitive damages were permitted only as to agencies and instrumentalities of foreign states, not as to states themselves.¹⁸ Both federal and state courts have jurisdiction over FSIA claims,¹⁹ though the Supreme Court has read the statute's legislative history as evincing a clear intent to channel such claims to the federal judiciary.²⁰

¹⁴ Letter from Jack B. Tate, Acting Legal Adviser, Dep't of State, to Acting Attorney Gen. Philip B. Perlman (May 19, 1952), in 26 DEP'T OF ST. BULL. 984-85 (1952).

¹⁵ See Lee M. Caplan, *The Constitution and Jurisdiction over Foreign States: The 1996 Amendment to the Foreign Sovereign Immunities Act in Perspective*, 41 VA. J. INT'L L. 369, 397 n.127 (2001) (describing U.S. State Department's post-Tate Letter system of determining foreign sovereign immunity and its critiques).

¹⁶ 28 U.S.C. § 1604 (2012) ("[A] foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.").

¹⁷ Exceptions were made for waivers of immunity, commercial activity directly or indirectly affecting the United States, expropriation and property claims, noncommercial torts occurring within the United States, and certain counterclaims. 28 U.S.C. §§ 1605(a)(1)-(5), 1607 (2012).

¹⁸ 28 U.S.C. § 1606 (2012) ("[T]he foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages . . .").

¹⁹ See 28 U.S.C. § 1604 (2012) (referring to "jurisdiction of the courts of the United States *and of the States*") (emphasis added).

²⁰ See *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 497 (1983) ("Congress deliberately sought to channel cases against foreign sovereigns away from the state courts and into federal courts, thereby reducing the potential for a multiplicity of conflicting results among the courts of the 50 States."). The statute explicitly provides foreign states the right to remove state cases to federal court on demand. 28 U.S.C. § 1441(d) (2012).

B. Establishment of the State Sponsor of Terrorism Exception to Sovereign Immunity

In the early 1990s, as human rights litigation became more common in U.S. courts, U.S. victims of terrorism became frustrated that the FSIA prevented courts from bringing actions against states engaging in terrorism. Accordingly, in 1996, Congress passed the Antiterrorism and Effective Death Penalty Act, which amended the FSIA to allow U.S. citizens to sue certain foreign governments identified by the State Department as “state sponsors of terror.”²¹ Under the 1996 amendments, plaintiffs could bring suit on specific causes of action, including “torture, extrajudicial killing, aircraft sabotage, hostage taking, or provision of material support or resources” for such acts.²²

The amended Act set a number of requirements for the SST exception to apply. In addition to enabling only specifically enumerated causes of actions, the Act maintained immunity if the “foreign state was [not] designated as a state sponsor of terrorism . . . at the time the act occurred,” unless later “so designated as a result of such act.”²³ Thus, for acts which preceded the date that a state is placed on the SST list, there is a requirement that, at the very least, there is a reasonable relationship between the act and the justification offered for such placement. Furthermore, the provision imposed a citizenship requirement, granting jurisdiction only when the claimant was “a national of the United States” when the act upon which the claim is based occurred.²⁴ Finally, in the event that the act occurred “in the foreign state against which the claim has been brought,” a claim can only be brought if “the claimant has afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration”²⁵

²¹ The State Department identified state sponsors of terrorism pursuant to § 6(j) of the Export Administration Act of 1979, 50 U.S.C. app. § 2405(j) and § 620A of the Foreign Assistance Act, 22 U.S.C. § 2371 (2012).

²² 28 U.S.C. § 1605(a)(7) (1996). A companion bill provided a private right of action for victims of those offenses, allowing for the recovery of pain and suffering, economic damages, solatium, and punitive damages. Civil Liabilities for Acts of State Sponsored Terrorism Act, Pub. L. No. 104-208, § 589, 110 Stat. 3009-172 (1996).

²³ 28 U.S.C. § 1605(a)(7)(A) (1996).

²⁴ 28 U.S.C. § 1605(a)(7)(B)(ii) (1996).

²⁵ 28 U.S.C. § 1605(a)(7)(B)(i) (1996).

C. Expansion of Liability and Asset Availability

After the passage of the 1996 Amendments, a number of plaintiffs filed cases against Iran and Cuba²⁶ and secured sizeable judgments when the states defaulted²⁷ and were found to have supported acts of terrorism against U.S. citizens. However, plaintiffs were frustrated in their attempts to collect on these judgments. Given that states on the SST list are subject to pervasive economic sanctions, the only property which they had in the United States were blocked assets subject to OFAC, which could not be transferred without a license granted by the Executive.²⁸

While Congress approved a legislative scheme to compensate the plaintiffs in *Alejandro v. Republic of Cuba*, *Flatow v. Islamic Republic of Iran*, and ten additional cases against Iran,²⁹ generalized recovery under the terrorism exception was relatively limited until 2002, when Congress passed the Terrorism Risk Insurance Act (TRIA). Section 201(a) of TRIA aimed to open up blocked assets to attachment and execution, and severely limited the President's waiver authority to prevent seizure of diplomatic or consular property only.³⁰

In 2008, Congress revamped FSIA's terrorism exception once again, repealing § 1605(a)(7) in its entirety, replacing it with a new section codified at § 1605A, and adding even more expansive provisions allowing for the attachment and execution of property under § 1610. As relevant here, the statute created § 1610(g), which subjected virtually all property of a foreign state and its agencies or instrumentalities to attachment and execution pursuant to terrorism judgments.³¹ The new section also clarified that property would not be immune from attachment and execution only because it was "regu-

²⁶ See *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1 (D.D.C. 1998); *Alejandro v. Republic of Cuba*, 996 F. Supp. 1239 (S.D. Fla. 1997).

²⁷ See Gartenstein-Ross, *supra* note 8, at 931–32 (describing foreign states' lack of respect for SST proceedings and nearly universal practice of defaulting).

²⁸ 31 C.F.R. § 515.203(e) (2015) ("Unless licensed . . . any attachment, judgment, decree, lien, execution, garnishment, or other judicial process is null and void with respect to any property in which . . . there existed the interest of [Cuba or its nationals].").

²⁹ See Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 2002, 114 Stat. 1541 (ordering vesting of Cuban assets to satisfy *Alejandro* judgment and allowing for the compensation from Treasury funds of judgments against Iran).

³⁰ Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, § 201, 116 Stat. 2322.

³¹ 28 U.S.C. § 1610(g)(1) (2012). The express purpose of this section is to ensure that the Court's "separate entity" doctrine in *First National City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611 (1983), would not be applied in SST cases. The Eleventh Circuit had previously blocked the *Alejandro* plaintiffs' recovery of debts owned by the Cuban state telecommunications company by applying this doctrine. See *Alejandro v. Telefonica Larga Distancia de P.R., Inc.*, 183 F.3d 1277, 1286–88 (11th Cir. 1999) (holding that Cuban telecommunications company had separate juridical status from Cuban government and could not be held liable for judgment).

lated by the United States Government” pursuant to its sanctions powers, adding on to TRIA § 201(a)’s provisions on blocked assets.³² No waiver authority was provided to the Executive.

In sum, TRIA and the 2008 amendments have eliminated the Executive’s waiver authority and expanded the asset classes susceptible to attachment and judgment to the broadest possible scope. This implies that virtually any property or assets that Cuba or its corporations bring into the United States would be subject to immediate attachment.

II

LITIGATION AGAINST CUBA UNDER THE SST EXCEPTION

A. *Cuba’s Placement on State Sponsor of Terrorism List*

Cuba was placed on the SST list by the Reagan administration’s Department of Commerce on March 1, 1982 pursuant to § 6(j) of the Export Administration Act.³³ On March 12, 1982, Thomas O. Enders, Assistant Secretary of State for Inter-American Affairs, justified the move before the Subcommittee on Security and Terrorism of the Senate Judiciary Committee. Enders testified at length about Cuban support for armed revolutionary movements in Colombia and a number of Central American countries.³⁴ While Enders did note that the Cuban leaders were deeply marked by their own experience of revolution and armed struggle “23 years ago” and sought to export it to other countries under Soviet direction, he did not ever suggest that Cuba’s placement on the list related to the Cuban Revolution itself or any of its associated ills such as repression of political opponents.³⁵ Such general claims about Cuban support for revolutionary violence were repeated in State Department communications issued in 1998 and 2003.³⁶

Whatever the merits of these claims, it is indisputable that they primarily concern Cuban support for various revolutionary movements in Latin America outside its borders. However, with the arguable exception of the *Alejandro* case,³⁷ Cuba has been repeatedly held

³² 28 U.S.C. § 1610(g)(2) (2012).

³³ MARK P. SULLIVAN, CONG. RESEARCH SERV., RL32251, CUBA AND THE STATE SPONSORS OF TERRORISM LIST 3 (2006).

³⁴ *The Role of Cuba in International Subversion and Terrorism: Hearings Before the Subcomm. on Sec. and Terrorism of the S. Comm. on the Judiciary*, 97th Cong. 142–48 (1982) (statement of Thomas O. Enders, Assistant Secretary of State for Inter-American Affairs).

³⁵ *Id.* at 147.

³⁶ See SULLIVAN, *supra* note 33, at 4 (detailing 1998 and 2003 State Department documents discussing Cuba’s support of terrorist groups).

³⁷ See *infra* notes 39–45 and accompanying text.

liable for events preceding 1982 stemming exclusively from its actions against domestic political opponents, which exceeds the stated justifications for the country's placement on the SST list.

B. *The Cases Against Cuba*³⁸

I. *Alejandro v. Republic of Cuba*

The first case to be filed after the SST exception was added to the FSIA in 1996 was *Alejandro v. Republic of Cuba*.³⁹ That case pertained to the shooting down of two civilian planes on February 24, 1996, killing four people, three of them U.S. citizens.⁴⁰ As thousands of Cuban rafters attempted to flee across the Florida Straits to the United States, the Brothers to the Rescue Cuban exile group flew civilian planes over the region, alerting the U.S. Coast Guard to their location. However, the group also provocatively violated Cuban airspace and, on at least one occasion, dropped anti-government leaflets over Havana, receiving warnings from the Cuban government that their activities were viewed as hostile.⁴¹ On February 24, 1996, Cuban fighter jets engaged the Brothers to the Rescue civilian planes, and shot them down, apparently without warning.⁴² The attack was condemned not only by the United States, but by the United Nations Security Council.⁴³

In *Alejandro*, the families of the three U.S. citizen pilots brought suit in the Southern District of Florida for extrajudicial killing under the SST exception to the FSIA. The court had no trouble finding that the elements for the FSIA exception had been met. The case was brought on behalf of individuals who were U.S. citizens at the time of the act, pertained to one of the causes of action for which sovereign immunity was waived by the exception, the Cuban Air Force which caused the killings was clearly an agent of the Cuban state, the action occurred after Cuba's designation on the SST list in 1982 and, according to a report by the International Civil Aviation Organization, the act occurred outside the sovereign territory of Cuba.⁴⁴

Stating that this was "precisely the type of action for which Congress meant to provide redress by stripping terrorist states of

³⁸ For a quick reference guide to all of the Florida-based judgments against Cuba, including several cases not covered in this section, see the Appendix to this Note.

