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Rubin v. Islamic Republic of Iran: The Supreme Court's Textually Veiled Decision to Give State Terror Sponsors Immunity

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Note*

Rubin v. Islamic Republic of Iran: The Supreme Court’s Textually Veiled Decision to Give State Terror Sponsors Immunity

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I. INTRODUCTION

After a near twenty-year legal saga, the Rubin plaintiffs, survivors of a grisly terrorist attack overseas, petitioned the U.S. Supreme Court this term, seeking to attach ancient Persian architectural artifacts in satisfaction of a \$71.5 million outstanding default judgment against the country of Iran.¹ The judgment stems from a 1997 suicide bombing in Jerusalem.² The eight American *Rubin* petitioners fell victim to the attack on a crowded pedestrian walkway when three suicide bombers, belonging to Hamas, an Islamic extremist terrorist organization, detonated cases of powerful bombs packed with nails, screws, pieces of glass, and chemical poison.³ The Rubins were among the injured survivors of the deadly attack funded by Iran.⁴

The *Rubin* petitioners⁵ filed suit against Iran on September 10, 2003, in *Campuzano v. Islamic Republic of Iran*⁶ under (a former version of) the “terrorism exception” to sovereign immunity⁷ in the U.S.

1. *Rubin v. Islamic Republic of Iran*, 137 S. Ct. 2326 (2017).

2. *See Campuzano v. Islamic Republic of Iran*, 281 F. Supp. 2d 258, 261 (D.D.C. 2003).

3. *Id.*

4. *Id.* at 263–68.

5. The Rubins are petitioning the Supreme Court as judgment creditors in the U.S. District Court for the Northern District of Illinois seeking attachment of a judgment entered in the U.S. District Court for the District of Columbia fifteen years ago. *See Campuzano*, 281 F. Supp. 2d 258.

6. *Id.* at 260–61.

7. It is a stalwart principle of international law that sovereign governments customarily enjoy immunity from lawsuits. However, this privilege is not absolute. Under the Foreign Sovereign Immunity Act (FSIA or the Act), state-sponsor-of-terrorism governments are not afforded this privilege. 28 U.S.C. § 1605(a)(7) (2012).

District Court for the District of Columbia.⁸ Iran failed to respond or appear at any stage of the proceedings, and the district court awarded plaintiffs a \$71.5 million default judgment.⁹ Iran eluded payment, and the Rubins initiated attachment proceedings to procure satisfaction of the default judgment.¹⁰ Fifteen years later, however, despite their multitudinous efforts in federal courthouses across the country, the Rubins have yet to collect upon their judgment.¹¹

Initially, the *Rubin* petitioners held high hopes that would change this term when the U.S. Supreme Court undertook their case to decide whether the new SST exception to foreign-sovereign attachment immunity (28 U.S.C. § 1610(g)) mandates a freestanding exception.¹² Meanwhile, the U.S. Government, for its part, filed an amicus brief on behalf of unexpected political bedfellow Iran, arguing against the statutory construction that would have granted terror victims such an independent exception.¹³ Ultimately, terror victims lost their biggest battle to date when the Court in an atypical ode to FSIA's greater strictures sided with Iran and the U.S. Government.¹⁴ Now the question remains whether Congress will once again seek to amend the State-Sponsored Terrorism Exception to attachment immunity (SST exception), which it has already amended more times than any other provision in FSIA's history, in its relentless endeavor to provide terror victims meaningful relief.

Part II of this Note provides a brief history of the Foreign Sovereign Immunity Act (the Act or FSIA), specifically focusing on legislative enactments modeled to facilitate a legal framework for terror victims to: (1) obtain jurisdiction and (2) enforce judgments against designated terror-sponsor sovereigns. Part II examines the role the federal judiciary has played in interpreting these enactments, examining the Seventh Circuit's analysis of the Act's terror exception to attachment immunity in the lead up to the Supreme Court's granting certiorari.¹⁵ Part III argues that the U.S. Supreme Court's recent holding was a strained textual interpretation that was more plausibly driven by separation-of-powers concerns. Part IV concludes by briefly

8. The *Campuzano* plaintiffs brought suit against Iran and its instrumentalities seeking compensatory damages for pain and suffering, loss of prospective income, medical expenses, and solatium damages. *Campuzano*, 281 F. Supp. 2d at 272-74.

9. *Id.* at 269-79.

10. *See infra* section II.B.1.

11. *See infra* section II.B.1.

12. *Rubin v. Islamic Republic of Iran*, 137 S. Ct. 2326 (2017).

13. Brief for the United States as Amicus Curiae Supporting Respondents at 2, *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816 (2018) (No. 16-534).

14. *Rubin*, 138 S. Ct. 816.

15. 28 U.S.C. § 1610(g) (2012).

identifying why the Court may have decided it necessary to textually veil its constitutionally driven decision in the manner in which it did.

II. BACKGROUND

A. The Foreign Sovereign Immunity Act: State Sponsor of Terrorism Exception

1. *History of Sovereign Immunity in U.S. Jurisprudence Under Customary International Law*

Throughout the majority of its history, the United States has ascribed to the general principle of international law that a foreign government is immune from the jurisdiction of another sovereign's courts.¹⁶ In 1812, Chief Justice Marshall articulated this "absolute immunity" standard as governing issues of foreign sovereign immunity.¹⁷ The Absolute Immunity Doctrine enshrined foreign nations virtually absolute immunity from U.S. courts.¹⁸ When the rare set of legal facts did arise to pose whether a U.S. court had jurisdiction over a foreign sovereign, the judiciary would systematically defer to the executive. The executive, would, in turn, habitually request immunity in all pending actions against friendly foreign sovereigns. This methodical ritual (quasi-rite) held unrelentingly firm, procedurally entrenched in the nation's early post-founding years.

By the turn of the twentieth century, however, the United States invariably sought an economic foothold on the world stage.¹⁹ This newfound global proliferation initiated an immediate and marked influx in Americans' foreign contacts abroad.²⁰ Arising out of these foreign connections, so too inexorably came an increase in the size,

16. From America's earliest origins, the Executive Branch has espoused the view that a foreign state, and its senior officials acting thereunder, enjoys immunity from U.S. courts where the contested conduct occurs outside U.S. territory. Curtis A. Bradley & Laurence R. Helfer, *International Law and the U.S. Common Law of Foreign Official Immunity*, 2010 SUP. CT. REV. 213, 218.

17. *Schooner Exch. v. McFaddon*, 11 U.S. 116, 136 (1812) ("The jurisdiction of the nation within its own territory, is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself."); see also VED. P. NANDA & DAVID K. PANSIUS, 1 LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS § 3.2, at 3-9 to 3-10 (2d ed. 2005) ("*The Schooner Exchange* is generally considered the case that inaugurated the doctrine of sovereign immunity in U.S. courts. . . . Justice Marshall indicated that the doctrine of sovereign immunity arises by international custom; the rule is necessary so that equal nations may freely interact in the territories of the others . . .").

18. See Andrzej R. Niekrasz, *The Past Is Another Country: Against the Retroactive Applicability of the Foreign Immunities Act to Pre-1952 Conduct*, 37 J. MARSHALL L. REV. 1337, 1341 (2004).

19. See Phillip Riblett, *A Legal Regime for State-Owned Companies in the Modern Era*, 18 J. TRANSNAT'L L. & POL'Y 1, 6-7 (2008).

20. *Id.*

number, and frequency of legal disputes therein.²¹ Ultimately, it was this unrelenting onset of ever-increasing globalization that served to underscore the country's glaring need for a legal framework of judicial redress.²²

2. *The 1976 Foreign Sovereign Immunities Act*

The FSIA, passed in 1976, provides the sole and limited authority under which U.S. nationals may bring civil suits against foreign states. By definition, the Act codified U.S. foreign-relations law to statutorily adopt the theory of "restrictive immunity," dispensing with what had become an antiquated theory of absolute immunity.²³ The FSIA delineates the narrow grounds upon which foreign nations are required to answer in U.S. courts. Formalistically, such narrow exceptions arise when certain predetermined acts of foreign states sever the general presumption of "immunity" sovereigns otherwise enjoy,²⁴ thereby establishing a judicial basis upon which U.S. plaintiffs can bring lawsuits against foreign-sovereign defendants.²⁵

The newly employed restrictive theory of immunity meant foreign states were presumed jurisdictionally immune in U.S. courts only to those claims involving the foreign state's public acts.²⁶ Practically speaking, suits based on a foreign state's commercial or private conduct were no longer presumed immune under the Act and, as a result, could be reasonably held subject to the jurisdiction of U.S. courts. In sum, the Act codified the sole means by which a foreign state would be

21. See Joseph W. Hardy, Jr., *Wipe Away the Tiers: Determining Agency or Instrumentality Status Under the Foreign Sovereign Immunities Act*, 31 GA. L. REV. 1121, 1125 (1997) (defining the restrictive theory of sovereign immunity as granting immunity to foreign states and their instrumentalities only for public, non-commercial activities).

22. See Riblett, *supra* note 19.

23. See Hardy, Jr., *supra* note 21, at 1126; see also Michael A. Tessitore, *Immunity and the Foreign Sovereign: An Introduction to the Foreign Sovereign Immunities Act*, FLA. B.J., Nov. 1999, at 48, 48 n.6 (noting the U.S. Executive Branch informally adopted the restrictive theory of sovereign immunity in 1952 when the Acting Legal Adviser of the Department of State, Jack B. Tate, corresponded to the Acting Attorney General that in future cases the Department would follow the restrictive theory).

