STORMING THE PERSIAN GATES: THE SEVENTH CIRCUIT DENIES ATTACHMENT TO IRANIAN ANTIQUITIES

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INTRODUCTION

The Persepolis Tablets have withstood two battles in their lifetime. In 329/330 B.C., Alexander the Great stormed the Persian Gates and captured the Persian city of Persepolis before burning it to the ground. The tablets survived Alexander’s sack of Persepolis, but they faced a second battle this past year. This time it was a legal battle, fought by the victims of a terrorist attack on the one hand, and the tablet’s stewards on the other. The battle threatened to dismember this unique collection of antiquities by auctioning off each tablet piece by piece. Had the victims won, the single most important surviving insight into the organization of the 2,500-year-old Persian Empire would be sold into the living rooms of private collectors around the world.

The Persepolis Tablets have been likened to the “crown jewels of England, or the original document of the Magna Carta, or the Western


Wall in Jerusalem, or the Parthenon in Athens." Why would such an important piece of history be put up for auction? Perhaps only the harrowing tale of the plaintiffs in *Rubin v. Islamic Republic of Iran* could justify such a sorrow.

On the afternoon of September 4, 1997, hundreds of people gathered at the Ben-Yehuda Street mall on one of Jerusalem’s main streets to shop, dine, and enjoy the nice weather. Three Hamas suicide bombers entered the crowded mall and detonated five pounds of explosives packed with nails, screws, glass, and chemical poisons. The blast shattered windows, collapsed buildings, and propelled bodies through the air. Five people were killed, and nearly two hundred were injured. Among the injured were eight Americans: Diana Campuzano, Avi Elishis, Gregg Salzman, Jenny Rubin, Daniel Miller, Abraham Mendelson, Stuart Hersh, and Noam Rozenman. The victims suffered life-threatening injuries and to this day continue to suffer physical and psychological effects of the blast.

In addition to the eight American victims, four of the victim’s family members not present that day—Deborah Rubin, Renay Frym, Elena Rozenman, and Tzvi Rozenman—sought recovery for the emotional injuries caused by watching their loved ones suffer, and for the time and effort required to provide full-time care to them in the attack’s immediate aftermath. Together, these thirteen victims

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4 Id.
5 Id.
6 Id.
7 Id.
8 Id.
9 Id. at 267–68.
brought suit against the Islamic Republic of Iran in the United States District Court for the District of Columbia.\textsuperscript{10}

In September 2003, the plaintiffs were awarded a default judgment against Iran for providing Hamas with training, money, and operational support that aided in the 1997 attack.\textsuperscript{11} This award—comprised of $71.5 million in compensatory damages and $300 million in punitive damages\textsuperscript{12}—was far from the end of the road for the victims. Thirteen years later, they are still unable to collect on the judgment, but they continue to seek justice by bringing suit in jurisdictions throughout the United States. \textit{Rubin v. Islamic Republic of Iran} is one such suit.\textsuperscript{13}

In order to satisfy their judgment, the \textit{Rubin} plaintiffs sought to obtain possession of Iranian cultural artifacts, including the Persepolis Tablets, located in various Chicago museums and institutions.\textsuperscript{14} The plaintiffs set forth three bases for obtaining execution jurisdiction over these cultural artifacts: §1610(a) and § 1610(g) of the Foreign Sovereign Immunities Act ("FSIA"), and § 201(a) of the Terrorism Risk Insurance Act ("TRIA").\textsuperscript{15}

The Seventh Circuit in \textit{Rubin} held that the Persepolis Tablets may not be used to execute the \textit{Rubin} plaintiff’s judgment against Iran.\textsuperscript{16} Pursuant to the FSIA, the court restricted execution to foreign sovereign assets that are used by the foreign sovereign itself for commercial activity in the United States, ultimately preventing such execution.\textsuperscript{17}

The Seventh Circuit created a circuit split by expressly declining to follow the Ninth Circuit’s decision in \textit{Bennett v. Islamic Republic of


\textsuperscript{11} \textit{Id.} at 265.

\textsuperscript{12} \textit{Id.}

\textsuperscript{13} \textit{Rubin v. Islamic Republic of Iran}, 830 F.3d 470 (7th Cir. 2016).

\textsuperscript{14} \textit{Id.} at 473.

\textsuperscript{15} \textit{Id.}

\textsuperscript{16} \textit{Id.} at 489.

\textsuperscript{17} \textit{Id. See} 28 U.S.C. § 1610(a).
Bennett held that § 1610(g) provides a freestanding basis for executing judgments for state sponsored terrorism, which enabled the Bennett plaintiffs to execute on assets that were not used commercially in the United States. If followed by the Seventh Circuit, this would have allowed the Rubin plaintiffs to execute their judgment on the museum collection at issue in this case. Additionally, the court partially overruled two previous Seventh Circuit decisions to the extent that they can be read as holding that § 1610(g) is a freestanding exception to execution immunity for terrorism-related judgments. This further narrowed the ability for terrorism victims to execute their judgments.

This Note first sets forth the historical development of foreign sovereign immunity in the United States, and how the law has developed into what it is today. Next, it examines the Seventh Circuit’s decision in Rubin, focusing on the court’s decision to partially overrule Wyatt v. Syrian Arab Republic and Gates v. Syrian Arab Republic and the court’s rejection of the Ninth Circuit’s decision in Bennett. The analysis of this decision relates to the issue of whether the FSIA § 1610(g) offers a freestanding basis for executing judgments against state sponsors of terrorism, independent of § 1610(a) and (b). Finally, this Note concludes that, from a statutory interpretation perspective, the Seventh Circuit reached the correct result in denying the plaintiffs execution on the Persepolis Tablets. Additionally, auctioning cultural property raises policy concerns that further buttress the Seventh Circuit’s outcome. However, the Rubin plaintiffs are deserving victims who have been denied execution of their judgment despite repeated attempts to do so. The Rubin victims are not alone; many other victims of state-sponsored terrorism have been unsuccessful at receiving compensation for their grievous injuries. This Note argues that, in lieu of a judicial remedy of the kind

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18 Id. at 487.
19 Bennett v. Islamic Republic of Iran, 825 F.3d 949, 960 (9th Cir. 2016).
20 Rubin, 830 F.3d at 487. See Wyatt v. Syrian Arab Republic, 800 F.3d 331, 342–43 (7th Cir. 2015); Gates v. Syrian Arab Republic, 755 F.3d 568, 575–77 (7th Cir. 2014).
the plaintiffs sought, the executive branch should establish a comprehensive victim’s compensation fund, paid for by the United States government, to compensate the victims of state-sponsored terrorism.

I. HISTORICAL BACKGROUND

The Foreign Sovereign Immunities Act provides the sole basis for obtaining jurisdiction over foreign states in both state and federal courts. The foreign sovereign immunity doctrine developed at common law in United States’ historical nascence. At that time, the United States accorded foreign states and governments “absolute” immunity from suit in domestic court based on principles of customary international law. The doctrine “is premised upon the ‘perfect equality and absolute independence of sovereigns, and th[e] common interest in impelling them to’” mutual association. Due to its control of foreign relations, the executive branch traditionally made determinations of immunity, and was accorded deference to determine when the judiciary was permitted to override the presumption of immunity and subject a foreign sovereign to suit.

In 1952, the United States abandoned “absolute” sovereign immunity when the Department of State adopted the “restrictive”

24 Schooner Exchange, 11 U.S. at 137. See also Nat’l City Bank of N.Y. v. Republic of China, 348 U.S. 356, 362 (1955) (foreign sovereign immunity is based on “reciprocal self-interest . . . and respect for the ‘power and dignity’ of the foreign sovereign.”).
theory of sovereign immunity. The restrictive theory reflects the view that foreign sovereign immunity is preserved for sovereign or “public” acts, but disputes that arise from a state’s commercial activities may be adjudicated in United States court.  

This “restrictive” approach toward immunity advocated by the Department of State was later codified when Congress enacted the Foreign Sovereign Immunities Act of 1976 (FSIA). In addition to shifting foreign sovereign immunity decision-making from the executive branch to the courts, the FSIA set forth “a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities.” Accordingly, the FSIA provides the sole basis for obtaining jurisdiction over foreign states in both state and federal court.