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

⁴⁰ *Id.* at 1242.

⁴¹ Juanita Darling, *Cuba Complained to U.S. About Flights, Havana Says*, L.A. TIMES, Feb. 29, 1996, at 15.

⁴² *Alejandro*, 996 F. Supp. at 1242.

⁴³ S.C. Res. 1067, ¶ 6 (July 26, 1996).

⁴⁴ *Alejandro*, 996 F. Supp. at 1248.

immunity from . . . judgment,” the district court found for the plaintiffs, awarding each family between \$16 and \$17.5 million in compensatory damages as well as \$137.7 million dollars in punitive damages.⁴⁵ The Cuban government, refusing to recognize the proceedings as legitimate, defaulted and presented no defenses. The *Alejandro* plaintiffs were eventually able to collect \$96.7 million in frozen Cuban assets liquidated by the U.S. government in 2001 pursuant to specific congressional authorization.⁴⁶

2. *McCarthy v. Republic of Cuba*

The *Alejandro* plaintiffs operated in a legal environment where collection on their judgments was difficult and they could only collect on their judgments thanks to congressional action targeted towards their specific case.⁴⁷ However, in 2002, millions of dollars in blocked assets were made available by the passage of TRIA, leading to a flurry of cases in the Circuit Court for the Eleventh Judicial District for Miami-Dade County, located in the heart of the Cuban exile community hostile to the Castro government. The first of these cases was *McCarthy v. Republic of Cuba*.

In *McCarthy*, the plaintiff was the widow of Howard Anderson, a U.S. citizen who was executed for allegedly conspiring to sabotage the Cuban revolutionary government and smuggle arms for the anti-government Acción Cívica movement during the Bay of Pigs invasion in April 1961. Mr. Anderson was given a summary one-day trial punctuated by vitriolic denunciations of U.S. imperialism, after which he was shot three days later.⁴⁸

On these facts, the court engaged in a peculiar jurisdictional analysis to conclude that the actions fell within the FSIA’s requirements. After stating that a summary execution could be considered an extrajudicial killing, the court noted that “[p]ursuant to the [FSIA], a foreign state is not immune from the jurisdiction of this Court if an American is tortured by the agent of a foreign state acting within the scope of his employment.”⁴⁹ The court concluded that Mr. Anderson was indeed tortured, and noted expert testimony of Congressman

⁴⁵ *Id.* at 1248, 1253.

⁴⁶ JENNIFER K. ELSEA, CONG. RESEARCH SERV., RL31258, SUITS AGAINST TERRORIST STATES BY VICTIMS OF TERRORISM 18 (2008). See *supra* note 29 for an explanation of this statutory scheme.

⁴⁷ See *Alejandro v. Telefonica Larga Distancia de P.R., Inc.*, 183 F.3d 1277, 1286–89 (11th Cir. 1999) (blocking plaintiffs’ attempt to collect on judgment from Cuban telephone company).

⁴⁸ *McCarthy v. Republic of Cuba*, No. 01-28628 CA 04, slip op. at 3–5 (Fla. Cir. Ct. Apr. 17, 2003).

⁴⁹ *Id.* at 6–7.

Peter Deutsch, finding that “Cuba was a terrorist state.”⁵⁰ It proceeded to award Mr. Anderson’s family \$67 million dollars.⁵¹

The jurisdictional analysis engaged in by the court is patently deficient. The judgment entirely failed to consider FSIA § 1605(a)(7)’s jurisdictional requirements, under which the case should have immediately been dismissed for lack of subject matter jurisdiction. The plain text of the statute reads: “[T]he court shall decline to hear a claim under [the terrorism exception] if the foreign state was not designated as a state sponsor of terrorism . . . at the time the act occurred, unless later so designated as the result of such act”⁵² The execution of Mr. Anderson occurred *twenty-one years before* the placement of Cuba on the state sponsors of terrorism list due to the country’s support for Latin American revolutionary movements. Neither Mr. Anderson’s execution nor any actions that Cuba took towards its own citizens were the cause for Cuba’s placement on the list.⁵³ Finally, the FSIA required states to have a reasonable opportunity to arbitrate claims if the act in question occurred on their own soil. Here, the act occurred in Cuba, yet Cuba was never given an opportunity to arbitrate the claim. Despite these flaws, the judgment was registered in and accorded full faith and credit in the district court for the Southern District of Florida.⁵⁴

3. Weininger v. Republic of Cuba

Following up on this victory, Janet Ray Weininger, the daughter of Thomas “Pete” Willard Ray, filed suit in the same court in Miami. Mr. Ray was a CIA pilot who participated in bombing missions over Cuba during the Bay of Pigs invasion (or, as the court termed it, “this country’s efforts to liberate Cuba”). His plane was shot down, and he was killed. The Cuban story is that he violently resisted being taken into custody,⁵⁵ while the court found that he was summarily executed,

⁵⁰ *Id.*

⁵¹ *Id.* at 17.

⁵² 28 U.S.C. § 1605(a)(7)(A) (1996) (repealed 2008).

⁵³ Indeed, it is unclear if Mr. Anderson would be treated any differently in the United States as an unlawful combatant. *Cf. Ex parte Quirin*, 317 U.S. 1, 31 (1942) (“[A]n enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property . . . [is deemed] to be [an] offender[] against the law of war subject to trial and punishment by military tribunals.”).

⁵⁴ See *McCarthy v. Republic of Cuba*, 354 F. Supp. 2d 1347, 1349 (S.D. Fla. 2005) (awarding \$67 million judgment to plaintiff). The district court did not examine the jurisdiction of the Florida state court. Instead, it concluded only that there was indeed a final judgment issued and that the judgment had not been satisfied in part or in whole. *Id.* at 1348–49.

⁵⁵ See Lázaro Barredo, *La hija de un piloto de la CIA dice embustes y busca dinero* [The Daughter of a CIA Pilot Tells Lies and Is Looking for Money], CUBADEBATE (Nov.

based on an autopsy report and unspecified “evidence that [Ray] was captured and taken to the headquarters of Fidel and Raul Castro,”⁵⁶ and then executed.

The jurisdictional findings in *Weininger* are even sparser than in *McCarthy*. The court simply stated that “[e]xpert testimony in this court and through deposition introduced into evidence establishes that Cuba is and was at all relevant times, a terrorist state due to its actions dating back to 1959.”⁵⁷ Of course, the FSIA does not delegate to the judicial branch, much less a state court, the authority to decide which state does or does not qualify as a terrorist state—that role is reserved for the Secretary of State.

The court’s final judgment awarded Ms. Weininger approximately \$3.5 million in economic damages, \$65 million in punitive damages, and \$18 million for solatium, pain and suffering, and emotional distress.⁵⁸

4. Hausler v. Republic of Cuba

In 2006, the family members of Bobby Fuller, a dual citizen of the United States and Cuba who was executed in Cuba in 1960, brought suit in the Florida state courts. Mr. Fuller and his family owned a plantation in Cuba which was to be expropriated by the authorities. Arrested and charged with counterrevolutionary activities, Mr. Fuller was tried in what was labeled a “Roman circus atmosphere” and then sentenced to death.⁵⁹

In finding jurisdiction, the court held that all statutory criteria under § 1605(a)(7) had been met. Although the incident involving Mr. Fuller, as those at issue in *Weininger* and *McCarthy*, occurred twenty-two years before Cuba was placed on the SST list, the court found that the country’s placement on that list was “at least in part by reason of the acts of terrorism described herein including the torture and extra-

30, 2004), <http://www.cubadebate.cu/opinion/2004/11/30/la-hija-de-un-piloto-de-la-cia-dice-embustes-y-busca-dinero/>.

⁵⁶ *Weininger v. Castro*, No. 03-22920 CA 20, slip op. at 4 (Fla. Cir. Ct. June 15, 2005).

⁵⁷ *Id.* at 4.

⁵⁸ *Id.* at 7–8. It should be noted, however, that the TRIA only permits collection of judgments from blocked assets for the compensatory damages component of such awards.

⁵⁹ *U.S. Protests Cuban Execution of Yanks*, MILWAUKEE SENTINEL, Nov. 13, 1960, at 2-M. According to Robert Muse, a lawyer who represented a telecommunications company nationalized by Cuba, Fuller “went to Florida [in 1960] to organize an ‘invasion of Cuba’ by four Americans and twenty-three Cubans.” Robert Muse, *Adverse Consequences of Court Judgments Against Cuba*, Address at Center for International Policy & Latin America Working Group Conference 1, 4 (Dec. 1, 2011), http://www.lawg.org/storage/documents/Cuba/lawg_cip_dec_2011.pdf.

judicial killing of Bobby Fuller”⁶⁰ Finding that Mr. Fuller had been tortured and executed without due process of law, the court then awarded Mr. Fuller’s family \$65 million in economic losses, \$35 million for non-economic compensatory damages, and—notably—\$300 million in punitive damages.⁶¹

The punitive damages award was accompanied by a vitriolic denunciation of the Cuban government’s geopolitical orientation. “Unbeknownst to most Americans,” the state court declared, “the Defendants . . . have engaged in and provided uninterrupted support of international terrorism for more than four decades”⁶² The court hearkened back to the Tri-Continental Congress of Havana in 1966, where delegates from a variety of anticolonial movements (in the court’s language, “a plethora of terrorist groups”) gathered to denounce American foreign policy. It then recited Cuba’s support for the Macheteros, a Puerto Rican nationalist group, and its harboring of Assata Shakur and other U.S. fugitives as indicators of Cuba’s “willful, wanton and intentional crimes against civilized society.”⁶³ The court imposed punitive damages which were three times those of the compensatory damages it offered—purportedly aiming to deter Cuba from supporting terrorism.⁶⁴

5. Jerez v. Republic of Cuba

In 2007, Nilo Jerez brought suit in Florida state court alleging that he was tortured by Cuban officials in the 1960s and 1970s because he was an opponent of the Cuban government. The decision had virtually no jurisdictional findings, and, impressively, actually failed to cite the FSIA at all, which is the “sole basis for obtaining jurisdiction over a foreign state.”⁶⁵ Instead, the court stated merely that “[t]he Defendants are liable for their conduct under both domestic and international law, including, but not limited to, the Torture Victim Protection Act This Court has jurisdiction over the claims asserted by Mr. Jerez pursuant to the Alien Tort Claim [sic] Act”⁶⁶ Mr. Jerez was

⁶⁰ *Hausler v. Republic of Cuba*, No. 02-12475, 2007 WL 6870681, at *3 (Fla. Cir. Ct. Jan. 19, 2007).