24. Tessitore, *supra* note 23, at 48 (stating that upon the Act's ratification, the FSIA and not preexisting common law indisputably mandates the determination of a foreign state's entitlement to sovereign immunity).

25. See 44B AM. JUR. 2D *International Law* § 94 (2017) ("The Act sets forth the sole and exclusive standards to be used in resolving sovereign immunity issues raised by a foreign state in federal and state courts, and it must be applied in every action involving a foreign state defendant.").

26. See Hardy, Jr., *supra* note 21, at 1126.

refused immunity and thus be subject to the jurisdiction of U.S. courts.²⁷

The Act was originally devised with four objectives:²⁸ (1) to codify the so-called restrictive principle of sovereign immunity, as discussed above;²⁹ (2) to assure that the newly minted “restrictive immunity” theory would be uniformly applied to all litigants appearing before U.S. courts;³⁰ (3) to systemize a formal procedure for U.S. nationals to obtain jurisdiction over foreign states;³¹ and (4) to provide an enforcement mechanism to procure plaintiffs the ability to collect on successful judgments against foreign states.³² In essence, the Act maintained the general presumption that “a foreign state shall be immune from the jurisdiction of the courts of the United States”³³ but also delineated several exceptions when the foreign state would *not* be immune.

27. The Act laid out comprehensive regulations governing the U.S.-national plaintiff's access to the federal and state courts in this country in which to assert claims against foreign states and instrumentalities thereof. See George Kahale, III, *Characterizing Nationalizations for Purposes of the Foreign Sovereign Immunities Act and the Act of State Doctrine*, 6 *FORDHAM INT'L L.J.* 391, 392–93 (1983), for a more in-depth discussion on the principles that underpinned the categorical designations under the restrictive theory of foreign sovereign immunity.

28. H.R. REP. NO. 94-1487, at 2 (1976).

29. This principle was adopted by the Department of State in 1952 and has since been followed by American courts in numerous cases and by the Executive Branch of the national government. The same principle is reciprocally applied regularly in lawsuits against the United States in foreign courts. See Michael A. Rosenhouse, Annotation, *State-Sponsored Terrorism Exception to Immunity of Foreign States and Their Property Under Foreign Sovereign Immunities Act of 1976*, 28 *U.S.C.A. § 1605(a)(7)*, 176 *A.L.R. Fed.* 1 (2002).

30. See Mark B. Feldman, *Foreign Sovereign Immunity in the United States Courts 1976–1986*, 19 *VAND. J. TRANSNAT'L L.* 19, 20 (1986) (“Prior to [FSIA’s] enactment, a foreign government sued in the United States would apply to the State Department for recognition of its immunity. If the State Department recognized and allowed that immunity, a ‘suggestion of immunity’ would be presented to the court by the Justice Department. The court would accept that suggestion in deference to the President’s constitutional responsibilities for the foreign relations of the United States. . . . [But] [i]n fact, these determinations were sometimes influenced, directly or indirectly, by diplomatic considerations.”); *id.* at 21–22.

31. A plaintiff could attain personal jurisdiction by making service of process upon, giving notice to, and obtaining in personam jurisdiction over a foreign state or one of its instrumentalities in an action in a U.S. court. The existence of this procedure renders unnecessary the former practice of seizing and attaching the property of a foreign government for the purpose of obtaining personal jurisdiction over it in the United States. *Id.* at 20.

32. Sean Hennessy, *In Re the Foreign Sovereign Immunities Act: How the 9/11 Litigation Shows the Shortcomings of FSIA as a Tool in the War on Global Terrorism*, 42 *GEO. J. INT'L L.* 855 (2011) (noting that prior to the Act’s enactment, a foreign state possessed absolute immunity from execution of judgments, even in commercial litigation disputes whereby commercial assets were readily available in United States whose attachment could function to satisfy the judgment, but FSIA significantly limited this previously broad execution immunity).

33. 28 *U.S.C. § 1604* (2012).

These primary exceptions included cases where “the foreign state ha[d] waived its immunity either expressly or by implication . . . or, where a commercial activity” exception applied.³⁴

As initially enacted, missing from the Act’s enumerated exceptions to foreign sovereign immunity was an exception for suits against foreign states for acts of terrorism committed against U.S. nationals overseas. This meant that U.S. courts routinely refused to hear cases for lack of jurisdiction against foreign states in suits brought by plaintiffs alleging violations of international law.³⁵ However, just one year before the *Rubin* petitioners fell victim to Iran, Congress amended FSIA to create a private cause of action to address this very issue.

3. *The 1996 Amendment—The State-Sponsored Terrorism Exception*

The terror exception to jurisdictional immunity (terror exception), passed under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), sought to eliminate the jurisdictional hurdle that had prior deprived U.S. terror victims their day in court.³⁶ Ratified to promote the dual doctrinal ends of victim compensation and punitive deterrence,³⁷ Congress sought to promote victims’ rights while penalizing foreign states’ terroristic support.³⁸

34. See 28 U.S.C. § 1605(a)(1)–(2) (2012). These exceptions, by practical effect, provided courts with subject matter jurisdiction over such claims.

35. See *Saudia Arabia v. Nelson*, 507 U.S. 349, 351 (1993) (“We hold that respondents’ action alleging personal injury resulting from unlawful detention and torture by the Saudi Government is not ‘based upon a commercial activity’ within the meaning of the Act, which consequently confers no jurisdiction over respondents’ suit.”); *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428 (1989) (granting immunity to a foreign sovereign because violation of international law did not come within one of the enumerated exceptions to the Act); *Prinz v. Fed. Republic of Ger.*, 26 F.3d 1166 (D.C. Cir. 1994) (holding the Third Reich’s violation of *jus cogens* norms did not fall under the enumerated immunity exception of “implied waiver”).

36. See John H. Blume, *AEDPA: The “Hype” and the “Bite,”* 91 CORNELL L. REV. 259 (2006), for further discussion on AEDPA’s jurisdictional effects.

37. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 303(a), 110 Stat. 1214, 1250–53 (codified as amended at 18 U.S.C. § 2339B (2012)).

38. The exception was widely passed subsequent to the successful lobbying of terror victims who were similarly situated to the *Rubin* petitioners. Powerless to bring suit against Libya for its involvement in an attack that brought down a commercial airliner, killing all passengers on board, the families of the Pan Am Flight 103 Lockerbie bombing victims were instrumental in bringing about its ratification. See, e.g., *Smith v. Socialist People’s Libyan Arab Jamahiriya*, 101 F.3d 239, 242 (2d Cir. 1996) (holding that the bombing, a grievous act of terrorism, “cannot provide a basis for giving an unwarranted interpretation to an act of Congress simply to achieve a result beneficial to the families of the victims,” as FSIA, in its original form—prior to the 1996 amendment—did not subject Libya to the U.S. court system).

Thus, the terror exception provides that U.S. nationals injured in terrorist attacks may bring civil suits against a foreign state or its instrumentality if the foreign state either committed or provided support for the attack.³⁹ Procedurally, the burden rests on the plaintiff-victim to prove that: (1) the foreign nation was—as expressly designated by the Secretary of State—a state sponsor of terrorism at the time the act occurred or the foreign state was later so designated as a result of the act at issue;⁴⁰ (2) the victim of the act of terrorism was a U.S. national at the time the act occurred; (3) the foreign state was given ample opportunity to arbitrate the claim *if* the claim was based on an act that occurred in the defendant state's territory;⁴¹ (4) the foreign sovereign engaged in conduct involving torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such acts; and (5) the provisionary support was from an official, employee, or agent of the foreign state acting within the scope of his or her duty.⁴² Once a plaintiff has sufficiently demonstrated these five preconditions, a foreign sovereign will be determined to have effectively forfeited its immunity.

4. *The Flatow Amendment*

Five months after the issuance of the 1996 Amendment, Congress further amended the FSIA with the addition of the Civil Liability for Acts of State Sponsored Terrorism provision (Flatow Amendment). The Flatow Amendment⁴³ stated that:

[a]n official, employee, or agent of a foreign state designated as a state sponsor of terrorism . . . while acting within the scope of his or her office, employment,

39. National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1083, 122 Stat. 3, 338.

40. Sponsors of terrorism are designated by the State Department pursuant to section 6(j) of the Export Administration Act of 1979 (50 U.S.C. § 2405(j) (2012)), section 620A of the Foreign Assistance Act (22 U.S.C. § 2371 (2012)), and section 40(d) of the Arms Export Control Act (22 U.S.C. § 2780(d)). For a country to be designated a state sponsor of terrorism, the Secretary of State must determine the country at issue has repeatedly provided support for acts of international terrorism by means of harboring safe havens for known terrorists; providing financial, logistical, or material support; or providing weapons for known terrorist organizations. See *State Sponsors of Terrorism*, U.S. DEP'T OF ST. (July 31, 2012), <http://www.state.gov/j/ct/rls/crt/2011/195547.htm> [https://perma.unl.edu/9AG7-3LGP].

41. § 1083, 122 Stat. at 338–39.