The FSIA codifies the rules for obtaining jurisdiction over foreign states in state and federal United States courts. Foreign states and governments are immune from suit in the United States unless one of the FSIA’s specific exceptions applies. One such exception is “Acts of State-Sponsored Terrorism”, which permits a foreign state to be sued in the United States. The FSIA also provides that foreign state and government property is immune from attachment and execution in the United States unless any one of the FSIA’s specific

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28 Verlinden, 461 U.S. at 488.
31 Id. §§ 1605–07.
exceptions applies. Pertinent to the Rubin case, property belonging to a foreign state that is located in the United States and used for commercial activity in the United States may be attached and executed if one of seven enumerated conditions is satisfied. Additionally, a terrorism victim who wins a § 1605A judgment may execute on the property of the foreign state.

A. Jurisdictional Immunity

Under the FSIA, foreign states and governments are immune from suit in the United States unless one of the FSIA’s specific exceptions applies. The basic rule, stated in 28 U.S.C. § 1604, provides that:

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in section 1605 to 1607 of this chapter.

The FSIA lists nine exceptions to sovereign immunity, in which foreign states are subject to the jurisdiction of United States courts: waiver, commercial acts, expropriations, rights in certain kinds of property in the United States, non-commercial torts, enforcement of arbitral agreements and awards, cases arising from certain acts of state-sponsored terrorism, maritime liens, preferred mortgages, and counterclaims.

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32 Id. § 1609.
33 Id. § 1610(a).
34 Id. § 1610(g).
35 Id. § 1604.
38 Id. § 1605A.
39 Id. § 1605 (b)–(d).
40 Id. § 1607.
Acts of state-sponsored terrorism first became an exception to foreign sovereign immunity in 1996 after a series of significant terrorist incidents in the 1980’s and 1990’s.\textsuperscript{41} This exception was codified under 28 U.S.C. § 1605(a)(7).\textsuperscript{42} Section 1605(a)(7) stripped foreign states of their immunity with respect to cases seeking money damages for personal injury or death caused by torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources engaged in by specifically designated states or their officials.\textsuperscript{43}

In response to difficulties that plaintiffs faced in asserting jurisdiction under this exception,\textsuperscript{44} Congress passed the Flatow Amendment to clarify the provision.\textsuperscript{45} The Flatow Amendment sought to enable terror victims to recover in private causes of action, and provided that money damages in FSIA suits could include economic damages, solatium,\textsuperscript{46} pain and suffering, and punitive damages.\textsuperscript{47} However, the Flatow Amendment failed to resolve the most significant obstacles facing plaintiffs under the statute: in spite of the amendment, courts issued contradictory opinions on whether the exception provided a cause of action against a foreign state itself,\textsuperscript{48} or only a

\textsuperscript{41} Stewart, supra note 26, at 83.
\textsuperscript{43} Id.
\textsuperscript{44} See id.; Flatow v. Iran, 999 F. Supp. 1, 15 (D.D.C. 1998) (ruling that § 1605(a)(7) did not itself create a federal cause of action, but merely allowed plaintiffs to bring suit in federal court for claims based on state law).
\textsuperscript{47} Flatow Amendment § 589.
cause of action against the individual officials, employees, or agents of a foreign state.\textsuperscript{49}

As a result, § 1605(a)(7) was repealed in 2008 and replaced with 28 U.S.C. § 1605A.\textsuperscript{50} The new provision clearly established a private right of action, re-codified the provisions for the award of punitive damages, authorized compensation for special masters to assist the courts in resolving cases, and incorporated new mechanisms for the enforcement of judgments.\textsuperscript{51}

The terrorism exception provides that a foreign state shall not be immune from jurisdiction:

\begin{quote}
[I]n any case . . . in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.\textsuperscript{52}
\end{quote}

\begin{footnotes}
\textsuperscript{49} Cicippio-Puleo v. Islamic Republic of Iran, 353 F.3d 1024 (D.C. Cir. 2004) (holding that neither § 1605(a)(7) nor the Flatow Amendment created a private right of action against foreign state sponsors of terrorism, removing the basis for punitive damage awards); Acree, 370 F.3d at 59–60 (holding that plaintiffs must identify a “particular cause of action raising out of a specific source of law”).


\textsuperscript{51} In re Islamic Republic of Iran Terrorism Litig., 659 F. Supp. 2d 31, 39 (D.D.C. 2009). 28 U.S.C. § 1605A is “more comprehensive and more favorable to plaintiffs because it adds a broad array of substantive rights and remedies that simply were not available in actions under” previous law. Id. at 58.

\end{footnotes}
In the majority of state-sponsored terrorism cases brought under the terrorism exception, neither the foreign state nor the individuals named as defendants appear or answer.\textsuperscript{53} In those cases, § 1608(e) provides that a default judgment can be entered against a foreign state after the plaintiff “establishes his claim or right to relief by evidence that is satisfactory to the court.”\textsuperscript{54}

Although the FSIA generally prohibits the award or recovery of punitive damages against foreign states,\textsuperscript{55} the terrorism exception explicitly provides the ability to collect economic, solatium, pain and suffering, and punitive damages.\textsuperscript{56} Such judgments are awarded both to punish defendants and to deter future terrorist acts.

\subsection*{B. Execution Immunity}

In addition to jurisdictional immunity, the FSIA provides foreign states with presumptive immunity from pre-judgment attachment and post-judgment execution of judgments on foreign states’ property. Defeating foreign states’ jurisdictional immunity does not automatically entitle a plaintiff to collect on a favorable judgment, however. Plaintiffs must separately obtain execution immunity, the rules governing which are in some respects more restrictive than jurisdictional rules.\textsuperscript{57} Thus, a foreign state may validly be subject to a court’s jurisdiction but be insulated from the execution of a resulting judgment. 28 U.S.C. § 1609 lays out the basic rule on execution immunity:

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from

\begin{itemize}
  \item \textsuperscript{53} \textit{Stewart}, supra note 26, at 89.
  \item \textsuperscript{54} 28 U.S.C. § 1608(e).
  \item \textsuperscript{55} \textit{Id.} § 1606.
  \item \textsuperscript{56} \textit{Id.} § 1605A(c)(4).
  \item \textsuperscript{57} \textit{Stewart}, supra note 26, at 3.
\end{itemize}
attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.\textsuperscript{58}

Many of the judgments rendered under the terrorism exception have been substantial, sometimes exceeding $100 million.\textsuperscript{59} Most of the judgments have been default judgments, and most claimants remain unsatisfied.\textsuperscript{60} Despite § 1610 and § 1611’s exceptions to execution immunity, plaintiffs have had great difficulty executing their judgments.\textsuperscript{61} In part, this is a result of the restrictive provisions of the law itself, but more generally, this is a result of the fact that designated state sponsors of terrorism have taken steps to minimize or eliminate any property or assets in the United States that might be subject to execution.

In response, FSIA provisions governing judgments against state-sponsors of terrorism have been amended several times, and several separate but related statutes, discussed below, have been enacted. This changing legislative framework has stimulated various judicial interpretations, resulting in a complicated, ever-evolving area of law.

\textsuperscript{58} 28 U.S.C. § 1609.


\textsuperscript{60} STEWART, supra note 26, at 110.

\textsuperscript{61} See 28 U.S.C. §§ 1610–11; In re Islamic Republic of Iran Terrorism Litig., 659 F. Supp. 2d 31, 37 (D.D.C. 2009) (concluding that “civil litigation against Iran under the FSIA state sponsor of terrorism exception represents a failed policy” because “[t]he cases do not achieve justice for victims, are not sustainable, and threaten to undermine the President’s foreign policy initiatives.” In defense of this argument, the court noted there were over ten billion dollars in outstanding court judgments but only forty-five million dollars of Iranian assets in the United States).
1. Section 1610(a): Limited Exceptions to Execution Immunity

Section 1610 sets forth limited exceptions to immunity for attachment in aid of execution and for execution of judgments obtained under the statute against foreign states. Under § 1610(a), a plaintiff who holds a judgment against a foreign state may execute it on the foreign state’s property if the property is located in the United States, is “used for commercial activity in the United States,” and if one of seven enumerated conditions is satisfied.

The Second, Fifth, and Ninth Circuits have examined the definition of “commercial use” to determine who must use the commercial property in the United States for § 1610(a) to be triggered. The circuits agree that the foreign state must use the property for a commercial purpose in order to trigger § 1610(a).