⁶¹ *Id.* at *10.

⁶² *Id.* at *9. It would appear that such support was “[u]nbeknownst” to the State Department as well, which only moved to put Cuba on the list in 1982.

⁶³ *Id.* at *10.

⁶⁴ *See id.*

⁶⁵ *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989).

⁶⁶ *Jerez v. Republic of Cuba*, No. 05-18719-CA-9, slip op. at 1–2 (Fla. Cir. Ct. Jan. 30, 2007).

awarded \$50 million in compensatory damages and \$150 million in punitive damages.⁶⁷

Were an FSIA jurisdictional analysis properly conducted, the case would have clearly failed on two counts. First, as in *Weininger*, *McCarthy*, and *Hausler*, Mr. Jerez's claims predated Cuba's placement on the SST list by at least a decade. Cuba's imprisonment and torture of domestic political dissidents was not related to the reasons why Cuba was placed on the list in 1982. Second, while the plaintiffs in the Bay of Pigs cases were U.S. citizens at the time that the alleged act leading to liability occurred, Mr. Jerez was a citizen of Cuba. Pursuant to the FSIA, courts must decline to hear claims when "neither the claimant nor the victim was a national of the United States . . . when the act upon which the claim is based occurred."⁶⁸

6. Vera v. Republic of Cuba

In 2008, the son of Aldo Vera, the former Havana chief of police in the first year of the Castro government, filed suit in Florida state court for the extrajudicial killing of his father. Despite being active in the struggle against Batista, his father had left Cuba for Puerto Rico shortly after the Revolution, where he helped found an exile group dedicated to overthrowing the Cuban government called La Cuarta Republica. According to the court, Vera was murdered in 1976 after leaving a meeting of his group, allegedly by "agents of the Cuban government."⁶⁹

In terms of jurisdiction, the findings were once again sparse. While it recited the text of § 1605(a)(7), it did not address either the link between the act in 1976 and Cuba's later designation as a state sponsor of terrorism or whether or not Vera was an American national at the time of his assassination. Nonetheless, it granted Vera

⁶⁷ *Id.* at 8.

⁶⁸ 28 U.S.C. § 1605(a)(7)(B)(ii) (1996).

⁶⁹ *Vera v. Republic of Cuba*, No. 01-31216-CA-11, slip op. at 5 (Fla. Cir. Ct. May 15, 2008). In a later enforcement proceeding, significant doubt was cast onto Vera's allegations that his father was killed because of his activism against the Cuban government. A newspaper article describing his murder stated that the Puerto Rican police believed that Vera's "slaying . . . was the result of an underworld struggle for illicit motel business and not political activity." *Slaying Said Tied to Underworld*, MIAMI HERALD, Oct. 28, 1978, at 10-B. This was confirmed in an FBI report from the period, and supported by an affidavit from a retired Puerto Rican police officer who stated that Vera was killed by a rival mafia boss after a failed assassination attempt in which two Puerto Rican police officers were wounded by a bomb. See Federal Bureau of Investigation Report of SA Robert James Dwyer at 4, *Vera v. Republic of Cuba*, 40 F. Supp. 3d 367 (S.D.N.Y. 2014); Declaration of Juan Oliveras Nazario in Support of Motion by Intervenor Villoldo Parties at 1–2, *Vera v. Republic of Cuba*, 40 F. Supp. 3d 367 (S.D.N.Y. 2014).

over \$45 million in compensatory and economic damages and \$50 million in punitive damages against Cuba.⁷⁰

7. Villoldo v. Ruz

In 2009, the sons of Gustavo Villoldo, a wealthy Cuban-American businessman, brought suit against Cuba. They alleged that shortly after the 1959 Revolution, Mr. Villoldo was subjected to a systematic campaign of harassment and torture by the revolutionary government which led to his suicide in February of that year.⁷¹ The court concluded that it had subject matter jurisdiction under § 1605A (the amended provision to § 1605(a)(7) effective January 28, 2008), and did not undergo an analysis of whether the 1959 events—occurring two months after the Cuban Revolution—were related to the reason why Cuba was placed on the SST list.⁷²

This judgment is striking not only because the events in question occurred immediately after the revolution, but for the astronomical amount of damages awarded, which were added by hand by the judge after a one-day non-jury trial. In addition to \$393 million in economic damages, each of the two brothers was awarded \$196.5 million for pain and suffering, solatium, and emotional distress (suspiciously, \$393 million total), and \$393 million in punitive damages.⁷³ The total was almost \$1.2 billion, in addition to interest accumulating at the statutory rate.

However, the Villoldo brothers were not finished. In 2011, they brought an amended case before the Florida state court, alleging now that in addition to their father's death, they too had been subject to torture by the Cuban government in 1959 and had been receiving (unspecified) threats of assassination until the year 2003.⁷⁴ Without disclosing any formula undergirding its actions, the court awarded the brothers a total of \$2.8 billion in damages, \$1 billion of which was punitive.⁷⁵

C. Enforcement of the Florida State Court Judgments Against Cuba

While plaintiffs had little difficulty in securing judgments against Cuba in Florida state courts, Cuba had no attachable property under

⁷⁰ *Vera*, slip op. at 8–9.

⁷¹ See *Villoldo v. Ruz*, No. 08-14505 CA-25, 2009 WL 1832603, at *2 (Fla. Cir. Ct. May 29, 2009).

⁷² *Id.* at *2–3.

⁷³ *Id.* at *3.

⁷⁴ *Villoldo v. Ruz*, No. 08-14505 CA-25, 2011 WL 3791913, at *2–3 (Fla. Cir. Ct. Aug. 19, 2011).

⁷⁵ *Id.* at *4.

the jurisdiction of the Florida courts. Therefore, the plaintiffs' ability to execute on their judgments was entirely dependent on their ability to domesticate and secure full faith and credit in the jurisdictions where they could access Cuban blocked assets available to them under TRIA § 201(a) and 28 U.S.C. § 1610(g). As most of these assets were sitting in bank accounts in New York City, the Southern District of New York became the primary, although not the exclusive, situs for enforcement litigation.

The first TRIA enforcement proceeding to be brought was *Weininger v. Castro*, involving the *McCarthy* and *Weininger* judgments.⁷⁶ The plaintiffs sought to seize several accounts at JP Morgan Chase holding moneys owed to Cuban telecommunications companies and to Cuban litigation.⁷⁷ In response to a state court attachment order filed by Weininger, JPM Chase filed a third-party petition for interpleader relief, pleading in McCarthy as well as several other adverse claimants. Additionally, the court received an amicus curiae submission from the Cuban Electric Company (CEC), a U.S. company whose property was nationalized after the Cuban Revolution and who sought to maintain the blocked assets in the United States for an eventual settlement of its claims.⁷⁸ As was its practice, Cuba itself did not appear in the litigation.

CEC urged the *Weininger* court to find that the Florida state courts never had subject matter jurisdiction to issue the judgments. However, given that Cuba itself did not appear in the litigation, the court found relevant that "the jurisdictional question is raised by a third party serving as amicus curiae, as well as by a garnishee seeking not to void the judgment but merely to obtain interpleader relief."⁷⁹ The court noted that "there have already been two levels of review"; one by Florida courts who "held hearings, took evidence, satisfied themselves of their jurisdiction and expressly so ruled," and another by the Southern District of Florida for the McCarthy judgment and the Southern District of New York for Weininger.⁸⁰ The court concluded that it would be "manifestly inequitable" for it to consider the jurisdiction of the Florida courts at the behest of an amicus who appeared by the court's grace and not as of right.⁸¹

⁷⁶ 462 F. Supp. 2d 457 (S.D.N.Y. 2006).

⁷⁷ *Id.* at 464. The funds in question were blocked by the United States pursuant to the Cuban Assets Control Regulations, 31 C.F.R. § 515 (2015). *Weininger*, 462 F. Supp. 2d at 463.

⁷⁸ *Weininger*, 462 F. Supp. 2d at 462.

⁷⁹ *Id.* at 469.

⁸⁰ *Id.*

⁸¹ *Id.*

Weininger recognized that Supreme Court precedent stated that “a judgment of a court in one State is conclusive upon the merits in a court in another State only if the court in the first State had power to pass on the merits”⁸² and therefore “may inquire into the jurisdictional basis of the foreign court’s decree.”⁸³ Nevertheless, it refused to conduct this inquiry, emphasizing repeatedly that no collateral attack was before it, and noting that the U.S. government had not asked that the judgments be found enforceable.⁸⁴ The court concluded that a sua sponte analysis of the Florida courts’ jurisdiction was not required, that enforcement of the judgments would not be “so clearly wrong that it would comprise a violation of some constitutional principle,” and that there was “no basis to support a finding that the state courts’ judgments represent such a plain usurpation of power to . . . defeat the compelling interest in repose for matters settled after extensive litigation.”⁸⁵ Accordingly, after finding that the assets were executable under TRIA, the court ordered that over \$90 million—which constituted nearly all of the blocked assets which Cuba had in the United States—be turned over to *Weininger* and *McCarthy*.⁸⁶

It bears reiterating that the *Weininger* and *McCarthy* judgments involved activities which occurred *over twenty years before* Cuba was placed on the SST list for supporting insurgent movements abroad. The jurisdictional findings of the Florida state courts included statements claiming that Cuba was “at all relevant times, a terrorist state due to its actions dating back to 1959”⁸⁷—what would appear to be a plain usurpation of the executive branch’s power to determine which nations are state sponsors of terrorism. Nevertheless, Cuba’s continued default allowed the court to turn over \$90 million pursuant to a patently flawed judgment.

⁸² *Id.* at 471 (quoting *Underwriters Nat’l Assurance Co. v. N.C. Life & Accident & Health Ins. Guar. Ass’n*, 455 U.S. 691, 704 (1982)).

⁸³ *Id.* (quoting *Underwriters*, 455 U.S. at 705).

⁸⁴ *Id.* at 474–75.