42. See 28 U.S.C. § 1605(A) (2012).

43. The Flatow Amendment was named in honor of Alisa Flatow, an American university student studying abroad in Israel, who was killed when a suicide bomber drove a van packed with explosives into the bus on which she was traveling through the Gaza Strip. Shrapnel perforated Flatow's skull, and she agonized for hours before slipping into a coma. Having lost necessary brain function, she died on April 10, 1995, after being taken off life support. See *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1 (D.D.C. 1998).

or agency shall be liable to a United States national or the national's legal representative for personal injury or death caused by acts of that official, employee, or agent for which the courts of the United States may maintain jurisdiction under section 1605(a)(7) of Title 28, United States Code, for money damages which may include economic damages, solatium, pain, and suffering, and punitive damages if the acts were among those described in section 1605(a)(7) [the previous version of the terror exception].⁴⁴

Of note, Congress clarified that: (1) the terror exception does provide for a federal cause of action and (2) it allows for punitive damages to strengthen the legislation's deterrence factor.

5. *The 2002 Amendment—The Terrorism Risk Insurance Act*

In the immediate aftermath of the September 11, 2001, terrorist attacks, plaintiffs continued to struggle to bring successful claims against state terror sponsors. Congress, facing amplified pressure in its wake, once again sought to prescribe a workable legal framework upon which plaintiffs could satisfy their judgments against terrorist states. Congress, in turn, passed the Terrorism Risk Insurance Act (TRIA), seeking, once again, to mitigate the obstacles victims indeterminately faced in collecting on judgments against state sponsors of terrorism.⁴⁵ Namely, the latest pitfall, prior to TRIA's enactment, came in the form of the presidency, which could issue waivers at will to protect foreign-state assets from attachment of judgments under the FSIA. Accordingly, TRIA undertook to lessen the attachment burden of blocked assets by drastically narrowing the available circumstances⁴⁶ under which presidential waiver could be applied to protect blocked assets.⁴⁷ By this same mechanism, TRIA aimed to bolster deterrence of state-sponsored-terrorism enablers by "provid[ing] a new, powerful disincentive for any foreign government to continue sponsoring terrorist attacks on Americans."⁴⁸

Unfortunately, owing to TRIA's limited scope, plaintiffs seeking to execute upon successful judgments continued to face obstacles from the Executive Branch. The government could routinely quash successful plaintiffs' attempts to execute against foreign-state assets. Thus, a considerable number of victims remained unable to collect on their

44. Flatow Amendment, Pub. L. No. 104-208, § 589, 110 Stat. 3009-172 (1996).

45. *Hausler v. JPMorgan Chase Bank, N.A.*, 845 F. Supp. 2d 553, 563 (S.D.N.Y. 2012).

46. See Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, § 201(b), 116 Stat. 2322, 2337 (codified as amended at 28 U.S.C. § 1610 (2012)).

47. *Hegna v. Islamic Republic of Iran*, No. 02-C-8643, 2003 WL 25952462, at *7 (N.D. Ill. Aug. 11, 2003) ("A Conference Report on the bill explains that the new Act 'eliminates the effect of any [previous] presidential waiver . . . making clear that all judgments are enforceable' against blocked assets." (alterations in original) (quoting 148 CONG. REC. H8722-06, H8728 (daily ed. Nov. 13, 2002))).

48. 148 CONG. REC. S11524-01, S11527 (daily ed. Nov. 19, 2002) (statement of Sen. Harkin).

“successful” judgments.⁴⁹ TRIA’s reach was further siphoned by the courts. For example, in *Cicippio-Puleo v. Islamic Republic of Iran*,⁵⁰ the U.S. Court of Appeals for the District of Columbia Circuit engendered further confusion on the liability landscape when it offhandedly determined the Flatow Amendment’s private right of action to extend solely to foreign state officials, employees, and their agents; hence, *not* to the foreign state itself.⁵¹ Prior to this ruling, courts had consistently held the Flatow Amendment to provide plaintiffs a private right of action against the terrorist state itself.⁵² The D.C. Circuit’s *Cicippio-Puleo* holding, in turn, engendered much confusion in its immediate aftermath. Congress acted promptly to alleviate the muddled aftermath, in 2008 unequivocally overruling *Cicippio-Puleo* and its progeny. Congress sought to use its final attempt to leave no interstitial doubt to the judiciary that the FSIA conferred a broad-based private right of action for terror victims against foreign terror-sponsor states, amending FSIA yet again.

6. *The 2008 Amendment—The “New” State-Sponsored Terrorism Exception*

Yet, by 2008 it was clear the terrorism exception had failed to achieve its intended purpose yet again. This time Congress decided to begin anew. It enacted a new terror exception under § 1605A⁵³ as part of the National Defense Authorization Act for Fiscal Year 2008, repealing the failed prior version of the terror exception⁵⁴ and the Flatow Amendment. The newly passed § 1605A was designed (1) to overrule court decisions that limited plaintiffs’ ability to collect against foreign states and (2) to demystify the 1996 amendments once

49. *See, e.g.*, *Bennett v. Islamic Republic of Iran*, 618 F.3d 19 (D.C. Cir. 2010) (affirming the lower court’s grant of the United States’ motion to quash writs of attachment that the plaintiff had attached against Iran’s former diplomatic properties located in the District of Columbia in order to satisfy a default judgment against Iran for the country’s sponsorship of a school bombing that took the life of plaintiff’s daughter); *see also In re Islamic Republic of Terrorism Litig.*, 659 F. Supp. 2d 31, 53 (D.D.C. 2009) (citing *Dep’t of the Army v. Blue Fox, Inc.*, 525 U.S. 255 (1999)) (explaining that victim-plaintiffs attempting to seize government-blocked assets were placed in the perverse position of being forced to litigate against their own government—a difficult, and quite frankly, awkward undertaking, which often dissuaded plaintiffs from undertaking such litigation).

50. 353 F.3d 1024, 1034 (D.C. Cir. 2004).

51. *Id.*

52. *See Regier v. Islamic Republic of Iran*, 281 F. Supp. 2d 87 (D.D.C. 2003); *Kilburn v. Republic of Iran*, 277 F. Supp. 2d 24 (D.D.C. 2003); *Cronin v. Islamic Republic of Iran*, 238 F. Supp. 2d 222 (D.D.C. 2002).

53. 28 U.S.C. § 1605A (2012).

54. 28 U.S.C. § 1605(a)(7), *repealed by* National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1083, 122 Stat. 3, 338.

and for all.⁵⁵ For the first time, the amendments were codified to clearly articulate that the terror exception stood as its own set of provisions within the Act. In other words, the terror exception conferred a private right of action for plaintiffs to bring monetary damage claims in U.S. federal courts against a foreign-state sponsor of terrorism or any agent of that foreign state acting within its scope of employment.⁵⁶ Seeking once and for all to guarantee plaintiffs' road to recovery, the Act also included a provision that would function to preserve the assets of the foreign-state defendant.⁵⁷ The new terror exception also did away with the prior requirement that a plaintiff prove the foreign state had effected economic control or took in profits from the property sought for attachment.⁵⁸ Finally, the dual incorporation of the new SST exception (to execution and attachment immunity) granted that "the property of a foreign state against which a judgment is entered under section 1605A [the new terror exception] . . . is subject to attachment in aid of execution," in turn expanding the scope of reachable property plaintiffs could attach in execution of successful judgments.⁵⁹

7. *The State-Sponsored Terrorism Exception in 2018*

As discussed *supra*, Congress passed the terror exception to jurisdictional immunity and enacted the SST exception to property attachment immunity with the twin aims of providing terror victims an avenue for monetary recovery and deterring foreign sovereigns from supporting abhorrent terroristic acts. Unfortunately, however, even though Congress has undertaken to amend the terror exception four separate times between 1996 and the present, undergoing more amendments than any other exception in the history of FSIA, its dogged efforts have gone unmet. The fundamental objectives that spurred

55. See Debra M. Strauss, *Reaching Out to the International Community: Civil Lawsuits as the Common Ground in the Battle Against Terrorism*, 19 DUKE J. COMP. & INT'L L. 307, 327–28 (2009).

56. See § 1605A; see also Danica Curavic, *Compensating Victims of Terrorism or Frustrating Cultural Diplomacy? The Unintended Consequences of the Foreign Sovereign Immunities Act's Terrorism Provisions*, 43 CORNELL INT'L L.J. 381, 389 (2010) (noting the 2008 amendments overruled prior decisions that served to limit a plaintiff's ability to collect against foreign states by codifying the terrorism exceptions of the FSIA).

57. § 1605A(g)(1) ("In every action filed in a United States district court in which jurisdiction is alleged under this section, the filing of a notice of pending action pursuant to this section, to which is attached a copy of the complaint filed in the action, shall have the effect of establishing a lien of *lis pendens* upon any real property or tangible personal property . . .").

58. *Id.*; see also Curavic, *supra* note 56, at 389 (explaining the amendment to allow plaintiffs to bring claims against foreign states or agents of that state acting within their scope of employment).

59. See § 1605A; 28 U.S.C. § 1610(g) (2012).

the terror exception's ratification have gone unheeded. In 2018, most victims remain without meaningful remedy, still unable to collect on their "successful" judgment.⁶⁰ As for the *Rubin* petitioners, fifteen years ago a district court judge entered a \$71.5 million judgment in their favor—a \$ 71.5 million judgment thus far null upon its entry.