Pertinent to the Rubin case, the seventh enumerated condition, § 1610(a)(7), permits attachment and execution if a judgment is

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63 The FSIA does not apply to the property and assets of a sovereign defendant located outside of the United States. Walters v. People’s Republic of China, 672 F. Supp. 2d 573, 574 (S.D.N.Y. 2009).
64 The property must be “used for the commercial activity upon which the claim is based;” thus, “commercial activity” is defined pursuant to § 1603(d). See also Republic of Argentina v. Weltover, 504 U.S. 607, 614 (1992). However, the definition poses difficult factual determinations. See, e.g., EM Ltd. v. Republic of Argentina, 473 F.3d 463, 482–83 (2d Cir. 2007) (government repayment of debt to IMF is not a “commercial activity”); Af-Cap, Inc. v. Chevron Overseas Ltd., 475 F.3d 1080, 1091 (9th Cir. 2007) (“[P]roperty is ‘used for a commercial activity in the United States’ when the property in question is put into action, put into service, availed or employed for a commercial activity, not in connection with a commercial activity or in relation to a commercial activity.”).
66 Id. § 1610(a). See Aurelius Capital Partners v. Republic of Argentina, 584 F.3d 120, 131 (2d Cir. 2009); Conn. Bank of Commerce v. Republic of Congo, 30 F.3d 240, 256 n.5 (5th Cir. 2002) (“[W]hat matters under the statute is how the foreign state uses the property, not how private parties may have used the property.”); Af-Cap, Inc., 475 F.3d at 1090-91 (same).
obtained for a claim of state-sponsored terrorism.\textsuperscript{68} When the state-sponsored terrorism exception to jurisdiction was added to the FSIA in 1996,\textsuperscript{69} a parallel provision was added at § 1610(a)(7) to permit the execution of judgments rendered under the terrorism exception.\textsuperscript{70} As it stands today, § 1610(a)(7) provides that a foreign state’s property in the United States, used for commercial activity in the United States, shall not be immune from attachment in aid of execution:

> [I]f the judgment relates to a claim for which the foreign state is not immune under section 1605A or section 1605(a)(7) . . . regardless of whether the property is or was involved with the act upon which the claim is based.\textsuperscript{71}

Accordingly, pursuant to § 1610(a)(7), a § 1605A claim that results in a judgment against a foreign state extinguishes the state’s execution immunity and allows the plaintiff to attach the judgment to the foreign state’s property that is used for a commercial purpose.\textsuperscript{72}

2. Section 1610(g): Easing the Burden on Executing Judgments

Section 1610(g) of the FSIA is another provision that was implemented to ease the collection process for victims of state-sponsored terrorism.\textsuperscript{73} Congress enacted § 1610(g) as part of the National Defense Authorization Act of 2008,\textsuperscript{74} which ushered in several changes to the FSIA as applied in cases of state-sponsored terrorism.\textsuperscript{75} Section 1610(g) further expanded the category of property

\textsuperscript{68} Id. § 1610(a)(7).
\textsuperscript{69} Id.
\textsuperscript{70} Id.
\textsuperscript{71} Id.
\textsuperscript{72} Id.
\textsuperscript{73} 28 U.S.C. § 1610(g).
\textsuperscript{75} 28 U.S.C. § 1610(g).
subject to attachment for cases involving state sponsors. Section 1610(g) provides that

the property of a foreign state against which a judgment is entered under section 1605A . . . is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of—(A) the level of economic control over the property by the government of the foreign state; (B) whether the profits of the property go to that government; (C) the degree to which officials of that government manage the property or otherwise control its daily affairs; (D) whether that government is the sole beneficiary in interest of the property; or (E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.\(^76\)

Prior to § 1610(g)’s enactment, there was a general presumption that a judgment against a foreign state may not be executed on property owned by a juridically separate agency or instrumentality.\(^77\) This presumption was established by the Supreme Court in First Nat. City Bank v. Banco Para El Comercio Exterior de Cuba (Bancec). The Court recognized two exceptions: the holder of a judgment against a foreign state may execute on the property of its instrumentality (1) if the sovereign and its instrumentalities are alter-egos, or (2) if adhering to the rule of separateness would create a fraud or injustice.\(^78\) The

\(^76\) Id. § 1610(g)(1)(A)–(E).
\(^77\) First Nat. City Bank v. Banco Para El Comercio Exterior de Cuba (“Bancec”), 462 U.S. 611, 626–27 (“Due respect for the actions taken by foreign sovereigns and for principles of comity between nations leads us to conclude . . . that government instrumentalities established as judicial entities distinct and independent from their sovereign should normally be treated as such.”).
\(^78\) Id. at 628–33.
court expressly declined to elaborate on these exceptions, leaving lower courts to fill in the gaps.\footnote{Id. at 633.} Soon after\textit{ Bancec} was decided, the federal courts coalesced around a set of five factors to determine when the exceptions applied.\footnote{See, e.g., Flatow v. Islamic Republic of Iran, 308 F.3d 1065, 1071 n.9 (9th Cir. 2002); Walter Fuller Aircraft Sales, Inc. v. Republic of Philippines, 965 F.2d 1375, 1380–82, 1380–81 n.7 (5th Cir. 1992) (these factors are: (1) the level of economic control by the government; (2) whether the entity’s profits go to the government; (3) the degree to which the government officials manage the entity or otherwise have a hand in its daily affairs; (4) whether the government is the real beneficiary of the entity’s conduct; and (5) whether adherence to separate identities would entitle the foreign state to benefit in United States courts while avoiding its obligations).}

However, § 1610(g) eliminated the\textit{ Bancec} doctrine by permitting a terrorism victim who wins a § 1605A judgment to execute on the property of the foreign state and the property of its agency or instrumentality “as provided in this section” but “regardless of” the five factors listed in subsections (A)–(E).\footnote{28 U.S.C. § 1610(g)(1)(A)–(E).} The five factors set forth in subsections (A)–(E) mirror almost exactly the five factors developed by the lower courts under the\textit{ Bancec} doctrine, thereby eliminating the\textit{ Bancec} doctrine irrelevant for terrorism-related judgments.\footnote{Id. See also Gates v. Syrian Arab Republic, 755 F.3d 568, 576 (7th Cir. 2014).} Accordingly, § 1610(g) eases the collection process for victims of state-sponsored terrorism by eliminating the\textit{ Bancec} rule.

3. Terrorism Risk Insurance Act

Despite the 1996 amendments to the FSIA, most plaintiffs have been unsuccessful at executing judgments against state sponsors of terrorism. This is due in part to the fact that the states in question typically do not engage in commercial activity in the United States, and because many assets that these foreign states possess are typically seized or frozen as a result of government sanctions. To help plaintiffs

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\footnote{Id. at 633.}
overcome this obstacle, Congress enacted the Terrorism Risk Insurance Act of 2002 ("TRIA"). TRIA provides an additional exception to the FSIA rule that property of a foreign state is immune from attachment and execution in the United States. Section 201(a) of the TRIA provides that:

in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, . . . the blocked assets of the terrorist party . . . shall be subject to execution or attachment in aid of execution in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable.

An asset is considered “blocked” when it has been “seized or frozen” by the United States pursuant to § 5(b) of the Trading with the Enemy Act ("TEA"), or under §§ 202 or 203 of the International Emergency Economic Powers Act ("IEEPA").

In response to the 1979 Iran hostage crisis, President Carter issued Executive Order 12170, which froze all Iranian assets in the United States pursuant to the IEEPA. Executive Order 12281 subsequently unblocked all uncontested property interests of the Iranian government when the Algiers Accords resolved the hostage crisis in 1981. The order gave implementing authority to the Treasury Department. The Treasury Department’s office of foreign assets control issued

89 Id.
regulations broadly defining unblocked property as “all uncontested and non-contingent liabilities and property interests of the Government of Iran, its agencies, instrumentalities, or controlled entities.”

A property interest is considered “contested only if the holder thereof reasonably believes that Iran does not have title or has only partial title to the asset,” and a belief is considered reasonable “only if it is based on a bona fide opinion, in writing, of an attorney licensed to practice within the United States stating that Iran does not have title or has only partial title to the asset.”