⁸⁵ *Id.* In defining what constitutes a “plain usurpation of power,” the *Weininger* court cited the following sources: *Nemaizer v. Baker*, 793 F.2d 58, 65 (2d Cir. 1986) (“[A] court will be deemed to have plainly usurped jurisdiction only when there is a ‘total want of jurisdiction’ and no arguable basis on which it could have rested a finding that it had jurisdiction.” (quoting *Lubben v. Selective Serv. Sys. Local Bd. No. 27*, 453 F.2d 645, 649 (1st Cir. 1972))); 18A CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 4428 (2d ed. 2002) (“This claim should be honored unless the lack of jurisdiction is so clear that a second court can act to protect the defendant against the imposition of any burden by a manifestly powerless tribunal and to defeat a judgment that offers no plausible basis for repose.”).

⁸⁶ See *Weininger v. Castro*, 462 F. Supp. 2d 457, 502–03 (S.D.N.Y. 2006).

⁸⁷ *Weininger v. Castro*, No. 03-22920 CA 20, slip op. at 4 (Fla. Cir. Ct. June 15, 2005).

Not all courts were as amenable to the execution of these judgments. In 2013, an attempt by the *Jerez* plaintiff to acquire the trademark for the National Warranty Seal on Cuban cigars was rebuffed by the D.C. District Court. Although the Southern District of Florida had granted full faith and credit to the judgment without commenting on jurisdiction,⁸⁸ the judgment had a particularly grievous error—the Florida state court had never even mentioned the FSIA as the source of its jurisdiction.⁸⁹ Given this, and the fact that Cuban instrumentalities had intervened in the case as third parties to collaterally attack the judgments, the *Jerez* court easily distinguished *Weininger* and conducted a de novo review of jurisdiction. It found that the Florida court had no jurisdiction over the case under the FSIA because the acts of torture alleged by *Jerez* occurred over a decade before and bore no relation to Cuba's placement on the SST list, and that *Jerez* further did not qualify for any relief as he was not a U.S. national at the time that he was allegedly tortured.⁹⁰

In affirming the district court's findings in full, the D.C. Circuit criticized the *Weininger* decision in broader terms. While *Jerez* argued that “a judgment rendered by a court assuming subject matter jurisdiction is preclusive, even if the judgment was incorrect, as long as the court did not ‘plainly usurp jurisdiction,’”⁹¹ the D.C. Circuit stated that this was only so in contested cases where the defendant had a chance to litigate jurisdiction, not in the case of default judgments. “To the extent that *Weininger* suggests the contrary,” the court “respectfully disagree[d].”⁹²

The defeat suffered by *Jerez* in the D.C. Circuit, however, did not prevent the other judgment holders from moving aggressively in the Southern District of New York. The *Hausler*, *Vera*, and *Villoldo* plaintiffs were all granted full faith and credit in a consolidated case entitled *Vera v. Republic of Cuba*.⁹³ The three plaintiffs served levies of execution on electronic fund transfers (EFTs) which were received for re-transmission by banks in New York City, “either from banks abroad to Cuban beneficiaries, or from Cuban entities to banks

⁸⁸ *Jerez v. Republic of Cuba*, No. 08-23405-CIV (S.D. Fla. May 6, 2009).

⁸⁹ See *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428, 434 (1989) (“[The FSIA is the] sole basis for obtaining jurisdiction over a foreign state in our courts.”).

⁹⁰ *Jerez v. Republic of Cuba*, 964 F. Supp. 2d 52, 58 (D.D.C. 2013), *aff'd*, 775 F.3d 419 (D.C. Cir. 2014).

⁹¹ *Jerez v. Republic of Cuba*, 775 F.3d 419, 422 (D.C. Cir. 2014) (quoting *Weininger v. Castro*, 462 F. Supp. 2d 457, 475 (S.D.N.Y. 2006)).

⁹² *Id.*

⁹³ 40 F. Supp. 3d 367 (S.D.N.Y. 2014).

abroad,” which were then blocked by the OFAC sanctions rules.⁹⁴ Banco Bilbao, one of the banks involved in the turnover proceedings, launched a collateral attack on the original judgments, arguing that the Florida courts lacked subject matter jurisdiction over Cuba.⁹⁵

The district court in *Vera* summarily dismissed Banco Bilbao’s attack, stating that the bank “cannot come close to showing these judgments are void for lack of jurisdiction.”⁹⁶ It found that the Florida court “found the facts, and applied the law, finding that acts of terrorism took the lives of plaintiffs’ family members,” and that “Cuba was designated as a state sponsor of terrorism either before these acts or partially as a result of these acts; and that victims or claimants were United States citizens.”⁹⁷ The sparseness of the Florida judgments (for example, their failure to cite the reasons why Cuba was placed on the SST list in all three cases, demonstrate their relation to the alleged acts, or inquire into Mr. Vera’s nationality) were not mentioned and thus, the three judgments worth over \$3.4 billion were fully recognized.

While the decision is currently under appeal to the Second Circuit,⁹⁸ the pattern is clear: With the exception of the D.C. Circuit, federal courts have been unwilling to examine the jurisdictional foundations of the Florida judgments, relying on vague language that the courts “found the facts, and applied the law,” without pausing to analyze whether any of the facts could, under any conceivable theory, actually justify jurisdiction. Under this logic, the same result would lie if the Florida courts issued a judgment “finding” Cuban liability for the bombing of the USS Maine in 1898, if followed by a rote recitation of the FSIA legal standard.

In an attempt to defeat the New York litigation, the banks holding EFTs in the *Vera* case requested that the Southern District of Florida vacate its decision to grant full faith and credit to the *Hausler* judgment.⁹⁹ In response, that court requested that the State Department present a statement of interest stating the reasons why Cuba was placed on the SST list. The State Department offered a declaration stating that Cuba was placed on the list “because of Cuba’s clear support for organizations and groups abroad that used terrorism and revolutionary violence as a policy instrument to undermine

⁹⁴ *Id.* at 373.

⁹⁵ *Id.* at 374–75.

⁹⁶ *Id.* at 376.

⁹⁷ *Id.*

⁹⁸ Notice of Appeal, *Vera v. Republic of Cuba*, No. 15-1796 (2d Cir. June 3, 2015).

⁹⁹ *Hausler v. Republic of Cuba*, No. 08-20197-CIV, slip op. at 2 (S.D. Fla. Sept. 11, 2013).

existing governments.”¹⁰⁰ The State Department emphasized that it did “not intend to submit its views on the legal question posed by the Court concerning whether the Florida state court had subject matter jurisdiction in the underlying action.”¹⁰¹ While denying the banks’ petition to vacate the court’s decision, the court stated that:

In support of their position, the adverse claimants filed a significant amount of documentary evidence that had not been introduced or considered in the underlying proceedings [T]he United States submitted a statement of interest indicating that . . . Cuba was placed on the [SST list] because of the Cuban government’s support of revolutionaries in Latin America.¹⁰²

Though recognizing that “this information may cast a shadow on the cause of Cuba’s designation as a state sponsor of terrorism,” the court found that it “need not address” the issue—in light of the fact that the Southern District of New York had independently granted full faith and credit to the judgment, the banks lacked standing.¹⁰³

With the exception of the D.C. Circuit in *Jerez*, the history of enforcement has been deeply problematic on the part of both the federal judiciary and the executive branch. Despite knowing that key blocked assets would be paid out to satisfy politically motivated, jurisdictionally frivolous judgments, the State Department failed to intervene of its own accord in enforcement proceedings. When finally asked to do so by the Southern District of Florida, the State Department presented facts tending to unequivocally undermine the plaintiffs’ claims of jurisdiction, and then formally refused to take a position on the matter. The judiciary, for its part, contented itself by ruling that there was no evidence that the state courts had “plainly usurped [their] jurisdiction,”¹⁰⁴ and that they had satisfactorily “found the facts, and applied the law.”¹⁰⁵ No federal court made any affirma-

¹⁰⁰ Declaration of Peter M. Brennan ¶ 4, *Hausler v. Republic of Cuba*, No. 08-20197-CIV (S.D. Fla. Sept. 11, 2013).

¹⁰¹ Statement of Interest of the United States of America at 2, *Hausler v. Republic of Cuba*, No. 08-20197-CIV (S.D. Fla. Sept. 11, 2013).

¹⁰² *Hausler*, No. 08-20197-CIV, slip op. at 3.

¹⁰³ *Id.* The court found that the standing requirement was not met because the plaintiff’s injuries were not redressable; as the Southern District of New York had already granted full faith and credit to the judgments independently, a contrary decision by the Southern District of Florida would not remedy the diminution of the bank’s interest in the Cuban assets. *Id.* at 4.

¹⁰⁴ *Weininger v. Castro*, 462 F. Supp. 2d 457, 475 (S.D.N.Y. 2006) (finding that the Florida state court established a jurisdictional basis).

¹⁰⁵ *Vera v. Republic of Cuba*, 40 F. Supp. 3d 367, 376 (S.D.N.Y. 2014) (holding that the findings in each case established the Florida Circuit Court’s jurisdiction and entitling the judgments entered to full faith and credit).

tive findings—or even persuasive suggestions—that the facts found by the Florida state courts actually met the FSIA’s requirements.

The danger that these multi-billion dollar judgments pose to the normalization process should not be underestimated, for even where Cuba has virtually no non-diplomatic assets under U.S. jurisdiction, judgment holders have been quite creative in their enforcement theories. They have attempted to seize the U.S.-based funds of a charitable foundation whose assets in Cuba were nationalized,¹⁰⁶ securities accounts opened by individuals with Cuban addresses in the 1950s and held by a transfer agent of U.S.-based securities issuers,¹⁰⁷ and funds held by the New York State Comptroller on behalf of uncompensated shareholders of a nationalized Cuban oil company and other individuals.¹⁰⁸ They have brought independent Racketeer Influenced and Corrupt Organizations Act claims against banks violating the Cuba sanctions program¹⁰⁹ and attempted to seize funds secured in settlements of federal criminal cases against these banks.¹¹⁰ There is every reason to believe that such “creativity” will only be exacerbated by any upturn in the bilateral economic relationship.

III

SETTLEMENT OF THE SST JUDGMENTS AGAINST CUBA

The prior section has demonstrated that the SST judgments against Cuba are jurisdictionally flawed and pose a serious—and unnecessary—obstacle to full normalization of Cuban-United States relations. The following Part will examine the prospects for a settlement of these judgments pursuant to a sole executive agreement and argue that, given the politicized nature of the judgments, the President should exercise this authority.