B. *Rubin v. Islamic Republic of Iran*

1. Facts

On September 4, 1997, three suicide bombers arrived at a crowded outdoor pedestrian mall in downtown Jerusalem and proceeded to detonate cases full of powerful explosives.⁶¹ The terrorists filled the bombs with chemical poisons and pieces of glass, nails, and screws in order to inflict the most pain, suffering, and death upon their civilian targets as possible.⁶² The explosion killed five people and severely wounded nearly two hundred others.⁶³ Of those party to the *Rubin* suit, five of the plaintiffs suffered grievous, life-altering injuries as a result of the attack, while the remaining four suffered severe emotional distress as an effect of having witnessed their family members' deaths and severe injuries firsthand.⁶⁴

Hamas, an Islamic militant terrorist organization, subsequently claimed the attack. An Israeli court convicted the three Hamas operatives on multiple counts of murder in addition to other associated charges for the operatives' role in orchestrating the attack.⁶⁵ At their interrogation, the convicted operatives and other captured members from the same terrorist cell provided the Israeli court with a thorough account of the details surrounding the planning, funding, and execution of the attack⁶⁶ and confirmed by all accounts that Iran had been at its helm.⁶⁷

60. *See Rubin v. Islamic Republic of Iran*, 830 F.3d 470, 480–81 (7th Cir. 2016).

61. *Campuzano v. Islamic Republic of Iran*, 281 F. Supp. 2d 258, 260–61 (D.D.C. 2003).

62. *Id.* at 261.

63. *Id.*

64. *Id.*

65. *Id.* at 261–62.

66. *Id.* at 261.

67. *Id.* at 262 (stating that the organization has a close relationship with Iran and that Iran provided financial assistance and training for the Hamas, as well as other types of support).

2. Procedural History

On July 31, 2001, the *Rubin* plaintiffs filed suit against Iran⁶⁸ for its material role in the attack.⁶⁹ The district court held that the FSIA afforded the court jurisdiction over the case.⁷⁰ Upon the defendant's failure to appear at the scheduled hearing and to answer the plaintiffs' complaints,⁷¹ the court held an evidentiary hearing to attain the necessary evidence to enter default judgment.⁷² The court found the plaintiffs had sufficiently demonstrated⁷³ Iran's material role⁷⁴ in the attack and awarded the plaintiffs nearly \$400 million in damages, ultimately reduced to a cap of \$71.5 million.⁷⁵ Thus ensued what was to become a fifteen-year—and counting⁷⁶—saga, as the *Rubin* plaintiffs traveled the country from one courthouse to the next, consistently unable to collect⁷⁷ upon their “successful” judgment.

The *Rubin* plaintiffs first sought to attach and execute against bank accounts associated with the Consulate of Iran.⁷⁸ The U.S. Government, however, argued that for the district court to allow for such

68. The Rubins also listed as defendants the Iranian Ministry of Information and Security (Iran's intelligence agency), and Ayatollah Ali Hoseini Khamenei, Ali Akbar Hashemi-Rafsanjani, and Ali Fallahian-Khuzestani (senior Iranian officials). *See id.*

69. *See id.*

70. *Id.* at 269–70 (reviewing, one by one, each of the elements under the FSIA necessary for the court to confer jurisdiction and concluding that the plaintiffs, “[h]aving met all of the requisite elements,” had established jurisdiction).

71. *Id.* at 261.

72. *Id.*

73. The plaintiffs met their burden, convincing the court of Iran's role in the attack by the requisite standard—“evidence satisfactory to the court’ and by clear and convincing evidence.” *Id.* at 270 (quoting *Elahi v. Islamic Republic of Iran*, 124 F. Supp. 2d 97, 108 (D.D.C. 2000)).

74. *Id.* (“Iran directly provided material support and resources to Hamas and its operatives, for the specific purpose of carrying out acts of extrajudicial killing, including the bombing at issue here.”).

75. Each of the *Rubin* plaintiffs was awarded \$37.5 million in punitive damages, in addition to the compensatory damages awarded. *Id.* at 271–74. *But cf.* Alicia M. Hilton, *Terror Victims at the Museum Gates: Testing the Commercial Activity Exception Under the Foreign Sovereign Immunities Act*, 53 VILL. L. REV. 479, 525 n.4 (2008) (noting Iran's foreign-sovereign status prevented the punitive damages award from being levied against Iran, and therefore, the plaintiffs' final default judgment award was capped at \$71.5 million).

76. On October 17, 2016, the *Rubin* plaintiffs petitioned the U.S. Supreme Court for certiorari on the issue of whether the new terror exception (§ 1605A(g)) created a freestanding right. Petition for a Writ of Certiorari, *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816 (2018) (No. 16-534).

77. Under the FSIA legal framework, plaintiff must first ascertain judgment against a state sponsor of terror. Then, plaintiff must locate foreign-sovereign property eligible for attachment under FSIA and bring a separate attachment hearing in the proper federal district in which the property is located.

78. *See Rubin v. Islamic Republic of Iran*, No. Civ.A. 01-1655(RMU), 2005 WL 670770, at *1 (D.D.C. Mar. 23, 2005), *vacated*, 563 F. Supp. 2d 38 (D.D.C. 2008).

attachment would impede U.S. duties under the Vienna Convention and, in turn, interfere with the government's ability to comply with its international agreements.⁷⁹ The U.S. District Court for the District of Columbia rejected this argument and granted the plaintiffs' request for attachment of the bank accounts. Nevertheless, the plaintiffs found themselves blocked by a prior outstanding lien by another judgment creditor and were ultimately unable to execute on the accounts. The plaintiffs were similarly unsuccessful in their next attempt to attach Iranian funds held at the Bank of New York.⁸⁰

Next, targeting Texas real estate belonging to an Iranian prince, the plaintiffs found their first (and only to date) "victory." However, after deducting the significant out-of-pocket expenses underlying litigation, what was left on the table failed to cover so much as a fraction of the post-judgment interest—let alone to make a meaningful dent in the judgment itself.⁸¹

Discouraged by the failure of their previously ill-fated attempts and with no other collection avenues for asset attachment in sight, the plaintiffs set their sights on Persian antiquities⁸² on loan to the Field Museum of National History and the University of Chicago's Oriental Institute.⁸³ Initially, the plaintiffs set forth to execute on the artifacts on the theory the collection fell within the "commercial activity" exception⁸⁴ and consequently was *not* immune from attachment.⁸⁵ In 2006,

79. Motion by the U.S. to Vacate Plaintiff's Writs of Attachment and Execution and to Vacate the Court's Op. and Order of Mar. 23, 2005, *Rubin*, No. Civ.A. 01-1655(RMU), 2005 WL 670770; see *Rubin*, 2005 WL 670770, at *3. The court rebuked this argument on the basis that only property that is specifically being used for "diplomatic or consular" purposes can be excluded from the definition of a blocked asset as it relates to this issue. *Id.* at *4. Therefore, the blocked assets fell within the ambit of the Terrorism Exception. *Id.*

80. See *Bank of N.Y. v. Rubin*, No. 05 CIV. 4926 (DLC), 2006 U.S. Dist. LEXIS 10215, at *2 (S.D.N.Y. Mar. 15, 2006).

81. See *Hilton*, *supra* note 75, at 495.

82. The *Rubin* victims registered their seventy-one-million-dollar default judgment in the U.S. District Court for the Northern District of Illinois, seeking to attach collections of Persian antiquities Iran owned that were on long-term loan to the University of Chicago's Oriental Institute. *Rubin v. Peterson*, 637 F.3d 783, 786 (7th Cir. 2011).

83. See *Rubin v. Islamic Republic of Iran*, 349 F. Supp. 2d 1108, 1110–11 (N.D. Ill. 2004); see also *Curavic*, *supra* note 56, at 396–97 (explaining the *Rubin* plaintiffs' attempts to attach Persian antiquities under the commercial activity exception after failing to execute on more traditional assets).

84. See 28 U.S.C. § 1610(a) (2012) ("The property in the United States of a foreign state . . . used for a commercial activity in the United States, shall not be immune from attachment . . . upon a judgment entered by a court of the United States"); see also *Hilton*, *supra* note 75, at 495 (explaining the plaintiffs' efforts to attach the Iranian artifacts after their attorney became aware of their existence).

85. In other words, the plaintiffs argued that because the artifacts had been used for commercial purposes (such as "publishing and selling books in the United

the museums—joined by the United States—responded in defense, seeking to protect the Iranian antiquities in their care. The district court, however, held that Iranian interests could not be raised by third-party United States.⁸⁶ It was this development that finally caught Iran’s attention and elicited it to acquire counsel and assert attachment immunity.⁸⁷

Meanwhile, the 2008 Amendments to the FSIA, as discussed in subsection II.A.6, had recently been passed. The 2008 Amendment initially appeared a breakthrough for the *Rubin* plaintiffs. The revised statutory framework put an even greater emphasis on asserting a viable remedy for the terror victim. Recall that § 1605A replaced its repealed predecessor, overruling the Flatow Amendment to (1) expand the private right of action to encompass suits against actual terror-sponsor governments, no longer just the individuals in charge;⁸⁸ (2) solidify a federal cause of action for terrorist victims;⁸⁹ and (3) hold liable current or prior designated state sponsors of terrorism—as well as states’ officials, employees, or agents acting within their official scope—for money damages.⁹⁰ In turn, the *Rubin* plaintiffs, wishing to take advantage of the Act’s beneficial new provisions, refiled their suit, moving to convert their existing judgment under the old terror exception into an altered judgment⁹¹ under the new § 1605A terror exception.⁹²

Meanwhile, as the *Rubin* plaintiffs continued to seek execution judgment against the Iranian antiquities, currently on loan to the University of Chicago and the Field Museum of Natural History, Iran

States”), the artifacts should be reachable property for attachment in aid of execution. *See Rubin*, 349 F. Supp. 2d at 1110–11.

