Nos. 07-1090 & 08-539

IN THE

Supreme Court of the United States

REPUBLIC OF IRAQ,

Petitioner,

v.

JORDAN BEATY, et al.,

Respondents.

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v.

ROBERT SIMON, et al.,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES:

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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INTRODUCTION

In making former Section 1605(a)(7) inapplicable to Iraq and thus restoring Iraq's sovereign immunity to the status enjoyed by other U.S. allies, the President acted with express statutory authority and effectuated important diplomatic and foreign

policies. Tellingly, respondents do not defend the D.C. Circuit's reasoning regarding the EWSAA. The *Simon*/*Seyam* respondents ("Simon") invent a new interpretation of the statute that is both atextual and nonsensical. And the *Beaty* respondents ("Beaty") effectively disregard the statutory language, arguing that it should be overridden based on generic presumptions that are inapplicable here. The statute should be read as it was written, and as the President properly understood it when he acted.

Alternatively, the case can be decided on the straightforward ground that Congress removed Section 1605(a)(7) from the U.S. Code and the President waived its replacement, new Section 1605A(a), as to Iraq under express statutory authority. Respondents fail to explain how jurisdiction can be sustained based on a statute that does not exist.

Either way, these claims based on the acts of the former Iraqi regime should be addressed as the President determined they should, and as claims of this sort always have been: through State-to-State diplomatic negotiations rather than by subjecting friendly allied nations to lawsuits in each other's courts.

ARGUMENT

I. THE PRESIDENT'S EWSAA DETERMINATION MADE FORMER SECTION 1605(a)(7) INAPPLICABLE TO IRAQ.

A. The Plain Language Of EWSAA Section 1503 Includes Former Section 1605(a)(7).

Far from refuting Iraq's explanation of the flaws in the D.C. Circuit's EWSAA interpretation, Beaty does not even address it. And Simon advances an

entirely new interpretation that is patently absurd. The language is unambiguous: EWSAA § 1503 authorized the President to "make inapplicable to Iraq section 620A of the Foreign Assistance Act of 1961 or *any other* provision of law that applies to countries that have supported terrorism." That plainly includes former Section 1605(a)(7).

The major premise of Simon's new argument is false: the contention that Section 1503 is hopelessly indeterminate because it could include laws of general applicability that happen to apply to terrorism-supporting countries along with all others. Simon Br. 11-14. The argument is irrelevant to this case. Whatever the outer boundary of the statute, there is no credible argument that it does not include former Section 1605(a)(7), which applied *exclusively* to terrorism-sponsoring nations.

But even if it were necessary to resolve Simon's contrived ambiguity in this case, the statute does so. The phrase "that applies to countries that have supported terrorism" is limiting language, modifying "provision of law." Yet under Simon's view the language serves no purpose, as the statute could have stopped at "provision of law." In fact, the limitation's intended scope is obvious. The President may waive applicability as to Iraq of the relatively small set of laws specifically applicable to countries that have supported terrorism as distinguished from other countries—*i.e.*, the laws that apply because of that designation. *See* U.S. Br. 11. Many of these laws were previously cited. *See* Pet. Br. 25 n.6; U.S. Br. 2. Others are listed in the Appendix to this brief.[1]

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[1] Because this set of laws is readily discernible, the purported distinction of *Ali* v. *Fed. Bureau of Prisons*, 128 S. Ct. 831 (2008), and *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578 (1980),

EWSAA § 1503 gives one example of such a law: Section 620A of the Foreign Assistance Act ("FAA"). Section 620A is not generally applicable to all nations but rather specifically targets countries that have "repeatedly provided support for acts of international terrorism." JA344. By authorizing the President to also waive "*any other*" provision of law "that applies to countries that have supported terrorism"—the only statutory criterion of similarity—Congress allowed him to relieve Iraq from "any" of the "other" legal provisions applicable because of its prior designation as a terrorism-sponsor. This included former Section 1605(a)(7).

From their flawed premise, the Simon respondents proceed to the truly ridiculous. They jettison the D.C. Circuit's interpretation and espouse a brand-new one under which the term "any other provision of law that applies to countries that have supported terrorism" is "confine[d] * * * to the statutes contained in §620A." Simon Br. 14. This interpretation is wrong for three reasons.