A. The President’s Power to Resolve Claims by Sole Executive Agreement

Presidential power in the area of international claims settlement has primarily developed in the context of nationalizations of property and has historically been viewed as extremely broad. Most such agree-

¹⁰⁶ *Hausler v. JP Morgan Chase Bank, N.A.*, No. 09-CV-10289, 2015 WL 5236481, at *1 (S.D.N.Y. Aug. 4, 2015).

¹⁰⁷ *Villoldo v. Ruz*, No. 13-mc-94014-TSH, 2015 WL 4092694, at *1 (D. Mass. July 7, 2015).

¹⁰⁸ Supplemental Complaint at 1, 3, *Villoldo v. Republic of Cuba*, 1:14-mc-0025 (LEK/CFH), 2016 WL 81492 (N.D.N.Y. 2016).

¹⁰⁹ Complaint at ¶¶ 8, 26, *Villoldo v. BNP Paribas S.A.*, No. 14-cv-9930 (S.D.N.Y. 2015).

¹¹⁰ *United States v. BNP Paribas S.A.*, No. 14 Cr. 460 (LGS), 2015 WL 1962882, at *1 (S.D.N.Y. Apr. 30, 2015).

ments are “lump-sum” settlements, in which the President agrees to extinguish all claims held by U.S. nationals against foreign governments in return for a payment or series of payments. In the modern era, claims are typically adjudicated, allocated, and paid out by the FCSC, an administrative agency under the aegis of the Department of Justice. Though some claims are settled by treaty, sole executive agreements are far more common. Since the creation of the FCSC, all but one of the eighteen property claims settlements did not require congressional approval.¹¹¹

In 1981, the Supreme Court confronted the question of presidential claims settlement in the context of the Algiers Accords, which called for the freeing of American hostages in Iran, the suspension of all litigation against Iran in U.S. courts, and the submission of all claims to an international claims tribunal. In *Dames & Moore v. Regan*, litigants took the position that the President had exceeded his constitutional authority by eliminating attachments on Iranian property and suspending their claims in U.S. courts.¹¹²

To resolve the question, the Court applied the tripartite framework enunciated in Justice Jackson’s concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*.¹¹³ This framework organizes presidential action into three distinct categories. In Category I, the President acts pursuant to an express or implied authorization of Congress and his authority is at its maximum. These actions are only unconstitutional if the federal government as a whole lacks power. When the President acts against a background of congressional silence, he is in Category II, and he can rely only upon his own independent Article II powers. He acts in a “zone of twilight” where his authority is concurrent to that of Congress. In Category III, where the President takes measures incompatible with the express or implied will of Congress, his power is “at its lowest ebb” and will be found unconstitutional unless the Presi-

¹¹¹ The one exception is Czechoslovakia, which is a special case due to the fact that the United States had retained large amounts of Czechoslovak gold after World War II and conditioned its return on a satisfactory resolution of U.S. property claims. In 1974, the United States reached a claims agreement that Congress found lacking in light of the enormous leverage the gold provided. Therefore, it wrote provisions into the Trade Act of 1974 stating that the agreement must be renegotiated and “submitted to the Congress” and that “[t]he United States shall not release any gold belonging to Czechoslovakia . . . until [a claims settlement] agreement has been approved by the Congress.” 19 U.S.C. § 2438 (2012). In 1982, a claims agreement was signed and approved by Congress. See Czechoslovakian Claims Settlement Act of 1981, Pub. L. No. 97-127, 95 Stat. 1675 (1981). This case demonstrates that Congress can limit presidential settlement discretion by passing a law subject to bicameralism and presentment.

¹¹² 453 U.S. 654, 666–67 (1981).

¹¹³ 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring).

dent is found to have exclusive power over a given domain.¹¹⁴ Ultimately, the Court found that the President's actions fell into Category II—while the nullification of attachments was within the authority granted to the President by statute, the termination of claims in the judiciary was not so authorized. Thus, the validity of his action turned on the scope of the Executive's Article II constitutional authority.¹¹⁵

In finding that the President had such authority, the Court focused on three elements. First, while not authorizing it explicitly, the Court found that the "general tenor" of congressional legislation in this area was fully consistent with the President's action, and there was no specific "contrary indication of legislative intent" in the record.¹¹⁶ Second, the Court held that the long history of claims settlement by executive agreement and the nearly universal congressional acquiescence in the practice, as demonstrated by its repeated enactment of legislation governing the allocation of post-settlement funds at the FCSC, could be treated as a "gloss" on presidential powers.¹¹⁷ Third, it found that the Court itself had previously upheld sole executive claims settlements, such as the "Litvinov Agreement" with the Soviet Union in 1933.¹¹⁸

However, the *Dames & Moore* Court left open a key question. It did not "decide that the President possesses plenary power to settle claims, even as against foreign governmental entities"; it merely emphasized that the facts before it made it clear that the settlement was "a necessary incident to the resolution of a major foreign policy dispute" and "that Congress acquiesced in the President's action"¹¹⁹ The Court was ambiguous about what constitutes congressional acquiescence. Clearly, a law disapproving of a claims settlement agreement approved by both houses of Congress, subject to a presidential veto, would push presidential power to its "lowest

¹¹⁴ See, e.g., *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2090, 2096 (2015) (finding Category III presidential action valid despite explicit congressional disapproval because of exclusive executive power to recognize foreign states).

¹¹⁵ See *Dames & Moore*, 453 U.S. at 676–77 (determining that the IEEPA and the Hostage Act did not provide the President with specific authorization to suspend claims).

¹¹⁶ *Id.* at 678.

¹¹⁷ *Id.* at 686 ("[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on 'Executive Power' vested in the President by § 1 of Art. II." (citing *Youngstown*, 343 U.S. at 610–11 (Frankfurter, J., concurring))).

¹¹⁸ *Id.* at 682–83. In *United States v. Pink*, which dealt with the Litvinov Agreement, the Court found that "[p]ower to remove such obstacles to full recognition as settlement of claims . . . certainly is a modest implied power of the President No such obstacle can be placed in the way of rehabilitation of relations between this country and another nation, unless the historic conception of the powers and responsibilities . . . is . . . revised." 315 U.S. 203, 229–30 (1942).

¹¹⁹ *Dames & Moore*, 453 U.S. at 688.

ebb,”¹²⁰ thus making unilateral executive action unconstitutional. *Dames & Moore*, however, did not directly address other scenarios: for example, whether a resolution passed by only one house¹²¹ or hostile congressional hearings absent any resolution would be enough to push presidential action out of the “twilight zone” and into *Youngstown* Category III.¹²²

The Court has since reaffirmed *Dames & Moore*’s holding. In *American Insurance Ass’n v. Garamendi*, the Court found that a state law was preempted to the extent that it conflicted with a sole executive agreement with Germany governing compensation for those injured by the Nazi regime.¹²³ In reaching its decision, the Court noted that “the President has authority to make ‘executive agreements’ with other countries, requiring no ratification by the Senate or approval by Congress, this power having been exercised since the early years of the Republic” and that “[m]aking executive agreement to settle claims of American nationals against foreign governments is a particularly longstanding practice” dating back to 1799.¹²⁴

More recently, the Court has been skeptical of the use of executive power to enforce international agreements, with its decision in *Medellin v. Texas*¹²⁵ being the primary example. In this case, the International Court of Justice had held that Mexican prisoners in the United States were denied access to consular assistance after their

¹²⁰ This is, indeed, what happened with the Czechoslovakia claims settlement. *See supra* note 111.

¹²¹ *But see* Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 STAN. L. REV. 573, 577–79 (2008) (defending the potential value of congressional soft-law communications, particularly “soft statutes” like simple and concurrent resolutions, as a way of escaping having to infer ambiguous congressional intent from inaction); Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 193–94 (1994) (arguing that concurrent congressional resolutions should be sufficient to block presidential action exercised pursuant to implicit powers).

¹²² It could be argued that any attempt to express disapproval of a claims settlement without full bicameralism and presentment would violate the prohibition on legislative vetoes in *INS v. Chadha*, 462 U.S. 919, 956–59 (1983). Assuming that claims settlements are within the President’s Article II powers, Congress should not be able to limit such settlements by anything less than a bill passed through both houses over the President’s veto. For further discussion on the significant effect of *Chadha* on U.S. foreign relations practice, see Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 YALE L.J. 140, 200–01 (2009).

¹²³ 539 U.S. 396, 401 (2003).

¹²⁴ *Id.* at 415. The *Garamendi* decision is consistent with the Court’s recent decisions regarding historical glosses on executive power in other domains. *See, e.g.*, *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2556–57, 2559 (2014) (rejecting a narrow interpretation of the President’s recess appointment power in light of lengthy historical practice and congressional acquiescence).

¹²⁵ 552 U.S. 491, 527–28 (2008).

arrest, as required under the Vienna Convention on Consular Relations.¹²⁶ President Bush had issued a memorandum ordering Texas to review their convictions, arguing that the document was a valid exercise of the President's foreign affairs authority to resolve international claims disputes.¹²⁷ The Court refused to enforce this memorandum, finding that executive action directing state courts to reopen final criminal judgments was "unprecedented."¹²⁸ In doing so, however, it explicitly contrasted this action with the "systematic, unbroken, executive practice" of executive claims agreements dealt with in *Dames & Moore* and *Garamendi*, recognizing again a "narrow and strictly limited authority to settle international claims disputes pursuant to an executive agreement"¹²⁹

Some critics have challenged the Supreme Court's claims settlement jurisprudence; for example, Bradford Clark has argued that the Court misread the long history of congressional acquiescence because most of the agreements were reached before the passage of the original FSIA in 1977, when states would have had absolute sovereign immunity in U.S. courts.¹³⁰ At that time, no judicial remedy was available, and presidential espousal and diplomatic settlement of claims was the only possible way for U.S. nationals to receive compensation from foreign states.¹³¹ Clark proposes that by making states amenable to suits under certain causes of action, the FSIA drastically changed this situation, taking away presidential power to settle claims for which there is jurisdiction in the judicial forum, and retaining it only for claims which remain barred by foreign sovereign immunity.¹³² In this view, presidential action on claims which fall within the FSIA's exceptions to sovereign immunity should properly be considered as directly inconsistent with the FSIA and falling within *Youngstown* Category III.¹³³

As Clark acknowledges, the Supreme Court rejected this argument in *Dames & Moore*, noting that Congress had refused to enact several contemporary proposals limiting the President's ability to

¹²⁶ Case Concerning *Avena and Other Mexican Nationals* (Mex. v. U.S.), Judgment, 2004 I.C.J. Rep. 12, ¶¶ 90, 115 (Mar. 31).

¹²⁷ *Medellin*, 552 U.S. at 498, 530.

¹²⁸ *Id.* at 532.