86. *Rubin v. Islamic Republic of Iran*, 436 F. Supp. 2d 938, 945 (N.D. Ill. 2006); *see Curavic*, *supra* note 56, at 397.

87. *Rubin v. Islamic Republic of Iran*, 637 F.3d 783, 788 (7th Cir. 2011).

88. 28 U.S.C. § 1605A(c) (2012).

89. *Id.*

90. *Id.* (“[D]amages may include economic damages, solatium, pain and suffering, and punitive damages.”)

91. § 1605A(b) (“An action may be . . . maintained under this section [the new terror exception] if the action is . . . a related action [that] was commenced under section 1605(a)(7) [the old terror exception] (before the date of the enactment of this section) . . .”).

92. In another unlikely series of events, the same month the *Rubin* plaintiffs refiled suit, around one thousand other Iran terror victims—of the October 23, 1983, U.S. Marine barracks attacks in Beirut—filed suit in the same court, touting a nearly three-billion-dollar judgment and seeking attachment of the very same museum antiquities. *See Peterson v. Islamic Republic of Iran*, 515 F. Supp. 2d 25, 60 (D.D.C. 2007). A tug-of-war battle ensued that butted the Iranian terror victims against one another—over who should ultimately hold ownership rights over the antiquities. Ultimately, the *Peterson* plaintiffs discarded the museum-attachment litigation in pursuit of a different avenue for collection. *Peterson v. Islamic Republic of Iran*, 264 F. Supp. 2d 46, 48 (D.D.C. 2003).

and both museums moved for summary judgment on the basis that the artifacts were not subject to attachment.⁹³ The defendants' argument rested on the FSIA rule that all property of a foreign country located in the United States is immune from attachment unless the property is exempted from immunity by an enumerated exception.⁹⁴ The defendants, therefore, argued that because no exception to the FSIA was applicable to the artifact collections at issue, the plaintiffs had no mechanism upon which to attach the artifacts.⁹⁵ The plaintiffs, on the other hand, argued that exceptions from the enumerated list did apply, and therefore the artifacts should not be immune from attachment.⁹⁶

First, the *Rubin* plaintiffs maintained that the commercial activity exception should apply. The commercial activity exception provides that "property in the United States of a foreign state . . . used for a commercial activity in the United States, shall not be immune from attachment"⁹⁷ proceedings. The plaintiffs reasoned that because the museums had put the artifacts toward commercial use,⁹⁸ the defendants' property should be exempt from immunity under the FSIA.⁹⁹ The district court disagreed with the plaintiffs' interpretation of the statute, holding that to trigger the commercial activity exception, the commercial activity must be conducted by the foreign sovereign itself.¹⁰⁰

In the alternative, and of relevance to this Note, the plaintiffs contended that the newly enacted 2008 terrorist exception to jurisdictional immunity, § 1605A, provides a freestanding basis for execution on the artifacts¹⁰¹ by vehicle of § 1610(g)'s abrogation of SST's attachment immunity.¹⁰² Enacted under the 2008 Amendment,¹⁰³ § 1610(g) creates an attachment provision that allows for broader attachment in aid of execution for plaintiffs with § 1605A judgments (under the new SST exception). The *Rubin* plaintiffs therefore argued that under § 1610(g), the museum antiquities were subject to execution without nexus to commercial activity.¹⁰⁴

93. *Rubin v. Islamic Republic of Iran*, 33 F. Supp. 3d 1003, 1008 (N.D. Ill. 2014).

94. 28 U.S.C. § 1610 (2012).

95. *Rubin*, 33 F. Supp. 3d at 1008.

96. *Id.* at 1008–10.

97. *Id.* (citing 28 U.S.C. § 1610(a) (2012)).

98. *See supra* note 82.

99. *See* § 1610(a).

100. *Rubin*, 33 F. Supp. 3d at 1011.

101. *Id.* at 1012.

102. § 1610(g).

103. National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 3 (codified as amended in scattered sections of 28 U.S.C.).

104. *Rubin*, 33 F. Supp. 3d at 1012.

3. Holdings

The district court rejected the plaintiffs' interpretation of § 1610(g) on the grounds that (1) it read contrary to the rule against surplusage; (2) the plaintiffs lacked support for their assertion that § 1610(g) expanded the scope of attachable property in aid of execution; and (3) § 1610(g) was solely intended as a congressional override to a frequently cited Supreme Court precedent¹⁰⁵ which articulated that a government instrumentality's assets "as juridical entities distinct and independent from their sovereign" were immune from attachment.¹⁰⁶ Subsequently, the court found that § 1610(g) did not provide a new mechanism upon which the plaintiffs could attach Iranian assets and thus held that the ancient artifact collections were immune to attachment and execution.¹⁰⁷ The court concluded plaintiffs had failed to provide a basis for attachment of the artifacts and granted the defendants' motions for summary judgment.¹⁰⁸

The plaintiffs timely appealed,¹⁰⁹ and on July 19, 2016, the U.S. Court of Appeals for the Seventh Circuit affirmed in full the lower court's decision.¹¹⁰ In doing so, the Seventh Circuit took the unusual move of overruling its own § 1610(g) precedent,¹¹¹ holding that the "FSIA provision allowing attachment of and execution against property held by foreign terrorist state's instrumentality is *not* a freestanding 'terrorism' exception to execution immunity."¹¹² In other words, it held that any foreign-state property a terror plaintiff seeks to attach must also be categorically commercial in nature to be eligible for attachment purposes. Through this interpretation of § 1610(g), the Sev-

105. See *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba (Banec)*, 462 U.S. 611, 626–27 (1983).

106. See *Rubin*, 33 F. Supp. 3d at 1013. The substantive and structural pattern of § 1610(g)(A)–(E) mirrors precisely the same set of factors laid out by *Banec*. However, § 1610(g)(A)–(E) sets forth the exact opposite conclusion to that of the *Banec* Court. Following this line of logic, the United States, in its Statement of Interest pointed out, and the district court agreed, that § 1610(g) was enacted by Congress *solely* to reverse the so-called *Banec* doctrine by putting forth the mirrored set of factors as determinative of the issue of whether an instrumentality of a foreign government should function legally as an alter ego of said foreign government (according to *Banec*—no; according to Congress—yes). See Statement of Interest of the United States, *Rubin*, 33 F. Supp. 3d 1003 (No. 03 C 9370).

107. *Rubin*, 33 F. Supp. 3d at 1014.

108. *Id.* at 1017.

109. See *Rubin v. Islamic Republic of Iran*, 830 F.3d 470, 473 (7th Cir. 2016); *Wyatt v. Syrian Arab Republic*, 800 F.3d 331 (7th Cir. 2015); *Gates v. Syrian Arab Republic*, 755 F.3d 568, 576 (7th Cir. 2014) ("[Section] 1610(g) is available only to holders of judgments under the . . . exception for state-sponsored terrorism, but it allows attachment of a much broader range of assets to satisfy those judgments.").

110. *Rubin*, 830 F.3d at 473–74.

111. See *Gates*, 755 F.3d at 567–68.

112. See *Rubin*, 830 F.3d at 481.

enth Circuit *Rubin* panel overruled the Seventh Circuit *Gates* panel and created a split with the Ninth Circuit as to how broadly § 1610(g)'s authority should extend insofar as whether it is a freestanding provision.¹¹³ On October 17, 2016, petitioners timely filed a petition for a writ of certiorari.¹¹⁴ On June 27, 2017, the Court granted the petition, limited to the issue of:

[w]hether 28 U.S.C. § 1610(g) provides a freestanding attachment immunity exception that allows terror victim judgment creditors to attach and execute upon assets of foreign state sponsors of terrorism regardless of whether the assets are otherwise subject to execution under section 1610.¹¹⁵

Thereafter, on February 21, 2018, the Court affirmed the Seventh Circuit in full, holding that § 1610(g) does not provide an independent basis for property attachment immunity.¹¹⁶

III. ANALYSIS

The Court's narrow and textually strained construal of § 1610(g) suggests that superseding issues of constitutionality drove the Court's decision.

A. The Court's lengthy ode to the historical development and overarching structure of FSIA evince separation-of-powers concerns trumped the statutory text's ordinary meaning.

It is well accepted that statutory text contains the best evidence of congressional purpose and intent.¹¹⁷ For this reason, the primacy of the ordinary-meaning rule is a cornerstone of statutory interpretation.¹¹⁸ When confronted with the proper meaning of a statute, courts begin their interpretive task by determining whether the meaning of the statute is clear from the text.¹¹⁹ Only if the court at this juncture

113. See *Bennett v. Islamic Republic of Iran*, 817 F.3d 1131, 1141 (9th Cir. 2016) ("We hold that [§ (1610)(g)] contains a freestanding provision for attaching and executing against assets of a foreign state or its agencies or instrumentalities. . . . Section 1610(g) requires only that a judgment under § 1605A have been rendered against the foreign state; in that event, both the property of the foreign state and the property of an agency or instrumentality of that state are subject to attachment and execution.").

114. Petition for a Writ of Certiorari, *supra* note 76.

115. *Id.* at ii; see *Rubin v. Islamic Republic of Iran*, 137 S. Ct. 2326 (2017).

116. *Rubin*, 137 S. Ct. 2326.

117. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 544 (2012) (stating that statutes are "creatures of Congress's own creation" and therefore "the best evidence of Congress's intent is the statutory text.").

118. *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.").