Despite Congress’s intentions, these TRIA provisions have been ineffective for several reasons. Generally, determining whether particular assets are blocked requires reference to Office of Foreign Assets Control (“OFAC”) regulations. When they are blocked, transactions in those assets are prohibited, and thus the assets may not be available to judgment creditors regardless of any sovereign immunity shield. When transactions have been licensed, the assets are “unblocked” to the extent of the license, and are definitionally outside of TRIA § 201. Furthermore, one purpose of the TRIA was to override OFAC’s regulations and permit attachment and execution even when no OFAC license had been issued. Yet, the TRIA has been ineffective to this end, as few states that sponsor terrorism have assets in the United States that may be blocked. TRIA excluded property used exclusively for diplomatic or consular purposes and thus such property is entitled to immunity and inviolability under the Vienna

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90 31 C.F.R. § 535.333(a).
91 Id. § 535.333(c).
94 STEWART, supra note 26, at 117.
Conventions. As a result, the practical impact of TRIA has been limited.

II. RUBIN V. ISLAMIC REPUBLIC OF IRAN

A. The Facts

On September 4, 1997, three members of the Hamas terrorist group carried out a suicide bombing in a crowded pedestrian mall in Jerusalem. Eight U.S. citizens were grievously injured in the attack. While all eight survived, each victim suffered severe injuries including burns covering more than forty percent of the body, over one hundred shrapnel entry wounds, permanent nerve damage, perforated eardrums, chronic infections, scarring, post-traumatic stress disorder, and depression.

In 2003, those individuals, along with their close family members, filed a civil suit against the Islamic Republic of Iran for its role in financing and training the Hamas suicide bombers. The plaintiffs brought suit in the United States District Court for the District of Columbia. Iran was subject to the suit as a state-sponsor of terrorism under the terrorism exception to the FSIA. The plaintiffs won a default judgment against Iran, comprised of $71.5 million in compensatory damages and $300 million in punitive damages.

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95 TRIA § 201(d)(2)(B)(ii); Bennett v. Islamic Republic of Iran, 618 F.3d 19 (D.C. Cir. 2010).
96 STEWART, supra note 26, at 110.
98 Id. at 263–68.
99 Id.
100 Id.
101 Id.
103 Campuzano, 281 F.Supp.2d. at 265.
Iran never paid. Over the course of the next decade, the plaintiffs tried unsuccessfully to attach and execute on Iranian assets across the country in order to satisfy the judgment. Given Iran’s minimal assets in the United States, the plaintiffs identified priceless Persian antiquities located in American Museums as the only meaningful source of recovery. The plaintiffs registered the judgment and initiated attachment proceedings in the First Circuit and the Northern District of Illinois. Though ultimately unsuccessful at executing their judgment on Iranian antiquities located at the Boston Museum of Fine Arts and Harvard University, the plaintiffs

104 Rubin v. Islamic Republic of Iran, 830 F.3d 470, 470 (7th Cir. 2016).
106 Rubin, 709 F.3d at 50.
107 Rubin v. Islamic Republic of Iran, 408 F. Supp. 2d 549, 551 (N.D. Ill. 2005).
108 Rubin, 709 F.3d at 50.
continued their pursuit of the Persian antiquities in federal court in the Seventh Circuit.

A. District Court Opinion

The plaintiffs named four collections of ancient Persian artifacts located in the territorial jurisdiction of the Northern District of Illinois to subject to attachment. The collections included the Persepolis Tablets, the Chogha Mish Collection, the Oriental Institute Collection—which were in the possession of the University of Chicago—and the Herzfeld Collection—which was split between the University of Chicago and the Chicago Field Museum of Natural History. If attached, the invaluable collections would be sold to the highest bidder at auction to pay the plaintiffs’ judgment award.

The District Court found that, “as a matter of law, no party other than Iran may assert Iran’s foreign sovereign immunity defenses under Sections 1609 and 1610 for the FSIA.” This ruling forced Iran to appear in litigation for the first time to try to protect the artifacts, which it later did.

For procedural reasons, Rubin already made its way to the Seventh Circuit once before. After the case was sent back down to the district court, Iran and the Museums moved for summary judgment. The district judge granted the motion, determining that the § 1610(a) exception to execution immunity was limited to commercial activity conducted by the foreign state itself, and not by a third party. Iran had not used the artifacts for commercial activity,

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109 Rubin, 830 F.3d at 475–76.
110 James Wawrzyniak, Rubin v. The Islamic Republic of Iran: A Struggle for Control of Persian Antiquities in America, YEARBOOK OF CULTURAL PROPERTY LAW 223, 227 (Sherry Hutt ed., 2008).
111 Rubin, 408 F. Supp. 2d at 563.
112 Id.
113 See Rubin v. Islamic Republic of Iran, 637 F.3d 783 (7th Cir. 2011).
114 Rubin v. Islamic Republic of Iran, 33 F.Supp.3d 1017 (N.D. Ill. 2014).
115 Id.
so the district judge held that § 1610(a) did not apply.\textsuperscript{116} The judge also held that execution under the TRIA was unavailable because the assets in question were not blocked by any current executive order.\textsuperscript{117} The plaintiffs responded to the summary judgment motion by identifying a third possible path to reach the artifacts: § 1610(g). The plaintiffs argued that § 1610(g) is a free-standing exception to execution immunity available to victims of state-sponsored terrorism.\textsuperscript{118} The judge rejected this argument, however, holding that § 1610(g) is not a freestanding terrorism exception to execution immunity. The district court found no statutory basis to execute on the artifacts and accordingly entered judgment for Iran and the Museums.\textsuperscript{119} The plaintiffs subsequently appealed this decision to the Seventh Circuit, reprising all three arguments.\textsuperscript{120}

\textbf{B. Appeal to the Seventh Circuit}

On appeal, the plaintiffs asserted the same arguments pursuant to § 1610(a), § 1610(g), and the TRIA. The \textit{Rubin} majority opinion was written by Judge Bauer, Judge Sykes, and Chief Judge Reagan of the Southern District of Illinois. Judge Hamilton penned a short dissent.\textsuperscript{121} The court affirmed the District Court’s holding.

1. Collections Potentially Subject to Attachment

As a threshold matter, the Seventh Circuit first identified which collections were potentially subject to attachment and execution by applying two basic criteria. First, the artifacts must be owned by Iran, and second, the artifacts must be within the territorial jurisdiction of

\textsuperscript{116} \textit{Id.}
\textsuperscript{117} \textit{Id.} at 1011.
\textsuperscript{118} \textit{Id.} at 1013.
\textsuperscript{119} \textit{Id.} at 1017.
\textsuperscript{120} See \textit{Rubin v. Islamic Republic of Iran}, 830 F.3d 470, 470 (7th Cir. 2016).
\textsuperscript{121} \textit{Id.}
the district court. The court found that there was no question that the Persepolis Tablets are owned by Iran and in the physical possession of the University, within the territorial jurisdiction of the court. The Persepolis Tablets, a collection consisting of roughly 30,000 dried clay tablets dating from 509 to 494 B.C., contain information about the Persian Empire. In 1931, the tablets were found underneath one of the fortification walls in Persepolis, modern day Iran. Although Iran owns the tablets, Iran permitted the University of Chicago’s Oriental Institute to conserve and research the tablets pursuant to a long-term loan.

However, the three other collections did not meet the criteria. The court held that the Herzfeld and the Oriental Institute Collections are not Iranian property, but are owned by their respective American institutions. Despite the plaintiff’s attempt to cast doubt on the legitimacy of the artifact’s removal from Iran, the museums maintained that they were bona fide purchasers or recipients of the collections, and Iran expressly disclaimed any legal interest in the two collections. The district court judge found no evidence that supported Iranian ownership of the artifacts, and plaintiffs did not meaningfully contest that point on appeal.

Additionally, the Chogha Mish Collection was in the possession of the University when the district court entered judgment. However, upon request by the State Department, the University

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122 Id. at 475. See also 28 U.S.C. § 1610(a).
123 Id. at 476.
124 Hilton, supra note 105, at 486.
125 Rubin, 830 F.3d at 476, 480.
126 See id. at 476.
127 The plaintiffs argued that Dr. Herzfeld is regarded by some in the academic community as a plunderer and that the artifacts in these collections are covered by Iran’s national heritage Protection Act of 1930, which gives the government of Iran an option to exercise control over certain antiquities unearthed in the country. Id.
128 See id.
129 See id.
returned the Chogha Mish artifacts to Iran.\textsuperscript{130} Thus, at the time of the appeal, the collection was no longer within the territorial jurisdiction of the court. Accordingly, the court confined the merits of review to the Persepolis Tablets.\textsuperscript{131}

On the merits of their appeal, the plaintiffs identified § 1610(a) and § 1610(g) of the FSIA, and § 201(a) of the TRIA as possible paths to execute their judgment on the Persepolis Tablets.