¹²⁹ *Id.* at 531–32.

¹³⁰ Bradford R. Clark, *Domesticating Sole Executive Agreements*, 93 VA. L. REV. 1573, 1624–37 (2007); see also Ingrid Brunk Wuerth, *The Dangers of Deference: International Claims Settlement by the President*, 44 HARV. INT'L L.J. 1, 1–2, 5 (2003) (discussing the problems associated with courts' deference to the Executive's international agreements designed to resolve the litigation that arose from World War II and the Holocaust).

¹³¹ Clark, *supra* note 130, at 1626–29.

¹³² *Id.* at 1625–26.

¹³³ *Id.* at 1632–34.

enter into executive agreements.¹³⁴ The Court has shown no appetite to revisit the question.¹³⁵ Therefore, for now, the law recognizes the President's power to settle claims otherwise cognizable under the FSIA.

*B. SST Judgments Are No Different than Other Claims:
Libya and Iraq*

Most of the long history of congressional acquiescence upon which the claims settlement cases rely dealt with property claims. Therefore, a threshold question in examining the Executive's power to resolve the judgments against Cuba is whether terrorism judgments are analogous to property claims. While the history of claims settlement goes back to 1799, only two settlements have been negotiated on SST claims since that time—Libya in 2008 and Iraq in 2010.

1. Libya

On August 4, 2008, Congress passed the Libya Claims Resolution Act (LCRA), officially sanctioning presidential action to agree to a claims settlement and restore Libya's sovereign immunity. This Act explicitly stated that Congress approved of the President's efforts to settle terrorism claims¹³⁶ and required the Secretary of State to certify to Congress that the United States had received sufficient funds to provide fair compensation to U.S. nationals with pending claims and existing settlements against Libya.¹³⁷ Upon receiving this certification, Libya would no longer be subject to the FSIA's SST exceptions to immunity from jurisdiction, liens, attachment, and execution, and any existing attachments, garnishments, or executions against Libya and its agencies or instrumentalities would be void.¹³⁸

The United States and Libya negotiated a comprehensive Claims Settlement Agreement on August 14, 2008, pursuant to which Libya paid \$1.5 billion into a fund to be distributed to victims of terrorist

¹³⁴ *Dames & Moore v. Regan*, 453 U.S. 654, 685 (1981) (“The FSIA was thus designed to remove one particular barrier to suit, namely sovereign immunity, and cannot be fairly read as prohibiting the President from settling claims of United States nationals against foreign governments.”); *id.* at 686 (“It is quite unlikely that the same Congress that rejected proposals to limit the President's authority to conclude executive agreements sought to accomplish that very purpose sub silentio through the FSIA.”).

¹³⁵ In addition to *Garamendi* and *Medellin*'s explicit approval, the claims settlement cases were cited approvingly last term in a case involving the Executive's recognition power. See *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2088–89 (2015).

¹³⁶ *Libyan Claims Resolution Act*, Pub. L. No. 110-301, § 3, 122 Stat. 2999, 2999 (2008).

¹³⁷ *Id.* § 5(a)(2)(B).

¹³⁸ *Id.* § 5(a)(1)(C).

attacks attributed to Libyan terrorism.¹³⁹ The Agreement stated that its objectives were to “(1) reach a final settlement of the Parties’ claims, and those of their nationals . . . ; (2) terminate permanently all pending suits (including suits with judgments that are still subject to appeal or other forms of direct judicial review); and (3) preclude any future suits that may be taken to their courts”¹⁴⁰ Upon receipt of all committed funds, the parties agreed to “[s]ecure . . . the termination of any suits pending in its courts . . . (including proceedings to secure and enforce court judgments), and preclude any new suits in its courts” and “[p]rovide the same sovereign, diplomatic and official immunity to the other Party and its property . . . as [that] provided to other states”¹⁴¹ On October 31, 2008, President Bush issued an executive order settling all claims referred to in the Agreement and ordering the termination of any pending suit in any court by U.S. nationals (including any with a judgment still subject to judicial review).¹⁴²

There can be no question that President Bush was acting with explicit statutory authorization and was squarely in Category I of the *Youngstown* framework. At first glance, therefore, the case would suggest that terrorism judgments *were* treated differently than property claims, and that the President, whether because of legal obligation or comity, sought congressional authorization before taking action. However, on closer examination, the LCRA says nothing whatsoever about sole executive authority to settle U.S. nationals’ claims against Libya. Instead, the LCRA appears to simply assume that it exists just as it does for property claims.¹⁴³

Instead, the LCRA acted on another domain clearly within legislative purview—by fully restoring Libya’s sovereign immunity under the FSIA.¹⁴⁴ In essence, the LCRA acted to provide Libya with

¹³⁹ Claims Settlement Agreement, U.S.A.-Libya, Aug. 14, 2008, T.I.A.S. No. 08-814. The United States also agreed to pay Libya \$300 million to compensate Libyan victims of a U.S. bombing campaign in Libya in 1986. *Id.*

¹⁴⁰ *Id.* at art. 1.

¹⁴¹ *Id.* at art. 3.

¹⁴² Exec. Order No. 13,477, 3 C.F.R. § 100.1 (2008).

¹⁴³ Libyan Claims Resolutions Act, Pub. L. No. 110-301, § 3, 122 Stat. 2999, 2999 (2008) (indicating congressional support for the Executive’s use of a pre-existing, discretionary power by stating that it “supports the President in his efforts to provide fair compensation . . . pursuant to an international agreement between the United States and Libya”); see also Claims Settlement Agreement, U.S.A.-Libya, *supra* note 139, at art. 3 (stating that the objective of the Agreement is to preclude future suits but indicating nothing about sole executive authority).

¹⁴⁴ See *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493 (1983) (“By reason of its authority over foreign commerce and foreign relations, Congress has the undisputed power to decide, as a matter of federal law, whether and under what circumstances foreign nations should be amenable to suit in the United States.”).

double protection by making Libya absolutely immune from attachment and execution as if it were never on the SST list in the first place. Therefore, any legal challenge that may have arisen to the President's authority to settle terrorism claims—a question of first impression at the time—would be futile, because if the presidential action were invalidated and outstanding judgments stood, there would be no manner of enforcing them in U.S. courts due to Libya's restored sovereign immunity.

2. *Iraq*

In the wake of the United States' invasion of Iraq in 2003, President Bush issued an executive order providing for the confiscation and vesting of Iraq's frozen assets in the U.S. government and placing them in the Development Fund for Iraq for use in the postwar reconstruction of Iraq.¹⁴⁵ Congress supported the President's determination in the Emergency Wartime Supplemental Appropriations Act for fiscal year 2003 (EWSAA), which provided that "the President may make inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961 or any other provision of law that applies to countries that have supported terrorism"¹⁴⁶ On the basis of the "any other provision of law" authority, President Bush declared a number of provisions, including the FSIA exception and TRIA § 201, to be inapplicable to Iraq.¹⁴⁷ Iraq was removed from the SST list on October 7, 2004.¹⁴⁸

This declaration notwithstanding, litigation against Iraq continued on behalf of plaintiffs injured by Iraqi government conduct during the Gulf War. In *Acree v. Republic of Iraq*, the D.C. Circuit found that the presidential determination restoring Iraq's sovereign immunity was invalid.¹⁴⁹ As other circuits did not conclusively rule on

¹⁴⁵ Exec. Order 13290, 3 C.F.R. § 100.1 (2003).

¹⁴⁶ Emergency Wartime Supplemental Appropriations Act, 2003, Pub. L. No. 108-11, § 1503, 117 Stat. 559, 579.

¹⁴⁷ See Presidential Determination No. 2003-23, 3 C.F.R. § 100.1 (2003) (making Section 620A of the FAA of 1961 inapplicable to Iraq and suspending the application of all but one of the provisions of the Iraq Sanctions Act of 1990); Message to the Congress Reporting the Declaration of a National Emergency with Respect to the Development Fund for Iraq, 39 WEEKLY COMP. PRES. DOC. 647 (May 22, 2003) (declaring sections of the Terrorism Risk Insurance Act inapplicable to Iraq).

¹⁴⁸ Rescission of Determination Regarding Iraq, 69 Fed. Reg. 61,702 (Oct. 20, 2004).

¹⁴⁹ 370 F.3d 41, 51 (D.C. Cir. 2004) ("[The waiver provision] was not intended to alter the jurisdiction of the federal courts under the FSIA."). The court also found that the plaintiffs failed to state a cause of action. *Id.* at 65.

the matter,¹⁵⁰ other judgments against Iraq were able to stand¹⁵¹ and litigation proceeded.¹⁵²

The 2008 amendments to the FSIA in section 1083 of the National Defense Authorization Act (NDAA) provided President Bush with a second opportunity to restore Iraq's sovereign immunity. This section allowed the President to waive "any provision" of the new FSIA's SST provisions in regards to Iraq under certain conditions and made clear that any such waiver would apply retroactively.¹⁵³ On the day that he signed the bill into law, President Bush waived "all provisions of section 1083 of the Act with respect to Iraq and any agency or instrumentality thereof."¹⁵⁴

However, because the D.C. Circuit interpreted the NDAA to permit it to retain jurisdiction over cases pending under section 1605(a)(7),¹⁵⁵ the issue reached the Supreme Court in *Republic of Iraq v. Beatty*. In *Beatty*, the Court unanimously held that as a matter of straightforward statutory construction, the original waiver exercised pursuant to the EWSAA in 2003 barred any jurisdiction over SST cases against Iraq.¹⁵⁶ It further found that given the regime change effected by the U.S. invasion, it would be "perplexing" to "convert[] a billion-dollar reconstruction project into a compensation scheme for a few of Saddam's victims."¹⁵⁷

Although *Beatty* effectively made all judgments against Iraq unenforceable by rendering inoperative the attachment and execution provisions of the FSIA, and voided any judgment entered after 2003, Congress expressed its desire for bona fide claims to be satisfied in the

¹⁵⁰ See, e.g., *Smith ex rel. Smith v. Fed. Reserve Bank of N.Y.*, 346 F.3d 264, 272 (2d Cir. 2003) (declining to reach the question of the validity of the 2003 executive order restoring Iraq's sovereign immunity).

¹⁵¹ See, e.g., *Smith v. Islamic Emirate of Afghanistan*, 262 F. Supp. 2d 217, 240 (S.D.N.Y. 2003) (ascribing partial responsibility for two deaths in the September 11, 2001 attacks to Iraq and awarding \$63.5 million).