119. *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) (stating that the Supreme Court has placed a statute's plain meaning at the top of the interpretational to-

determines the language ambiguous will it proceed forward through its legal analysis.¹²⁰

The U.S. Supreme Court in its recent *Rubin* decision did not look to the ordinary meaning of § 1610(g) as an initial matter.¹²¹ Instead, it unconventionally began its analysis with a review of the historical development of FSIA, reasoning that such history would provide “a helpful guide to [the Court’s] decision.”¹²² In the eight paragraphs that followed, the Court attempted to delineate the governing principles upon which it had based its ultimate interpretation of the five ambiguous words: “as provided in this section.”¹²³ This unusual move served as an early indicator that factors extrinsic to § 1610(g)’s text guided the Court’s decision.

The Court’s initial deployment of the broad history surrounding FSIA’s 1976 enactment as a “helpful guide to [its] decision” was peculiar for two notable reasons. First, as discussed above, statutory text best evidences Congress’s intent.¹²⁴ Hence, the Court’s preliminary departure from the language’s obvious import struck a dubious chord.¹²⁵ Instead, drawing focus to the governmental branches’ authoritative limits in matters of foreign sovereign immunity, the Court eluded justification of its salient detour.

The Court, to hinge its interpretation of the law on factors extrinsic to the text of the law, would have required necessary means of constitutional avoidance to do so, lest the Court run up against its own Article III power.¹²⁶ Yet, the Court did not forthrightly predicate its

tem pole and that in the absence of ambiguity, the “first canon [of construction] is also the last: ‘judicial inquiry is complete’” (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)); see also *United States v. Gonzales*, 520 U.S. 1, 6 (1997) (“Given the straightforward statutory command, there is no reason to resort to legislative history.” (citing *Conn. Nat’l Bank*, 503 U.S. at 254)).

120. *Caminetti v. United States*, 242 U.S. 470, 501 (1917) (“It is the dictate of common sense.”)

121. See *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 821 (2018).

122. *Id.*

123. *Id.* at 821–23.

124. See *United States v. Temple*, 105 U.S. 97, 99 (1881) (stating that courts have the duty to interpret a statute in accordance with the “natural and obvious import of the language, without resorting to subtle and forced construction” in order to limit its effectual function).

125. 82 C.J.S. *Statutes* § 413 (2018) (“Words used in a statute normally must be given their usual, natural, plain, ordinary, and commonly understood meaning, in the absence of any indication of a legislative intention to the contrary.”).

126. *Cf. Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 179 (1803) (“Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that *courts*, as well as other departments, are bound by that instrument.”).

reasoning on these doctrinal ends.¹²⁷ Only in dictum did the Court employ separation of power limits as a “helpful guide” to how “as provided in this section” served to significantly narrow terror-victim’s pool of attachable assets.

The second oddity in the Court’s employing FSIA’s history to justify its interpretational anomaly is the attenuated nature of the history upon which it so fervently relied. After looking to plain meaning, courts customarily, if at all, look to the legislative history surrounding a bill’s passage as a mechanism to garner meaning from ambiguous statutory terms.¹²⁸ Here the Court did neither of these things. Initially, it failed to address plain meaning, and at no point did it look to the legislative history surrounding the passage of the SST exception and the 2008 Amendments that added § 1610(g). Instead, the Court scrutinized the contours of the enactment of the original 1976 Act itself through an unusually broad lens.¹²⁹

The Court drew upon the delicate balance of sovereign immunity and therein the limited instances of immunity abrogation FSIA sought to preserve.¹³⁰ It further emphasized the traditionally limited nature of such exceptions, underscoring the importance of deference to the executive in deciding such matters.¹³¹ Effectively speaking, the Court singled out the same cornerstone principles that accompanied FSIA’s enactment in 1976 as to support the very narrowed interpretation of § 1610(g) the Court was ultimately to adopt.¹³² Parlaying these his-

127. The Court justifies its decision to “start with a brief review of the historical development of foreign immunity law” as providing “a helpful guide to [its] decision,” *Rubin*, 138 S. Ct. at 821, but never hinges its actual decision on the separation-of-powers concerns it goes on to lengthily discuss in dictum.

128. *Burlington N. R.R. Co. v. Okla. Tax Comm’n*, 481 U.S. 454, 461 (1987) (stating that “[l]egislative history can be a legitimate guide to a statutory purpose obscured by ambiguity,” but unless a clear legislative intent manifests itself contrary to the statute’s language, plain language must prevail).

129. *Rubin*, 138 S. Ct. at 821–22.

130. *Id.*

131. *Id.*

132. First, the Court emphasized that it has always “recognized that foreign sovereign immunity ‘is a matter of grace and comity on the part of the United States,’” harkening back to 1952 to reinforce that absolute immunity, in its original form afforded foreign states immunity under all circumstances. *Id.* at 821 (quoting *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983)). Further, the Court emphasized, it was the Executive Branch, not the Legislative Branch, in charge of delimiting the law’s confines. The Court continued that when the State Department did ultimately allow exceptions to immunity, it was only for those acts arising out of foreign state’s commercial activities. *Id.* at 821–22. In officially adopting this “restrictive theory” of immunity, the Court stated, FSIA sought “to codify this careful balance between respecting the immunity historically afforded to foreign sovereigns and holding them accountable, in certain circumstances, for their actions.” *Id.* at 822. Foreign states, therefore, continue to enjoy the default presumption of jurisdictional immunity from U.S. courts, and their property, likewise, the same presumption of immunity from attachment and execution. *Id.*

torical principles into a conservative reading of the SST exception, the Court reinforced foreign-state property's strong default presumption of immunity absent Congress's express prescription otherwise.¹³³ The Court clarified that § 1605A(a) functions to subject designated state-terror sponsors to the jurisdiction of courts, while § 1610(a)–(b) delineates the circumstances under which such foreign states' *commercial* property shall be excepted from immunity.¹³⁴

Meanwhile, the Court consigned the broader statutory framework of § 1610(g) to serve merely as Congress's intended statutory *Bancec* override, which had granted instrumentalities of state-sponsored terrorism a presumption of immunity absent a clear showing otherwise.¹³⁵ The Court therefore posited that because subparagraphs (A) through (G) tracked nearly word-for-word the factors the federal circuit courts had developed to override instrumentalities presumption of immunity, § 1610(g) must, in turn, function to abrogate *Bancec*.¹³⁶ The sole remaining issue, the Court concluded, was whether § 1610(g) did "something more."¹³⁷

B. The Court's myopic application of the ambiguous "as provided in this section" language suffers from various interpretational anomalies.

Once the Court turned to § 1610(g)(1)'s ambiguous language, it properly determined the most natural reading of "as provided in this section" to apply to the entire section.¹³⁸ However, the Court's construal of how to apply "as provided in this section" broadly, and to which specific section the ambiguous language might reference, fell short. Recall that the 2008 Amendment, as discussed *supra*, added § 1610(g) and further amended the FSIA.¹³⁹ In relevant part, § 1610(g) states:

(g) Property in Certain Actions.—

(1) In general.— . . . [T]he property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment *as provided in this section*¹⁴⁰

133. *Id.*

134. *Id.*

135. *Id.* at 822–23.

136. *Id.* at 823.

137. *Id.*

138. *Id.* at 823–24.

139. 28 U.S.C. § 1605A (2012).

140. 28 U.S.C. § 1610(g)(1) (2012) (emphasis added).

Turning to the text of the statute, the Court concluded that subsection (g) did not serve as one of § 1610's "express immunity-abrogating provisions to attach and execute against a relevant property."¹⁴¹ In support of its interpretation, the Court cited various textual canons of construction. First, the Court pointed out that the other provisions within § 1610 that already serve to unambiguously revoke a foreign state's property immunity ubiquitously incorporate the requirement that such immunity abrogation may only reach that property which is commercially used in the United States.¹⁴² Allowing § 1610(g) to serve as an express immunity abrogation to property, then, would unlawfully conflate a § 1605A judgment holder's ability to reach noncommercial property.¹⁴³ Second, the Court argued that when Congress intends to abrogate immunity it knows how to do so clearly and it did not do so under § 1610(g)(1).¹⁴⁴ In other words, those provisions within § 1610 that unambiguously stand to sever immunity either (1) expressly enumerate preconditions¹⁴⁵ or (2) employ "textual markers" that unequivocally either state the property "shall not be immune" or are immune "notwithstanding any other provision of law,"¹⁴⁶ whereas § 1610(g) lacks these indicators. Finally, the Court noted that structurally, § 1610 exceptions that unilaterally abrogate immunity are narrowly tailored, whereas § 1610(g) is overtly broad.¹⁴⁷

Various issues belie the Court's interpretational reasoning to these ends. First, the Court provides little by way of justification in its determination that § 1610(g)(1) shall "govern the attachment and execution of property [only where] exempted from the grant of immunity as provided elsewhere in § 1610."¹⁴⁸ In this vein, it is unclear on what grounds the Court infers that because "as provided in this section" ap-

141. *Rubin*, 138 S. Ct. at 824.

142. *Id.*

143. *Id.* at 825 ("The Court's interpretation of § 1610(g) is also consistent with the historical practice of rescinding attachment and execution immunity primarily in the context of a foreign state's commercial acts. Indeed, the FSIA expressly provides in its findings and declaration of purpose that 'under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connect with their commercial activities.'" (citations omitted)).

144. *Id.* at 824.

145. *Id.* at 824 ("For example, subsection (a) provides that 'property in the United States . . . used for a commercial activity in the United States . . . shall not be immune' from attachment and execution in seven enumerated circumstances . . ." (citation omitted)).