2. Execution Judgment Denied under Section 1610(a)

The plaintiffs first pointed to § 1610(a)(7) as an avenue to execute their judgment on the Persepolis Tablets.\textsuperscript{132} The Seventh Circuit rejected this argument.\textsuperscript{133} The major issue that the court looked to under § 1610(a) was a question of statutory interpretation: where Congress did not identify who must “use” the property, does a third party’s use suffice?\textsuperscript{134}

Section 1610(a)(7) permits the holder of a judgment against a foreign state to execute on “property in the United States of a foreign state . . . used for a commercial activity in the United States” if the judgment relates to a claim for which the foreign state is not immune under § 1605A or § 1605(a)(7).\textsuperscript{135} The court found that the judgment did relate to a claim for which Iran was not immune under § 1605A, but took issue with the passive-voice phrasing of the above quote, which provided the basis of the key issue in this case: who must use the Iranian property for a commercial activity?\textsuperscript{136}

\textsuperscript{130} See id. The University notified the Seventh Circuit that they return the artifacts unless the court ordered otherwise. The Seventh Circuit did not, and the University returned the artifacts to Iran’s National Museum in Tehran and filed notice with the court that Iran received and accepted them.

\textsuperscript{131} See id.

\textsuperscript{132} See id. at 478.

\textsuperscript{133} See id. at 481.

\textsuperscript{134} See id. at 479.

\textsuperscript{135} 28 U.S.C. § 1610(a)(7).

\textsuperscript{136} Rubin, 830 F.3d at 479.
The plaintiffs argued that a third party’s commercial use of the property triggers § 1610(a) and that the University’s academic study of the Persepolis Tablets counts as a commercial use.\(^{137}\) Iran and the University countered that the foreign state itself must use the property for commercial activity and that academic study is not commercial use.\(^{138}\) The United States provided an amicus curiae brief supporting the latter argument.\(^{139}\)

Following the Second, Fifth, and Ninth Circuit’s holdings, the Seventh Circuit held that the exception is triggered only when the foreign state itself uses its property in the United States for commercial activity.\(^{140}\) The court reasoned that attributing the legislature’s use of a passive voice to reflect indifference to the actor would be inconsistent with the FSIA’s statutory declaration of purpose in § 1602, which explicitly invokes the international law understanding of foreign sovereign immunity that foreign sovereigns do not have immunity for “their commercial activities” or immunity from execution on “their commercial property.”\(^{141}\) The court deduced that § 1602’s declaration of purpose clarifies that a foreign state’s property is subject to execution under § 1610(a) only when the state itself uses the property for commercial activity.\(^{142}\)

The court rejected the plaintiff’s argument that the declaration of purpose is irrelevant because resorting to legislative history is unnecessary when statutory language is unambiguous.\(^{143}\) The Seventh Circuit countered that § 1602 is legislation, not legislative history.\(^{144}\) The court further asserted that the passive-voice phrasing of § 1610(a)

\(^{137}\) Id.

\(^{138}\) Id.

\(^{139}\) Id.

\(^{140}\) See Aurelius Capital Partners v. Republic of Argentina, 584 F.3d 120, 131 (2d Cir. 2009); Af-Cap. Inc. v. Chevron Overseas Ltd., 475 F.3d 1080, 1090–91 (9th Cir. 2007); Conn. Bank of Commerce v. Republic of Congo, 30 F.3d 240, 256 n.5 (5th Cir. 2002). See also supra note 64 and accompanying text.


\(^{142}\) See Rubin, 830 F.3d at 481. See also 28 U.S.C. § 1610(a).

\(^{143}\) Rubin, 830 F.3d at 479–80.

\(^{144}\) Id. at 480.
creates uncertainty about whose commercial use of the property suffices to forfeit a foreign state’s execution immunity, so the words must be read “in their context and with a view to their place in the overall statutory scheme.” The court stated that although § 1610(a) does not unambiguously abrogate execution immunity when a third party uses a state’s property for commercial activity, the statutory declaration of purpose suggests that a narrower interpretation is correct, that a foreign state may lose its execution immunity only by its own commercial use of its property in the United States.

The plaintiffs further argued that the language in § 1605(a), that the commercial activity must be “carried on in the United States by the foreign state,” does not appear in § 1610(a). Thus, the commercial activity exception to execution immunity is broader than § 1610(a), and applies to third parties. The court relied on the settled principle that exceptions to execution immunity are narrower than, and independent from, the exceptions to jurisdictional immunity. Further, the court reasoned that seizing a foreign state’s property is a more serious affront to its sovereignty than taking jurisdiction in a lawsuit, and it carries far reaching implications for American property abroad. Thus, the court held that a third party’s commercial use of a foreign state’s property does not trigger the § 1610(a) exception to execution immunity, but § 1610(a) applies only when the foreign state itself has used its property for a commercial activity in the United States, and the actions of third parties are irrelevant. Because nothing in the record suggested that Iran itself used the Persepolis Tablets for a commercial activity in the United States, and the

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145 Id. (quoting FDA v. Brown & Williamson Tobacco Corp. 529 U.S. 438, 450 (2002)).
146 Rubin, 830 F.3d at 480.
147 Id.
148 Id.
149 Id. See Republic of Argentina v. NML Capital, Ltd., 134 S. Ct. 2250, 2256 (2014); Rubin v. Islamic Republic of Iran, 637 F.3d 783, 790 (7th Cir. 2011); DeLetetier v. Rep. of Chile, 748 F.3d 790, 798–99 (2d Cir. 1984).
150 Rubin, 830 F.3d at 481.
plaintiffs did not argue that they do, the court held that § 1610(a) did not apply.\textsuperscript{151}

3. Section 1610(g) is Not a Freestanding Exception

Second, the plaintiffs pointed to § 1610(g) and made the argument that § 1610(g) makes all Iranian assets available for execution without needing to prove that the property has a nexus to commercial activity, as § 1610(a) requires.\textsuperscript{152} In other words, the plaintiffs argued that § 1610(g) is a freestanding exception to execution immunity for terrorism-related judgments.\textsuperscript{153} The court rejected this argument.\textsuperscript{154}

The text of § 1610(g) states that “the property of a foreign state against which a judgment is entered under section 1605A . . . is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section . . . .”\textsuperscript{155} In its analysis, the court first identified the obvious textual parallels between § 1610(g) and the \textit{Bancec} rule, concluding that § 1610(g) overrides the \textit{Bancec} doctrine for terrorism-related judgments, as the defendants argued,\textsuperscript{156} and as the Seventh Circuit has previously held.\textsuperscript{157} The court next looked to the key question that was not decided in \textit{Gates} — whether § 1610(g) establishes a freestanding terrorism exception to execution immunity.

The plaintiffs argued that the § 1610(g) language “as provided in this section”\textsuperscript{158} refers to only to the “non-substantive rules” set forth in § 1610. However, the plaintiffs did not provide a basis to limit the phrase in this way, and they did not identify which non-substantive rules they thought Congress intended to include in § 1610(g).\textsuperscript{159} The

\textsuperscript{151} Id.
\textsuperscript{152} 28 U.S.C. § 1610(a), (g).
\textsuperscript{153} Rubin, 830 F.3d at 481.
\textsuperscript{154} Id. at 487.
\textsuperscript{155} 28 U.S.C. § 1610(g)(1).
\textsuperscript{155} The United States supported this interpretation in an \textit{amicus curiae} brief.
\textsuperscript{157} Rubin, 830 F.3d at 483. \textit{See also} Gates v. Syrian Arab Republic, 755 F.3d 568, 576 (7th Cir. 2014).
\textsuperscript{158} Rubin, 830 F.3d at 482; 28 U.S.C. § 1610(g)(1).
\textsuperscript{159} Rubin, 830 F.3d at 484.
plaintiff’s argument relied on assumptions made about § 1610(g) in the Seventh Circuit Gates and Waytt decisions, and in the Ninth Circuit’s Bennett decision.\textsuperscript{160}

The court declined to read the phrase in this way, arguing that it was odd to read “as provided in this section” as referring to only certain unidentified subsections.\textsuperscript{161} Instead, the court concluded that “section” means what it says: that § 1610(g) modifies all of § 1610, not just certain parts of it.\textsuperscript{162} The court further reasoned that treating § 1610(g) as an independent basis for execution creates superfluities in other parts of the statute—if § 1610(g) were a freestanding exception to execution immunity, then the amendments enacted at the same time were completely unnecessary.\textsuperscript{163} Understanding § 1610(g) in this way, the court overruled Gates and Waytt in part, and declined to follow Bennett.\textsuperscript{164}