¹⁵² See, e.g., *Beatty v. Republic of Iraq*, 480 F. Supp. 2d 60, 90, 93 (D.D.C. 2007) (recognizing claims of children of Gulf War hostages); *Vine v. Republic of Iraq*, 459 F. Supp. 2d 10, 19, 28 (D.D.C. 2006) (recognizing claims of U.S. nationals used as human shields during Gulf War).

¹⁵³ National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1083(d), 122 Stat. 3, 343-44.

¹⁵⁴ Presidential Determination No. 2008-9, 3 C.F.R. § 100.1 (2008).

¹⁵⁵ See *Simon v. Republic of Iraq*, 529 F.3d 1187, 1194 (D.C. Cir. 2008).

¹⁵⁶ *Republic of Iraq v. Beatty*, 556 U.S. 848, 866-67 (2009).

¹⁵⁷ *Id.* at 864. In finding that the judicial presumption against retroactivity did not apply in the context of foreign sovereign immunity, the Court reasoned that "[f]oreign sovereign immunity 'reflects current political realities and relationships,' and its availability (or lack thereof) generally is not something on which parties can rely 'in shaping their primary conduct.'" *Id.* at 864-65 (quoting *Republic of Austria v. Altmann*, 541 U.S. 677, 696 (2004)).

traditional way—through a sole executive agreement. To this end, § 1083 of the NDAA included a “[s]ense of the Congress” statement that “the President, acting through the Secretary of State, should work with the government of Iraq on a state-to-state basis to ensure compensation for any meritorious claims based on terrorist acts committed by the Saddam Hussein regime against [U.S. nationals].”¹⁵⁸ This statement demonstrates congressional approval, shifting presidential action to resolve outstanding judgments in the Iraq case to *Youngstown* Category I. However, it is worded as a recommendation, not a grant of authority, and clearly presupposes the President’s discretionary power to do so absent congressional supervision.

The Executive complied with this “sense of Congress” on September 2, 2010, when the United States negotiated and signed a \$400 million claims settlement agreement with Iraq for SST-related claims occurring before the country’s removal from the SST list in 2004.¹⁵⁹ In addition to standard claims settlement language suspending claims and suits currently pending before the courts and precluding new claims from being filed, the agreement also compelled the United States to “nullify all attachments and judgments obtained in [SST] claims”¹⁶⁰ and “seek the vacatur of any judgment rendered by a U.S. federal or state court”¹⁶¹ Congress was not asked to approve of the compensation scheme established by the agreement. In fact, they appeared to have acquiesced to the President’s hitherto unprecedented intent to nullify even those final judgments which are no longer subject to judicial review.¹⁶²

C. *The Cuban SST Judgments Can Be Settled*

The cases of Libya and Iraq demonstrate several principles relevant to any potential executive action to settle the judgments against Cuba. First, they stand for the proposition that the claims settlement line of cases is relevant in this domain: FSIA SST claims—even those with final judgments—can be settled without a clear statutory grant of authority, at least when Congress supports or acquiesces to the President’s action to do so. Second, they make clear the distinction between a restoration of FSIA immunity from attachment and execution—which can only be accomplished by Congress—and a settlement

¹⁵⁸ National Defense Authorization Act § 1083(d)(4).

¹⁵⁹ Claims Settlement Agreement, U.S.A.-Iraq, art. IV, Sept. 2, 2010, T.I.A.S. No. 11-522.

¹⁶⁰ *Id.* at art. II.

¹⁶¹ *Id.* at art. V.

¹⁶² This presidential power goes further than the Libya settlement, which excluded such final judgments. *See supra* notes 139–41 and accompanying text.

of the underlying claims to be enforced—which is within the domain of executive power. Therefore, after presidential action, Cuba may find itself in the anomalous situation of having its assets remain theoretically subject to execution pursuant to SST judgments, but have all existing claims and judgments finally settled.

Neither the Libya nor the Iraq case resolves the more difficult question raised by *Dames & Moore* of whether an executive claims settlement would be valid if Congress withheld support or showed signs of disapproval which stop short of the passage of a law over the presidential veto.¹⁶³ In conducting this analysis for Cuba, courts would likely consider Congress's history of limiting executive discretion via enactments such as the Helms-Burton Act of 1996¹⁶⁴ and the Trade Sanctions Reform and Export Enhancement Act of 2000.¹⁶⁵ However, no reference to limiting executive discretion regarding the settlement of claims against Cuba are made in any of these laws, which otherwise impose limitations of great specificity. For example, the Helms-Burton Act explicitly referenced the resolution of outstanding property claims,¹⁶⁶ required the Secretary of State to submit a report to Congress about the status of the claims,¹⁶⁷ and authorized new liability for “trafficking in confiscated property claimed by United States Nationals,”¹⁶⁸ but did not create any legislative mechanism for the settlement of such claims or challenge the President's authority to do so.¹⁶⁹

¹⁶³ See *supra* notes 119–22 and accompanying text (describing *Dames & Moore*'s treatment of this question and subsequent scholarship).

¹⁶⁴ Cuban Liberty and Democratic Solidarity (Libertad or Helms-Burton) Act, 22 U.S.C. §§ 6021–91 (1996). The structure of the Helms-Burton Act requires the President to submit a determination to Congress that Cuba has a “transition government” in place prior to the lifting of the economic embargo. 22 U.S.C. §§ 6061, 6065. It also grants Congress the right to nullify the presidential action by passing a joint resolution. 22 U.S.C. § 6064(e).

¹⁶⁵ Pub. L. No. 106-387 tit. IX, § 910, 114 Stat. 1549A-71 (2000) (forbidding the Secretary of the Treasury from authorizing tourist travel to Cuba).

¹⁶⁶ The Act states that one of the factors the President should consider in making the determination that a transition government is in power is whether it is “taking appropriate steps to return to United States citizens . . . property taken by the Cuban Government . . . on or after January 1, 1959, or to provide equitable compensation to such citizens and entities for such property.” 22 U.S.C. § 6065(b)(2)(D) (1996). However, this is listed as an “additional factor” for the President's consideration, not a “requirement” for the lifting of the embargo. 22 U.S.C. § 6065(a) (1996). At any rate, directing the President to consider claims settlement as a factor and retaining veto power over that decision is a far cry from cabinining his authority to settle those claims in the first place.

¹⁶⁷ 22 U.S.C. § 6067(a) (2012).

¹⁶⁸ 22 U.S.C. § 6082.

¹⁶⁹ Indeed, the property-related sections of the Helms-Burton Act only make sense under the assumption that the Executive has the right to resolve outstanding claims against Cuba; otherwise, there would be no mechanism for Cuba to comply with Congress's desire that claimants be compensated. Given that the law was drafted in the context of the

There is no indication that Congress had any other intent towards SST judgments against Cuba. The fact that the voluminous amount of restrictive legislation pertaining to Cuba does not reference claims settlement power in any way, but instead appears to presuppose that this power exists, indicates that no “specter” of congressional disapproval over presidential action can be inferred. As such, the President can and should act to settle the SST claims against Cuba, provided a veto-proof congressional majority would not act to overturn his determination. In doing so, the President will be standing on the firm jurisprudential ground of *Dames & Moore* and *Garamendi*, a “systematic, unbroken, executive practice”¹⁷⁰ extended into the area of SST judgments in the Libya and Iraq cases, and a current Supreme Court which has not hesitated to consider historical precedent on separation of powers cases.¹⁷¹

D. Takings Claims Should Not Arise from a Settlement of SST Judgments

A final concern with the settlement of the judgments against Cuba addresses the probability that judgment holders will file takings claims against the United States for expropriating their property interest in the causes of action against Cuba. Because claims settlement agreements involve the governmental espousal of private litigants’ claims, plaintiffs could argue that the U.S. government took ownership of their judgment and cause of action without just compensation. In order to state a claim, plaintiffs would have to “identif[y] a cognizable Fifth Amendment property interest” and demonstrate that the property interest was, in fact, “taken.”¹⁷²

This question is more than academic in light of a trio of decisions stemming from the Libya claims settlement handed down by the U.S. Court of Federal Claims in 2015. In two nearly identical claims, the court denied the government’s motion to dismiss in both cases brought by insurance companies excluded from the FCSC compensa-

longstanding tradition of claims settlement via sole executive agreement, it must be assumed that Congress foresaw that any agreement with Cuba would also take this form.

¹⁷⁰ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring).

¹⁷¹ See *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2091 (2015) (analyzing the President’s power to recognize foreign nations in light of historical practice); *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2567 (2014) (examining historical practice in determining contours of President’s recess appointments power).

¹⁷² See *Acceptance Ins. v. United States*, 583 F.3d 849, 854 (Fed. Cir. 2009) (collecting Federal Circuit cases stating the legal test for a Fifth Amendment claim).

tion process.¹⁷³ Most relevant for this Note, the court also denied the government's motion to dismiss of an individual SST judgment holder whose judgment of almost \$1.3 billion was vacated and instead received \$10 million in compensation from the FCSC.¹⁷⁴

In *Alimanestianu v. United States*, the court found that the plaintiffs' district court judgment constituted a cognizable property interest despite the fact that it was still subject to appeal. The court reasoned that part of the taking was the government's intervention in the D.C. Circuit to vacate the judgment, which "deprived Plaintiffs of their right to defend their judgment to finality."¹⁷⁵ The court rejected the argument that an "inchoate" judgment could not be the object of a takings claim.¹⁷⁶

This decision is inconsistent with Federal Circuit precedent and should either be rejected on the merits or reversed on appeal. While the court did not reach the point when considering the motion to dismiss, the takings claim should not survive the regulatory takings analysis provided by *Penn Central Transportation Co. v. New York City*.¹⁷⁷ Because of the special nature of the SST exception—which is highly dependent on an executive judgment of whether a state belongs on the SST list and always subject to change—parties cannot form distinct investment-backed expectations in their continuing right to execute property of foreign sovereigns. Moreover, because in both the Cuba and Libya cases the jurisdictional rules abrogating sovereign immunity were enacted after the conduct giving rise to plaintiffs' claims, the plaintiffs could not possibly have had an expectation of redress at the time they were wronged.¹⁷⁸ Finally, there is no principled way to determine the actual economic value of the judgment

¹⁷³ See *Aviation & Gen. Ins. Co. v. United States*, 121 Fed. Cl. 357, 367 (2015); *Aureus Asset Managers, Ltd. v. United States*, 121 Fed. Cl. 206, 214 (Fed. Cl. 2015).

¹⁷⁴ *Alimanestianu v. United States*, 123 Fed. Cl. 126 (Fed. Cl. 2015).

¹⁷⁵ *Id.* at 131.