146. *Id.*

147. Emphasizing that § 1610(a) requires "certain express conditions are satisfied," subsections (b), (d), and (e) only apply to "certain property," and other abrogating provisions within the section only apply to assets associated with prohibited financial transactions. *Id.* at 824.

148. *Id.* at 823.

plies broadly, other substantive subsections must therefore subsume this one. This reading is unduly strained. Simply because § 1610(g) serves to “govern” under what circumstances attachment and execution of property is exempt from immunity does not automatically mandate bifurcation of the cause of action for attachment immunity for the property itself. Moreover, the argument that other substantive provisions within the section already serve such attachment mechanisms is nothing more than a red herring.¹⁴⁹ Finally, demoting subsection (g) to this narrow purpose is entirely contrary to the ordinary meaning of how subsection (g) was tailored to apply to “[p]roperty in certain actions”—not *commercial* property in certain actions.¹⁵⁰

As the Ninth Circuit reasoned, “this section” more plausibly refers to the other procedural provisions contained within the section,¹⁵¹ whereby subsections (g) and (f) were both modeled to enable collection on outstanding terrorism judgments, given that both provisions facilitate plaintiff-creditors’ ability to attach blocked and regulated property.¹⁵² Historically however, President Clinton waived § 1610(f)(1)’s application by his then-existing authority under § 1610(f)(3).¹⁵³ Hence, it reasonably follows that Congress, in enacting a new exception to attachment and execution immunity would have referred to such procedures that were explicitly drafted in connection with terrorism judgment actions.¹⁵⁴

Alternatively, it’s also entirely possible that Congress didn’t intend “as provided in this section” to apply to § 1610 at all but rather to reference section 1083 of the National Defense Authorization Act (NDAA).¹⁵⁵ “Section 1083 in the NDAA, is titled, ‘Sec. 1083. Terrorism Exception to Immunity.’ Subsection 1083(a)(1) creates 28 U.S.C. § 1605A, and names it: ‘Terrorism exception to the *jurisdictional* im-

149. Namely, that subsections (a), (b), and (d) are similarly structured should lend credence, not uncertainty, as to subsection (g)’s serving an analogous function.

150. 28 U.S.C. § 1610(g) (2012) (emphasis added).

151. For example, the court in *Bennett v. Islamic Republic of Iran* noted that procedures are contained in § 1610(f) that, like § 1610(g), refer to § 1605A judgments. 825 F.3d 949, 959 (9th Cir. 2016). For instance, § 1610(f)(1)(A) allows for execution of blocked property, § 1610(f)(1)(B) prohibits “execution against property of a foreign state that has been expropriated from a natural person”, and § 1610(f)(2)(A) states that the Secretary of State and the Secretary of Treasury shall make advanced efforts to assist courts in locating property awarded pursuant to a § 1605A judgment. *Id.* at 959–60. Therefore, an alternatively plausible explanation is that the legislation mandates § 1610(g) attachment be executed in accordance with these procedures.

152. Petitioner’s Brief at 4–5, *Rubin*, 138 S. Ct. 816 (No. 16-534).

153. *Rubin*, 138 S. Ct. at 826 n.6.

154. Petitioner’s Brief, *supra* note 152, at 44–45.

155. *Id.* at 46–47.

munity of a foreign state.’ The entire § 1083 applies to both jurisdictional and executional immunity exceptions for terrorism cases.”¹⁵⁶

Section 1083 contains provisions that allow punitive, and other types of, damages explicitly precluded by § 1606 of FSIA.¹⁵⁷ Thus, it is reasonable to assume “as provided in this section” which modifies the word “judgment” was intended to reference section 1083 and equip judgment creditors with its wide latitude of execution provisions.¹⁵⁸ Meanwhile, section 1083 was intended to supersede § 1606’s injunction on punitive damages. This argument is further bolstered by the fact that those provisions of section 1083 that didn’t make it into the United States Code are still listed following § 1605A, and each of these provisions reference “this section” as applying to section 1083 (or section 1087).¹⁵⁹

In other words, although the Court rightly identified the inherent ambiguity in the “as provided in this section” language and rightfully discerned the most natural reading as to encompass a broad reading of the entire section, its construed application of this finding was unduly strained.¹⁶⁰ The Court failed to undertake exhaustive consideration of what “this section” should be read to implicate and in turn arrived at a meaning at odds with the statute’s purpose.

C. The Court’s narrow construal of § 1610(g) dilutes the SST exception’s intended clout, contrary to statutory purpose.

The Court’s conclusion that “as applied in this section” means subsection (g) must utilize either subsection (a) or (b) as an attachment mechanism effectively establishes that § 1605A judgment creditors may only attach commercial property.¹⁶¹ This outcome heavily dilutes § 1610(g)’s potency so as practically to render it a nullity and directly contravenes Congress’s purposes in enacting the 2008 Amendments to meaningfully expand property outlets available to § 1605A judgment creditors whereby the commercial property pool had run dry.¹⁶²

Anticipating this criticism, the Court attempted to assuage its narrow reading, reasoning that the addition of § 1610(g) provides some semblance of additional relief through its abrogation of *Bancec*. How-

156. *Id.* at 45 (citation omitted).

157. *Id.* at 47–48.

158. *Id.* at 48.

159. *Id.* at 47.

160. *See* *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 823–24 (2018).

161. *Id.* at 825 (intimating that because subsections (a), (b), and (d) all stipulate that property must be used for a commercial activity “[t]his focus of the FSIA” must intrinsically be “reflected within [§ 1610(g) as well]”).

162. *See* *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1318 n.2 (2016) (recognizing that § 1610(g)’s broad purpose was to meaningfully expand the pool of assets available to § 1605A judgment creditors).

ever, given the oversaturated commercial-property landscape Congress sought to rectify, is it far from apparent that *Bancec* serves anything beyond the illusory role the Court intended.

Further, the Court's argument that Congress knew how to unambiguously revoke immunity where it wanted to is unconvincing.¹⁶³ The Court determined that because § 1610(g) "conspicuously lacks the textual markers, 'shall not be immune' or 'notwithstanding any other provision of law,'" Congress could not have intended it to serve as a freestanding abrogation provision.¹⁶⁴ First, the Court fails to account for its own value of hindsight in that Congress is a body of lawmakers, not automatons. Second, it fails to explain by what logic this duo of phrases has come to pedagogically entail the sole means by which Congress may expressly designate property-immunity abrogation.¹⁶⁵

After all, the text makes entirely plausible that Congress designated § 1610(g) as an express immunity-abrogating provision, utilizing a congruous textual marker to do so. Namely, § 1610(g)(1) 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."¹⁶⁶ Arguably, the direct import of the command "is subject to attachment" could not be much clearer. Black's Law Dictionary defines *subject* here to mean "to make liable."¹⁶⁷ In other words, in its most literal sense, § 1610(g) prescribes that a foreign state's property will be made liable where judgment creditors hold § 1605A judgments.

The Court would counter that such property is only made liable "as provided in this section."¹⁶⁸ In other words, only where the foreign state's property is commercial in nature. But the Court's own earlier argument that Congress knows how to speak clearly when it intends to undermines the Court's own reading.¹⁶⁹ After all, where Congress intended to denote "commercial property," it readily did so throughout the entirety of subsections (a), (b), and (d).¹⁷⁰ Thence, there is no doubt that Congress knew how to insert *commercial* to modify the word *property* where it intended to denote "commercial property."

Yet notably absent from any portion of § 1610(g) is the *commercial* modifier.¹⁷¹ To this end, § 1610(g) utilizes the word *property* in eleven different instances throughout the subsection, never inserting the

163. See *Rubin*, 138 S. Ct. at 826.

164. *Id.*

165. See *id.*

166. 28 U.S.C. § 1610(g)(1) (2012)

167. *Subject*, BLACK'S LAW DICTIONARY (10th ed. 2014).

168. § 1610(g)(1).

169. *Rubin*, 138 S. Ct. at 826 ("Had Congress likewise intended . . . , it knew how to say so.").

170. § 1610(a)–(b), (d).

171. § 1610(g).

commercial modifier.¹⁷² The Court's reading in effect inserts the word *commercial* into the legislation not one but eleven times.¹⁷³ Hence, the Court determined that the five ambiguous words—"as provided in this section"—tagged to the end of subsection (g)(1) affirmatively functioned eleven times to make *property* mean "commercial property." Yet, by the Court's own logic, had Congress intended to limit § 1610(g)'s ambit to solely extend to commercial property, it simply would have said so. Congress knew precisely how to—and did—demarcate "commercial property" instead of "property" each time it intended to throughout the section.¹⁷⁴ Even subsection (g)'s statutory heading denotes "*Property in Certain Actions*,"¹⁷⁵ notably lacking the *commercial* modifier. Needless to say, it is well accepted that Congress doesn't "hide elephants in mouseholes."¹⁷⁶

Moreover, that subsections (a), (b), and (d) each serve as "independent avenue[s] for abrogation immunity"¹⁷⁷ has the tendency to bolster, not detract, as the Court argues, that subsection (g) also logically extends to serve this purpose. The broader statutory context of § 1610 demonstrates that each of the other substantive subsections is a freestanding provision. Specifically, only the subsections that are procedural in nature are construed to be read in tandem with other provisions.¹⁷⁸ Where such a referential indication does exist, its subsection counterpart is expressly enumerated.¹⁷⁹ Subsection 1610(g), on the other hand, points specifically to no such other subsection but conversely tracks the same basic structure as subsections (a) and (b), adding further weight that subsection (g), too, was intended by Congress as a freestanding exception.¹⁸⁰

Finally, when § 1610(g) was enacted in 2008, a foreign state's commercial property under § 1610(a)(7) had already been subject to attachment immunity for over a decade.¹⁸¹ The Court's adopted interpretation of § 1610(g) then rendered the inclusion of "the property of a foreign state against which a judgment is entered under section 1605A" meaningless since such commercial property has already long since been statutorily mandated under § 1610. The Court reasoned that this phrase was not rendered useless on account that it

172. *Id.*

173. *Id.*

174. Compare § 1610(a)–(b), (d) ("commercial property"), with § 1610(g) ("property").

175. § 1610(g).