The court reasoned that Gates assumed rather than decided the crucial question of whether § 1610(g) is itself a freestanding exception to execution immunity.\textsuperscript{165} The court in Gates simply described § 1610(g) in a way that implied that it is an independent basis for attachment and execution for all terrorism-related judgments, without further inquiry.\textsuperscript{166} There is no mention in Gates of the limiting phrase in § 1610(g) “as provided in this section” nor any reference to statutory superfluities created by the broader interpretation advanced

\textsuperscript{160} Bennett v. Islamic Republic v. Iran, 799 F.3d 1281, 1286–87 (9th Cir. 2015); Wyatt v. Syrian Arab Republic, 800 F.3d 333, 333–34 (7th Cir. 2015); Gates, 755 F.3d at 574–75.
\textsuperscript{161} Rubin, 830 F.3d at 484; 28 U.S.C. 1610(g)(1).
\textsuperscript{162} Rubin, 830 F.3d at 484.
\textsuperscript{163} Id. For instance, if § 1610(g) paves a dedicated lane for execution actions by victims of state-sponsored terrorism, then § 1610(a)(7), which relates specifically to judgments obtained under § 1605A, serve no purpose at all. Section 1610(a)(7) was enacted at the same time as § 1605A and added in the same 2008 legislation to make the commercial-activity exceptions applicable to judgments obtained under § 1605A.
\textsuperscript{164} Id. at 487. See also Bennett, 799 F.3d 1281; Wyatt, 800 F.3d at 333; Gates, 755 F.3d at 568.
\textsuperscript{165} Gates, 755 F.3d at 576.
\textsuperscript{166} Id.
by the *Rubin* plaintiffs in this case.\textsuperscript{167} The court conceded that there is no doubt that the opinion treats § 1610(g) as if it were an independent exception to execution immunity, albeit without actually deciding the questions.

Similarly, in *Wyatt*, the Seventh Circuit did not directly address the fundamental interpretative question about the scope of § 1610(g), leaving the underlying premise of *Gates* unexamined. The court relied on the holding of *Gates* that “[§] 1610(c) simply does not apply to the attachment of assets to execute judgments under § 1610(g) for state-sponsored terrorism.”\textsuperscript{168} Consequently, the *Rubin* court explicitly stated that “[t]o the extent that *Gates* and *Wyatt* can be read as holding that § 1610(g) is a freestanding exception to execution immunity for terrorism-related judgments, they are overruled.”\textsuperscript{169}

The *Rubin* court then rejected the Ninth Circuit’s holding in *Bennett*, arguing that the *Bennett* majority explained away the “as provided in this section” language in § 1610(g) by interpreting it to apply only to § 1610(f).\textsuperscript{170} The court explained that this opinion “implausibly reads the word ‘section’ as ‘subsection,’ so the phrase ‘as provided in this section’ actually means ‘as provided in this subsection (f).’”\textsuperscript{171} The *Rubin* court explained that § 1610(f) never became operative,\textsuperscript{172} thus does not allow any form of execution, so if the Ninth Circuit’s reasoning is correct, § 1610(g) was effectively a nullity upon the passage.\textsuperscript{173} The court concluded that interpreting “as provided in this section” to refer only to § 1610(f), an inoperative part of the statute, makes no sense and cannot be the correct interpretation.\textsuperscript{174} If that were the case, then execution “as provided in this section” would

\begin{itemize}
\item \textsuperscript{167} See id.
\item \textsuperscript{168} *Wyatt*, 800 F.3d at 343 (quoting id. at 575).
\item \textsuperscript{169} *Rubin*, 830 F.3d at 487.
\item \textsuperscript{170} *Id. See also* *Bennett* v. Islamic Republic v. Iran, 799 F.3d 1287 (9th Cir. 2015).
\item \textsuperscript{171} *Rubin*, 830 F.3d at 486.
\item \textsuperscript{172} *Id.* at 486–87.
\item \textsuperscript{173} *Id.* at 487.
\item \textsuperscript{174} See 28 U.S.C. §§ 1610(f), (g)(1).
\end{itemize}
mean no execution at all. Thus, the court declined to follow the Ninth Circuit’s interpretation of § 1610(g).

Based on this analysis, the court held that § 1610(g) is not itself an exception to execution immunity for terrorism-related judgments; rather, it abrogates the Bancec rule for terrorism-related judgments. Accordingly, terrorism victims with unsatisfied § 1605A judgments against foreign states may execute on the foreign state’s property and the property of its agency or instrumentality—without regard to the Bancec presumption of separateness—but they must do so “as provided in this section.” That is, they must satisfy an exception to execution immunity found elsewhere in § 1610. Pertinent to the Rubin case, this required the plaintiffs to satisfy the commercial activity requirement laid out in § 1610(a).

4. Dissent from the Denial of En Banc Review

In accordance with Circuit Rule 40(e), the Rubin opinion was circulated to all judges in active service. Circuit Rule 40(e) requires circulation within the court before publication to inquire whether a majority of active judges wish to rehear the case en banc. Chief Judge Wood and Circuit Judges Posner, Flaum, Easterbrook, and Rovner did not participate, so a majority did not vote to rehear the case en banc. Judge Hamilton filed a rare dissent from the denial of en banc review.

In his dissent, Hamilton took issue with the fact that the panel had the power to partially overrule two recent Seventh Circuit decisions.

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175 Rubin, 830 F.3d at 487.
176 Id.; 28 U.S.C. § 1610(g).
177 Rubin, 830 F.3d at 487.
179 U.S. Ct. of App. Fed. Cir. Rule 40(e); Rubin, 830 F.3d at 487 n.6.
180 Circuit Rule 40(e).
181 Rubin, 830 F.3d at 487 n. 6.
182 Id.
and create a circuit split without meaningful Rule 40(e) review.\footnote{Id. at 489.} Hamilton argued that either by itself would ordinarily trigger Rule 40(e) review.\footnote{Id.} In \textit{Rubin}, the majority of active judges were disqualified, and thus did not have the opportunity to vote; it was functionally impossible to rehear the case \textit{en banc}.\footnote{Id. at 489.} Thus, Hamilton argued that one panel’s decision to overrule another’s decision should not be treated as settling the legal issue in the Seventh Circuit.\footnote{Id.}

Hamilton argued the practical consequences of ruling that § 1610(g) does not offer a freestanding basis for executing judgments against state sponsors of terrorism independent of § 1610 (a) and (b).\footnote{Id.} He also asserted that the \textit{Bennett} and \textit{Rubin} textual readings are both reasonable, and that the text is ambiguous.\footnote{Id. at 489.} Thus, the courts must choose between two statutory readings: one that favors state sponsors of terrorism, or one that favors the victims of that terrorism.\footnote{Id.} According to Hamilton, the court should favor a textual reading that favors the victims of terrorism.\footnote{Id. at 489.}

5. Terrorism Risk Insurance Act

The plaintiffs’ third argument asserted that the Persepolis Tablets are subject to attachment and execution under § 201(a) of the TRIA.\footnote{Id. at 487. See TRIA § 201(a).} Section 201(a) permits a person who holds a judgment against a state sponsor of terrorism to execute on the foreign state’s assets if the assets have been blocked by an executive order under certain international sanction provisions.\footnote{TRIA § 201(a).} Though President Carter blocked all Iranian assets in the United States, he subsequently unblocked all
“uncontested property interest of the Iranian government.” The plaintiffs argued that the Persepolis Tablets were a contested property interest, and consequently, remained blocked by Executive Order 12170.

The court rejected this argument, citing the absence of evidence that the University contests Iran’s title to the Persepolis Tablets, and the University’s reaffirmation of the terms of the long-term academic loan, which unambiguously requires the University to return the artifacts to Iran upon completion of study. The court acknowledged the University’s possessory interest in the collection, but found it relevant only for the argument that Iran retains full ownership of the collection.

The court also rejected the plaintiff’s claim that the Persepolis Tablets have been “reblocked” by President Obama’s Executive Order 13599. The court reasoned that section 4(b) of Order 13599 expressly exempts all “property and interests in property of the Government of Iran that were blocked pursuant to Executive Order 12170 of November 14, 1979, and thereafter made subject to the transfer directives set forth in Executive Order 12281 of January 19, 1981.”