¹⁷⁶ *Id.* In making this conclusion, the court relied on an earlier case that appeared to hold that a cause of action was sufficient to constitute a cognizable property interest. See *All. of Descendants of Tex. Land Grants v. United States*, 37 F.3d 1478, 1481 (Fed. Cir. 1994) ("Because a legal cause of action is a property interest within the meaning of the Fifth Amendment, claimants have properly alleged possession of a compensable property interest."). The United States had attempted to distinguish this case by cabining it to the context of land interests, arguing that property rights from legal claims do not exist unless the causes of action themselves protected a "legally-recognized property interest." *Adams v. United States*, 391 F.3d 1212, 1225–26 (Fed. Cir. 2004).

¹⁷⁷ 438 U.S. 104 (1978). In *Penn Central*, the Court identified three factors in analyzing whether a regulatory taking has occurred: (1) the extent to which the government's action interferes with investment-backed expectations; (2) the character of the government's action; and (3) the economic impact of that action on the claimants. *Id.* at 124.

¹⁷⁸ *Cf. Republic of Iraq v. Beaty*, 556 U.S. 848, 865 (2009) (stating, in a non-takings context, that "[t]he President's elimination of Iraq's *later* subsection to suit could hardly

beyond mere speculation. Neither the *Alimanestianu* nor the *Villoldo* plaintiffs could actually be said to have had a realistic expectation of fulfilling their billion-dollar judgments against states which have virtually no property under U.S. jurisdiction.¹⁷⁹

There is also a strong argument that takings claims which seek to second-guess the sufficiency of international claims agreements should be considered nonjusticiable political questions not subject to the *Penn Central* analysis.¹⁸⁰ In *Shanghai Power Co. v. United States*,¹⁸¹ the claims court rejected a company's argument that a taking occurred when it received only fourteen percent of the amount certified by the FCSC pursuant to a claims settlement agreement with China. The court found that "a judicial inquiry into whether the President could have extracted a more generous settlement from another country would seriously interfere with his ability to carry on diplomatic relations."¹⁸² The court further reasoned that such an inquiry would nullify the efficacy of the claims settlement power and lead to the raising of claims by everyone whose claim had been settled at less than one hundred percent of its expected value.¹⁸³ In *Belk v. United States*, the Federal Circuit reaffirmed this reasoning, stating that the espousal of claims pursuant to the Algiers Accords negotiated to secure the liberation of U.S. hostages in Iran was a nonjusticiable political question.¹⁸⁴

Because the Supreme Court has established a bright-line rule that the destruction of the entire value of a property interest virtually always constitutes a compensable taking,¹⁸⁵ the United States would

have deprived respondents of any expectation they held at the time of their injury that they would be able to sue Iraq in United States courts").

¹⁷⁹ In the Matter of the Claim of Pat Wayne Huff et al., Foreign Claims Settlement Commission, Claim No. LIB-II-017, at 15, <http://www.justice.gov/sites/default/files/fcsc/docs/lib-ii-017-018-019-020-021-022-047.pdf> ("Claimants appear to start with the premise that the judgment was the equivalent of money in hand—but, it was not A one hundred percent chance for \$10 million may well be worth more than some probability . . . of recovering in the future some proportion of a judgment for a far greater amount.").

¹⁸⁰ *Dames & Moore* states that there is no "jurisdictional obstacle to an appropriate action in the United States Court of Claims under the Tucker Act." 453 U.S. 654, 689-90 (1981); see also *id.* at 691 (Powell, J., concurring and dissenting in part) ("The Government must pay just compensation when it furthers the Nation's foreign policy goals by using as 'bargaining chips' claims lawfully held by a relatively few persons and subject to the jurisdiction of our courts."). However, the majority's statement is clearly dicta, as the Court found that the takings claim was not ripe for review. *Id.* at 688. Justice Powell's position has never been accepted by the Court.

¹⁸¹ 4 Cl. Ct. 237 (1983), *aff'd*, 765 F.2d 159 (Fed. Cir. 1985).

¹⁸² *Id.* at 248.

¹⁸³ *Id.*

¹⁸⁴ 858 F.2d 706, 710 (Fed. Cir. 1988).

¹⁸⁵ See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992) ("[W]hen the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name

be best advised to provide a process by which some compensation for the judgment holders can be adjudicated, the questionable nature of their judgments notwithstanding. In all prior claims settlement cases applying the *Penn Central* analysis where there was a finding of no taking, some compensation was provided to claimants.¹⁸⁶ As used in the cases of Libya and Iraq, the mechanism for such compensation would come by way of a referral to the FCSC, which would independently evaluate the claims and assess their value without considering the presence of existing default judgments.¹⁸⁷

CONCLUSION

This Note demonstrates that all three branches of government have some responsibility for this geopolitical debacle. In passing the FSIA's SST exception and subsequent enactments permitting attachment and execution of assets belonging to foreign sovereigns, Congress set no prudent limits on damages and ignored predictable effects on foreign relations. The statute, in turn, has been abused by politically motivated state courts who have issued jurisdictionally frivolous judgments imposing massive liability on the Cuban government. This initial miscarriage of justice has been exacerbated by federal courts who have refused to revisit the judgments on prudential grounds and by the Executive, who failed to take a position regarding

of the common good . . . he has suffered a taking.”). For further discussion of the application of *Penn Central* and *Lucas* to the SST judgments context, see Daveed Gartenstein-Ross, Note, *Resolving Outstanding Judgments Under the Terrorism Exception to the Foreign Sovereign Immunities Act*, 77 N.Y.U. L. REV. 496, 525–33 (2002).

¹⁸⁶ See *Abraham-Youri v. United States*, 139 F.3d 1462, 1468 (Fed. Cir. 1997) (“[T]he Government provided an alternative tailored to the circumstances which produced a result as favorable to plaintiffs as could reasonably be expected.”); *Shanghai Power Co.*, 4 Cl. Ct. at 245–46 (noting that claimants benefited from partial compensation secured by the Executive and would have otherwise been unable to satisfy their claim); cf. *Aviation & Gen. Ins. v. United States*, 121 Fed. Cl. 357, 366 (2015) (finding that plaintiffs stated a claim for a taking when the government terminated their legal claims and failed to provide an alternate means of recovery).

¹⁸⁷ In the decision underlying the *Alimanestianu* case, the FCSC explicitly rejected the judgment holders’ argument that they were entitled to additional compensation over the \$10 million awarded to other wrongful-death claimants simply because they held a judgment providing for damages over one hundred times that amount. The FCSC emphasized that it was exclusively limited to considering the “provisions of the applicable claims agreement” and “the applicable principles of international law, justice and equity.” In the Matter of the Claim of Pat Wayne Huff et al., Foreign Claims Settlement Commission, Claim No. LIB-II-017, at 8, <http://www.justice.gov/sites/default/files/fcsc/docs/lib-ii-017-018-019-020-021-022-047.pdf>. Finding that both the text and the mutual intent of the parties were silent on the question of whether additional compensation should be granted to judgment holders, the FCSC found that no principle of international law supported the proposition that a domestic court judgment could be used to augment compensation awards, and that no U.S. laws compelled this conclusion either. *Id.* at 9, 13.

the enforceability of the judgments. Over \$185 million in Cuban assets—which could have served as a bargaining chip in an eventual settlement of outstanding property claims against Cuba—have been paid out to claimants in only three cases, with almost \$4 billion in claims still outstanding.¹⁸⁸

This Note shows that the Executive can and should act to settle these claims pursuant to a sole executive agreement absent congressional acquiescence. An executive settlement will provide judgment holders with a modest recovery and pave the way for full normalization of relations with Cuba. While such action would expose the federal government to some risk of takings liability under the analysis of several recent Court of Federal Claims decisions, it is likely that the provision of an alternate adjudicatory forum in the FCSC would lead to a finding that no compensable taking occurred.

By taking these actions, the U.S. government would reaffirm the crucial nature of the claims settlement power to the Executive's ability to conduct foreign relations. Even more importantly, a decisive move would assure the international community that the politically motivated litigation of a handful of plaintiffs should not nullify the United States' ability to replace adversarial relationships with peaceful coexistence, and finally bringing a conflict which should have ended with the Cold War, to an end.

¹⁸⁸ See CONG. RESEARCH SERV., CAN CREDITORS ENFORCE TERRORISM JUDGMENTS AGAINST CUBA? (2015), <https://www.fas.org/sgp/crs/terror/creditors.pdf> (listing all outstanding judgments against Cuba).

APPENDIX
FLORIDA-BASED JUDGMENTS AGAINST CUBA

Case Name (Year of Alleged “Terrorist” Conduct)	Compensatory Damages	Punitive Damages	Notes
Alejandro v. Republic of Cuba (1996)	\$49,927,911	\$137,700,000	Original decision from federal district court (S.D. Fla.). Plaintiffs received \$97 million after congressional authorization in 2000.
Hausler v. Republic of Cuba (1960)	\$100,000,000	\$300,000,000	Enforcement proceedings currently ongoing in the SDNY; on appeal to Second Circuit.
Jerez v. Republic of Cuba (1964-1977)	\$50,000,000	\$150,000,000	Judgment found unenforceable by D.C. Circuit.
Martinez v. Republic of Cuba (1996)	\$7,175,000	\$20,000,000	Bizarre case brought by former wife of Cuban spy, alleging that misleading her about his identity for years constituted “torture.”
McCarthy v. Republic of Cuba (1961)	\$67,000,000	\$0	Fully satisfied under TRIA § 201(a) in <i>Weininger v. Castro</i> .
Saludes v. Republic of Cuba (2003-2009)	\$2,750,000	\$25,000,000	Original decision from federal district court (S.D. Fla.). Case concerned Cuban dissident journalist imprisoned in 2003 and held until 2010.
Suarez v. Republic of Cuba (1959-2007)	\$2,750,000	\$250,000,000	
Vera v. Republic of Cuba (1976)	\$49,346,713	\$0	Punitive damages were struck by the SDNY. Enforcement proceedings currently ongoing in the SDNY; on appeal to Second Circuit.
Villoldo v. Republic of Cuba (1959)	\$1,785,000,000	\$1,000,000,000	Enforcement proceedings currently ongoing in the SDNY; on appeal to Second Circuit.
Weininger v. Republic of Cuba (1961)	\$21,562,000	\$65,000,000	Compensatory damages paid in full in <i>Weininger v. Castro</i> .
Wiederspan v. Republic of Cuba (1959)	\$63,630,534	\$0	

Information from CONG. RESEARCH SERV., *Can Creditors Enforce Terrorism Judgments Against Cuba* (Sept. 29, 2015), <https://www.fas.org/sgp/crs/terror/creditors.pdf>.