176. *Whitman v. Am. Trucking Ass'n, Inc.*, 531 U.S. 457, 468 (2001) ("Congress, we have held, does not alter the fundamental details . . . in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.").

177. *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 824 (2018).

178. See § 1610(c), (e).

179. *Id.*

180. See § 1610(g).

181. See Pub. L. No. 104-132, § 221, 110 Stat. 1232–43 (1996) (adding 28 U.S.C. § 1610(a)(7)).

could “help inform when § 1610(g) will apply in the first place,”¹⁸² failing to justify under what logic § 1610(a)(7) suddenly required, after more than a decade, such “help” and, perhaps more startlingly, failing to define just how the argument that one subsection will “help” inform another won’t be later used by courts *any time* to overcome a Rule Against Surplusage argument.

The Court’s appeal to FSIA’s broader strictures in lieu of § 1610(g)’s legislative history ultimately enabled its reading past Congress’s purpose for § 1610(g): “to subject *any* property interest in which the foreign state enjoys a beneficial ownership to attachment and execution.”¹⁸³

D. Separation-of-powers concerns were ostensibly at the primacy of the Court’s narrow interpretation.

The *Rubin* Court’s strong emphasis of FSIA’s limitations as expressly delimiting international law’s confines evidences that overarching separation-of-powers issues were at the primacy of the Court’s decision.¹⁸⁴ The Court’s deferential disposition throughout the opinion to the Executive Branch’s position as *amicus curiae* underscores the more immediate inquiry with which the Court was concerned: which branch’s interpretation should be granted supremacy.¹⁸⁵

This was foreseeable considering that legal scholars have long questioned the constitutional legitimacy of the SST exception.¹⁸⁶ Under its delegated constitutional authority, sole power is vested in the President as commander in chief to govern matters of U.S. diplomacy, including the fight against terrorism. While Congress retains authority to enact legislation concerning issues of foreign affairs, to

182. *Rubin*, 138 S. Ct. at 827 (emphasis added).

183. H.R. REP. NO. 110-477, at 1001 (2007) (Conf. Rep.) (emphasis added).

184. *See Rubin*, 138 S. Ct. at 826 (stating that interpreting § 1610(g) to require the “commercial activity” nexus is consistent with the “history and structure of the FSIA”).

185. *Id.* (“Out of respect for the delicate balance that Congress struck in enacting the FSIA, we decline to read into the statute a blanket abrogation of attachment and execution immunity for § 1605A judgment holders absent a clearer indication of Congress’ intent.”).

186. *See Curavic, supra* note 56, at 384 (“Currently, the courts play a prominent role under FSIA’s terrorism provisions, arguably usurping the executive’s constitutional power to effectively conduct foreign affairs.”); Daveed Gartenstein-Ross, *A Critique of the Terrorism Exception to the Foreign Sovereign Immunity Act*, 34 N.Y.U. J. INT’L L. & POL. 887, 912 (2002) (“The most significant cost of international human rights litigation is that it shifts responsibility for official condemnation and sanction of foreign governments away from elected political officials to private plaintiffs and their representatives. The plaintiffs and their representatives decide whom to sue, when to sue, and which claims to bring. These actors, however, have neither the expertise nor the constitutional authority to determine US foreign policy.” (quoting Curtis A. Bradley, *The Costs of International Human Rights Litigation*, 2 CHI. J. INT’L L. 457, 460 (2001))).

the extent this authority divergently overlaps that of the President's in matters of foreign sovereignty, the Court has typically held that the Executive Branch must prevail.¹⁸⁷

The SST exception has long been criticized for its hardwired propensity to cause other governmental branches to impinge upon that territory exclusively within the authoritative realm of the President.¹⁸⁸ Therein, it has been construed as improperly elevating private plaintiffs' interests above those of the Executive Branch in areas of national security and foreign affairs.¹⁸⁹ Such concerns have been materially validated when the State Department has been forced to join state terror sponsors, as it did here, in support of their positions simply to safeguard the United States from breaking its international legal obligations.¹⁹⁰

Specifically, commentators have pointed to the SST exception's obliteration of the *Zivotofsky* Court's "one voice" doctrine, which stands for the proposition that the country must speak in a unified voice on matters of foreign sovereign recognition.¹⁹¹ "The SST exception, however, results in a nation speaking through thousands of voices in the form of plaintiffs lawyers, and federal judges. The disparate disjointed, disorderly cacophony that emerges from SST litigation makes it difficult for the President's position to be heard loud and clear from oceans away."¹⁹²

In turn, giving individual citizens the capacity to decide in which manner to involve foreign-sovereign terror sponsors creates myriad obstacles for the Executive Branch to have to try to sort through.¹⁹³ In *Zivotofsky v. Kerry*, therefore, the Court found that "common sense and necessity" mandated the President's exclusive grant of power over the recognition of foreign sovereigns, precluding Congress from enact-

187. *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2078–81 (2015) (stating that the judiciary in resolving an "interbranch dispute" between the legislature and the executive over a question that surrounds a foreign state's "international status" will defer to the President's exclusive power in this arena).

188. See Troy C. Homesley, "Towards a Strategy of Peace": *Protecting the Iran Nuclear Accord Despite \$46 Billion in State-Sponsored Terror Judgments*, 95 N.C. L. REV. 795, 816–19 (2017) (arguing that the SST exception constantly initiates interbranch tug-of-wars through its usurpation of the separation-of-powers doctrine).

189. See *id.* at 797–98.

190. For example, in *Flatow v. Iran*, attorneys for the government were forced to intervene to stop attachment of an embassy building, no longer in use, that plaintiff sought to execute upon against Iran. Had the government failed to do so, however, and the attachment proceeding been successful, this would have put the United States in violation of Article 22(3) of the Vienna Convention. Such a breach would have, in turn, put the United States' own embassies abroad in jeopardy. *Flatow v. Iran*, 308 F.3d 1065 (9th Cir. 2002).

191. Homesley, *supra* note 188, at 816–17.

192. *Id.* at 817–18.

193. *Id.* at 816.

ing a law in direct contravention to the President's position.¹⁹⁴ Presumably then, although it is beyond the scope of this Note to undertake a thorough analysis of the constitutional issues the *Rubin* Court sought to avoid, such separation-of-powers concerns do appear to have played a central role in the Court's decision.

As discussed above, ordinary meaning, clear statutory purpose, and application of the rule against surplusage all strongly allude that Congress intended § 1610(g) to extend to *all* property. Likewise, the position of the United States was unambiguously clear:

Litigation against foreign states in U.S. courts can have significant foreign affairs implications for the United States, and can affect the reciprocal treatment of the United States in the courts of other nations. . . .

. . .

. . . Seizing a collection of ancient Persian artifacts on loan to a university museum presents foreign-policy ramifications that are different in kind from executing against state-owned property used in commercial activity.¹⁹⁵

Therefore, the *Rubin* Court, recognizing the Executive Branch's exclusive power in this political sphere and duly recognizing how a broad reading of § 1610(g) would circumvent that power, construed the language only to extend to commercial property.¹⁹⁶ Covertly invoking these constitutional-avoidance principles, the Court left for another day the unresolved constitutional issues that remain entrenched in the SST exception and, meanwhile, left the *Rubin* plaintiffs yet again empty-handed.

IV. CONCLUSION

The resounding effects of the *Rubin* Court's § 1610(g) interpretation will be felt in multiple directions. Terror victims like the Rubins, having expended much time, effort, and money over decades reliving their horror in federal courthouses across the country will remain unable to hold their perpetrator accountable or to attain the relief and closure their government promised them. Congress's dogged efforts, meanwhile, to provide terror victims meaningful relief will go unmet. Finally, the Executive Branch, for its part, will be required to continue to insert itself to argue alongside state terror sponsors wherever necessary to ensure U.S. international legal obligations remain intact, until the Court steps in to determine the constitutionality of the SST.

194. *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2095 (2015).

195. Brief for the United States as Amicus Curiae Supporting Respondents, *supra* note 13, at 1, 11.

196. *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 825 (2018) (stating that the Court's interpretation is consistent with FSIA's "findings and declaration of purpose" as well as "the historical practice of rescinding attachment and execution immunity primarily in the context of a foreign state's commercial acts").

Iran, meanwhile, will remain blissfully unaffected and the SST exception's main function as a deterrent—a failure.

In light of these practical considerations, and the fact that such empty judgments against Iran only continue to grow in size and number, next time, given the opportunity, the Court should not evade the question of the SST exception's constitutionality. To allow the SST exception to remain in legal limbo will only continue to waste precious governmental time and resources. More importantly, terror victims deserve either a meaningful remedy or to be granted the closure to know when to stop looking for one.