The court dismissed the plaintiff’s interpretation of “transfer directives” to be a directive from Iran, reasoning that this misreads the 2012 order, which refers to “transfer directives set forth in” Executive Order 12281 requiring all property meeting certain specified criteria be returned to Iran. That is, the directive is categorical rather than contingent on particularized demands by Iran. Accordingly, the court found that attachment and execution under § 201 was unavailable.

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193 Rubin, 830 F.3d at 488.
194 Id. at 487. See supra note 86 and accompanying text.
195 Id. at 488.
196 Id.
198 Rubin, 830 F.3d at 488 (citing 77 Fed. Reg. 6659, 6660 (Feb. 8, 2012)).
199 Id.
200 Id. at 489.
III. ANALYSIS

From a statutory interpretation perspective, the Seventh Circuit reached the correct result in denying the plaintiffs execution on the Persepolis Tablets. Additionally, auctioning cultural property raises policy concerns that further buttress the Seventh Circuit’s outcome. However, the Rubin plaintiffs are deserving victims who have been denied execution of their judgment despite repeated attempts to do so. The Rubin victims are not alone; many other victims of state-sponsored terrorism have been unsuccessful at receiving compensation for their grievous injuries. In lieu of a judicial remedy of the kind the plaintiffs sought, the executive branch should establish a comprehensive victim’s compensation fund, paid for by the United States government, to compensate the victims of state-sponsored terrorism.

A. The Court Correctly Interpreted § 1610(g)

The court’s interpretation that § 1610(g) is not a freestanding exception to execution immunity was correctly determined.201 Had the court found that § 1610(g) was a freestanding exception, it would permit plaintiffs to seize sovereign property without regard to its commercial status. The restrictive theory of sovereign immunity that was codified in the FSIA in 1976 was a codification of customary international law that permits adjudication of disputes arising from a foreign state’s commercial activities.202 The rules governing execution immunity are more restrictive than jurisdictional rules.203 There is no indication that customary international law has changed since 1976, nor that adjudication is permitted to extend beyond commercial activities. Sovereign immunity is a reciprocal arrangement; by ignoring the obligation to protect other states’ diplomatic property, the

201 Id. at 487.
202 See supra Part II.
United States’ property abroad, valued anywhere from $12–$15 billion, becomes increasingly vulnerable. Judge Hamilton’s contention that the language of § 1610(g) is ambiguous fails to understand the majority’s argument. Hamilton noted that the interpretation of § 1610(g) in both Bennett and in Rubin are reasonable. However, the Bennett majority purported to explain away the “as provided in this section” language in § 1610(g) by interpreting it to apply only to § 1610(f). This reading is not reasonable, as Judge Hamilton purported. As the Rubin majority explained, the Bennett court read the word “section” as “subsection” and interpreted “as provided in this section” to mean “as provided in subsection (f).” This is implausible and unreasonable, contrary to Hamilton’s suggestion.

Moreover, Hamilton conceded that “in interpreting an ambiguous statutory text, we can and should draw on statutory purpose and legislative history.” Hamilton concluded that the court must choose between one of the two statutory interpretations of the ambiguous text, one reading which favors state sponsors of terrorism, and the other which favors the victims of terrorism. Hamilton asserted that the court should interpret the statute in a light most favorable to the victims. While the plaintiffs are deserving victims who, arguably, most anyone would want to see compensated for their suffering, that alone is not sufficient for a judgment in their favor.

Hamilton posited that the court “should not attribute to Congress an intent to be so solicitous of state sponsors of terrorism, who are also

205 See Rubin, 830 F.3d at 489.
206 Id. See Bennett v. Islamic Republic v. Iran, 799 F.3d 1281 (9th Cir. 2015).
207 Bennett, 799 F.3d at 1287.
208 Rubin, 830 F.3d at 486.
209 Id. at 490.
210 Id. at 489–90.
211 Id. at 490.
undeserving beneficiaries . . . " However, it is not clear that courts should ascribe such a congressional intent. The premise of the FSIA is to provide only narrow exceptions to sovereign immunity and, historically, Congress has been wary of providing plaintiffs with an avenue to sue a foreign state in the United States. There are other considerations to take account of, such as retaliatory suits against U.S. citizens abroad. This consideration may have more far reaching consequences than denying a terrorist victim the ability to sue a state sponsor of terrorism in the United States.

While § 1610(g) is intended to provide relief to terrorist victims, it should be viewed in light of the larger context of the FSIA. The dissent acknowledges that “[t]his Court has admonished that ‘no legislation pursues its purposes at all costs,’ and that it ‘frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute’s primary objective must be the law.’” Section 1610(g) indeed provides relief to terrorist victims by abrogating the Bancec doctrine to make it easier for terrorist victims to pursue their claim against state-sponsors of terrorism. However, the court should not interpret this to mean that such plaintiffs are entitled to win at all cost.

Although the Rubin court’s statutory interpretation of § 1610(g) is a reasonable interpretation, it is troubling that courts continue to follow the Ninth Circuit’s view in Bennett. Around the time that the Rubin opinion was published, two other circuits issued an opinion on whether § 1610(g) is a freestanding exception to execution immunity. In Weinstein v. Islamic Republic of Iran and Kirschenbaum v. 650 Fifth Ave., the D.C. Circuit and the Second Circuit, respectively,

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212 Id.
described § 1610(g) as freestanding. However, similar to the Ninth Circuit and the Seventh Circuit cases that Rubin overruled, these courts did not provide any analysis of the “as provided in this section” language.  

While it appears that all other circuits that have approached the issue have decided that § 1610(g) is freestanding, they have done so without adequate analysis. The Seventh Circuit is the only court that delves into the analysis of the grammatical structure of the language “as provided in this section.”  

The dissent claims that the language can be interpreted in two different ways. However, the Seventh Circuit’s arguments are incredibly persuasive, and the other courts did not provide arguments against this interpretation, as they have not delved into the analysis. For this reason, it appears that the language should be interpreted as the Rubin court has done.

In October 2016, the Rubin defendants submitted a petition for a writ of certiorari. In large part, the defendants identified the stark differences between the Seventh and Ninth Circuits’ contradictory holdings on § 1610(g). Perhaps the Supreme Court will settle this issue in the future.

B. Public Policy Supports the Court’s Interpretation

Removed from the legal issues considered in Rubin, there exists an underlying policy concern that further buttresses the Seventh Circuit’s outcome: cultural property should not be used to satisfy a legal judgment. While this proposition rests on more ideological considerations rather than legal considerations, guiding principles in international and domestic conventions indicate that the Persepolis

217 See Weinstein, F.3d, 2016 WL 4087940. See also Kirschenbaum, F.3d 2016 WL 3916001.
219 Petition for a Writ of Certiorari, Rubin v. Islamic Republic of Iran, 830 F.3d 470 (7th Cir. 2016) (No. 16-543), 2016 WL 6124417.
220 Id.
Tablets should be treated different from other property based on their status as cultural property.\textsuperscript{221}

Cultural property is defined as “objects that are a product of a particular group or community and embody some expression of that group’s identity.”\textsuperscript{222} It is a “specific form of property that enhances identity, understanding, and appreciation for the culture that produced the particular property.”\textsuperscript{223} The preservation of cultural property requires measures against the destruction, mutilation, or division of sets and collections.\textsuperscript{224}

Article 1(2)(c) of the UNESCO Constitution, to which the United States is a party, identifies three obligations to cultural heritage that state parties must adhere to: (1) conservation and protection; (2) the recommendation of international conventions; and (3) the encouragement of international exchange.\textsuperscript{225} Scholars argue that, to uphold these principles, the United States must allow for “the question for knowledge, for valid information about the human past, for the historical, scientific, cultural and aesthetic truth that the object and its context can provide.”\textsuperscript{226} Further, the object must be “optimally accessible to scholars for study and to the public for education and enjoyment.”\textsuperscript{227}

The Persepolis Tablets hold great historical importance, as their text provides a unique cognizance of the Persian Empire. Prior to the tablet’s discovery, the Persian Empire was largely understood

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{222} Id. at 569.
\item \textsuperscript{223} Id.
\item \textsuperscript{224} Paul M. Bator, \textit{An Essay on the International Trade in Art}, 34 STAN. L. REV. 275, 298 (1982).
\item \textsuperscript{227} Id.
\end{itemize}
\end{footnotesize}
through the writing of contemporary foreigners. The tablets, written by the Persians themselves, provide a first-hand, impartial understanding of the everyday life and internal workings of the Empire. However, the analysis and publication of the tablets is still far from complete. Selling the collection would prevent scholars from completing the tablet’s study, and would prevent the public from accessing them for education; society at large would lose a wealth of knowledge.

The preamble of the 1970 UNESCO Convention of the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, to which the United States is party, provides that “cultural property constitutes one of the basic elements of civilization and national culture,” and “that the interchange of cultural property among nations for scientific, cultural and educational purposes increases the knowledge of the civilization of Man, enriches the cultural life of all peoples and inspires mutual respect and appreciation among nations.” The 1970 Convention, however, acts as a set of guidelines, and is not self-executing. Thus, it does not exert legal authority over the United States.

In 1983, the United States passed the Convention on Cultural Property Implementation Act (CPIA) to implement the 1970 Convention into law in the United States. The CPIA was implemented to “promot[e] U.S. leadership in achieving greater international cooperation towards preserving cultural treasures that not only are of importance to nations whence they originate, but also to a

228 Stein, supra note 2, at 3–4.
229 Id.
231 The United States required Congress to enact legislation by which the convention would be implemented into domestic law to have domestic legal effect. PATTY GERSTENBLITH, ART, CULTURAL HERITAGE, AND THE LAW: CASES & MATERIALS 622–23 (3d ed. 2012).
greater international understanding of our common heritage.”

In addition, a comment by the U.S. Department of State regarding the U.S. Cultural Property Act contends that “[t]he legislation is important to our foreign relations, including our international cultural relations.”

While neither the 1970 Convention nor the CPIA provide controlling law over the Persepolis Tablets, the United States’ willingness to adhere to the principles set forth in the texts reinforces the idea that cultural property should not be used to satisfy a legal judgment. The Persepolis Tablets are “irreplaceable items of cultural heritage for the people of Iran.” To demonstrate the modern significance of the tablets, Professor Gil Stein emphasizes that “Persepolis and the Persian Empire are the central symbols of Iranian cultural identity.”

The tablets, as actual records of the Persian King Darius I, are incredibly important to the cultural heritage of the Iranian people.

In a petition to the court opposing seizure of the tablets, Attorney James S. Irani argued that the tablets belong not only to the Iranian government but “to the world as well.” As an irreplaceable piece of shared human history, the tablets themselves and the knowledge that they hold should be available to the world at large, not just to a single individual.

In addition, permitting the attachment and execution of judgments on cultural property that is on loan from another country, and the subsequent sale of this cultural property, would have profound consequences. Countries would, understandably, be very wary of lending invaluable and irreplaceable artifacts to museums in the

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233 S. REP. NO. 97-564, at 1 (1982). See also GERSTENBLITH, supra note 231, at 557.
234 GERSTENBLITH, supra note 231, at 558.
235 Stein, supra note 2, at 3–4.
236 Id.
237 Id.
United States. This would prevent the exchange and study of culture in the United States. At a time of rampant xenophobia in the United States, particularly towards Middle Easterners, cultural exchange and understanding are of the upmost importance.

These policy concerns support the Seventh Circuit’s outcome in *Rubin*. Cultural artifacts should not be auctioned, even to award damages to the most deserving victims. Sympathetic, innocent plaintiffs such as those in *Rubin* make a strong case that their rights to recovery should prevail over more dubious sociological ownership claims. However, it would be tragic for society-at-large to remedy the plaintiff’s grievances by sending cultural property to the auction block.

### C. Congress Should Implement a Comprehensive Victims Compensation Fund

While the *Rubin* decision properly shielded the Persepolis Tablets from execution, the *Rubin* plaintiffs are deserving victims whose grievances should be remedied. For the past thirteen years, the *Rubin* victims have tirelessly pursued execution of their judgment. Despite the time and money that they have devoted to endless court battles, their judgment remains unsatisfied. The United States government and federal courts have been unable to compel state-sponsors of terrorism to pay the judgments awarded against them. In large part, this is due to the inadequate funds available from foreign states’ assets in the United States to pay successful litigants. Congress should provide an alternative to these lawsuits through a comprehensive victim compensation fund. Such a fund would guarantee that victims are compensated, regardless of a terrorist state’s available property in the United States, and would satisfy several U.S. policy concerns.

Congress has already created limited a victim compensation fund to provide compensation to victims of state-sponsored terrorism. In December 2015, President Obama signed the Justice for United
States Victims of State Sponsored Terrorism Act ("VSST"). The VSST, part of the Consolidated Appropriations Act of 2016, is an omnibus spending bill passed by Congress to set aside funds to compensate victims of state sponsored terrorism with unsatisfied final court judgments. This fund, overseen by a Special Master, will receive over $1 billion in appropriations from the Treasury Department in 2017. The VSST will compensate eligible victims for:

- compensatory damages awarded to a United States person in a final judgment issued by a United States district court . . . against a state sponsor of terrorism; and arising from acts of international terrorism, for which the foreign state was determined not to be immune from jurisdiction . . . under section 1605A.

Claimants with final judgments dated before July 14, 2016 must have filed their application for compensation by October 12, 2016. Filings are confidential, and it is therefore unclear whether the Rubin plaintiffs filed for compensation.

While the VSST is a terrific start to compensating terrorism victims, it does not provide a true alternative to lawsuits, as the fund will not satisfy the entirety of the Rubin plaintiffs’ judgment award. The fund will pay no more than $20 million to individual claimants, regardless of whether their claim exceeds that amount. While a one billion dollar fund appears significant, a 2008 report by the

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243 U.S. Victims of State Sponsored Terrorism Fund, supra note 240.
244 Id.
Congressional Research Service indicated that there are nineteen billion dollars in outstanding judgments against state-sponsors of terrorism. Further, given the number of claims that have already been submitted to the VSST, it is anticipated that initial payments will be less than the total eligible claim amount.

Furthermore, the VSST only provides compensation for compensatory damage awards. The VSST defines compensatory damages as “excluding pre-judgment and post-judgment interest or punitive damages.” Therefore, while the fund may satisfy the Rubin plaintiff’s $71.5 million compensatory damages award, their $300 million award for punitive damages, the bulk of their award, will remain unsatisfied. To fully compensate the Rubin victims and other similarly situated victims of state-sponsored terrorism, Congress must designate further appropriations to the VSST and must expand claims to include punitive damages.

Taxpayers will likely oppose a compensation fund that is funded by taxpayer dollars, as opposed to requiring Iran to pay damages. Nevertheless, it is in the Untied State’s best interest to fully compensate victims of state-sponsored terrorism to prevent U.S. based lawsuits against Iran.

Allowing American citizens to sue Iran neither protects Americans from terrorist attacks, nor improves the effectiveness of the United States’ response to the attacks. States will continue to support terrorist attacks on foreign soil, regardless of whether the state is subject to litigation on American soil. However, allowing suit against foreign nations in the United States weakens the U.S.’s approach to dealing with state sponsors of terrorism, and potentially opens up American service members, diplomats, and private entities to spurious

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247 *Id.*

248 *Id.*
lawsuits in courts around the world. For instance, Iran and Cuba have each passed legislation encouraging retaliatory suits in their courts.249

A compensation fund for these victims reflects both foreign policy considerations as well as domestic goals of compensation and deterrence. Implementing a victim’s compensation fund that pays the full amount of the victim’s damages will prevent U.S. courts from having to freeze foreign states' assets or attach property to enforce judgments. This will protect U.S. citizens and property abroad.

CONCLUSION

Alexander the Great sacked Persepolis in retaliation for Persia’s burning of the Athenian Acropolis. Should the United States accord compensation to the victims of Iranian-sponsored terrorist acts by once again permitting the plunder of Persian cultural property? While this time it is deserving terrorism victims that have stormed the Persian Gates, the Seventh Circuit denied them entry. From a statutory interpretation perspective, the Seventh Circuit reached the correct result in denying the plaintiffs execution on the Persepolis Tablets. Auctioning cultural property also raises policy concerns that further buttress the Seventh Circuit’s outcome. However, the Rubin plaintiffs are deserving victims who have been denied execution of their judgment despite repeated attempts to do so. The Rubin victims are not alone; many other victims of state-sponsored terrorism have been unsuccessful at receiving compensation for their grievous injuries. In lieu of a judicial remedy of the kind the plaintiffs sought, the executive branch should establish a comprehensive victim’s compensation fund, paid for by the United States government, to compensate the victims of state-sponsored terrorism.