First, the EWSAA says nothing like this: it refers to "any other" law without the peculiar qualification invented by respondents. If Congress had meant to include *only* the four statutes listed in FAA § 620A, it would not have said "any other." Second, the four listed statutes (which include the FAA itself) are *not* provisions of law that "appl[y] to countries that have supported terrorism" because Section 620A itself makes those laws *inapplicable* to such countries. *See* JA344. Third, if the President really was authorized to make those general assistance statutes

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on the ground that this case involves an unknown set of elements, Simon Br. 21, 25-26, is inapposite.

"inapplicable to Iraq," that action would have *prohibited* Iraq from receiving such assistance, thereby undoing what he did by making Section 620A inapplicable in the first place. Congress obviously did not intend for the President to restore Iraq's ability to receive assistance and then, in the next breath, take it away again. Indeed, the EWSAA itself authorized FAA assistance to Iraq. *See* EWSAA, Pub. L. No. 108-11, ch. 5, 117 Stat. 572.

Respondents also note that the President's authority lies in a proviso. *See* Beaty Br. 41; Simon Br. 34. But they neither explain how this nullifies the statute's plain language, nor distinguish the cases holding that provisos like this one can state independent rules. *See* Pet. Br. 26. And again without explaining why the argument matters, Simon argues that the other EWSAA provisos are all "directly related to a specific provision of the [Iraq Sanctions Act ("ISA")]." Simon Br. 35. But that is not so. The fourth proviso, for example, refers to Section 307 of the FAA, which did not apply to Iraq until 1994, well *after* the ISA was enacted. *Id*. at 36. And that provision would still have applied to Iraq even if both the ISA and FAA § 620A did not. *See* U.S. Br. 14-15. Thus, the fourth proviso was independent of the ISA and ensured that the President could relieve Iraq from disabilities that a mere suspension of the ISA would not eliminate. The second proviso, at issue here, did the same.

As applied here, Section 1503 is unambiguous: it authorized the President to make inapplicable "any" provision of law that applies to terrorism-sponsoring countries, which unquestionably includes former Section 1605(a)(7). But even if there were ambiguity, the President's interpretation would be

entitled to dispositive deference. *See* Pet. Br. 30-31; U.S. Br. 22-25. Unlike interpretation of the FSIA, where the Executive's views warrant no special deference, Simon Br. 33, the President was specifically delegated authority to implement the EWSAA in an exercise of his foreign-policy judgment. Deference is thus warranted even under respondents' own cited authority. *See Japan Whaling Ass'n* v. *Am. Cetacean Soc'y*, 478 U.S. 221, 233 (1986) (deferring to Executive's decision not to certify foreign nation as having violated treaty).

B. Applying Section 1503 To Foreign Sovereign Immunity Implicates No Anti-Retroactivity Presumption.

Unable to deny that Section 1503's plain language encompasses former Section 1605(a)(7), respondents contend that the Court should read that statute other than how it is written because of the general presumption against retroactive application of statutes. *See* Beaty Br. 7-25; Simon Br. 48-49. But that presumption is inapplicable here.

1. Like any tool of statutory construction, the presumption against retroactive application does not apply where the statute itself contains the answer. *See* Beaty Br. 9. EWSAA § 1503 provides that answer. It states that the President may "make inapplicable as to Iraq" certain provisions of law, including (as already shown) former Section 1605(a)(7). This language is unqualified. It does not say, for example, that a provision made inapplicable will nevertheless remain applicable in certain instances or cases but not others.

Thus, effective upon the President's exercise of his EWSAA authority, former Section 1605(a)(7)

became immediately and entirely "inapplicable" to Iraq, including in these cases. Respondents' cases, however, depend on the statute still being "applicable" today, as it would supply the basis for continuing subject matter jurisdiction. The language of EWSAA § 1503 admits of no such construction, and in fact provides the opposite.

The President understood this. His determination to make laws applying to sponsors of terrorism inapplicable as to Iraq was unqualified. But he *did* qualify his EWSAA suspension of the ISA, suspending all ISA provisions *except* Section 586E, which directs the penalties for past violations of export sanctions. *See* JA396, 351. As the President correctly understood, if he had not excepted Section 586E, past violators could not be penalized because the plain language of Section 1503 applies to *all* applications of the provisions of law suspended or made inapplicable as to Iraq.

2. Even if the statutory language were not dispositive, the Court held in *Republic of Austria* v. *Altmann*, 541 U.S. 677 (2004), that the anti-retroactivity presumption does not apply to changes in foreign sovereign immunity. Whereas "[t]he aim of the presumption is to avoid unnecessary *post hoc* changes to legal rules on which parties relied in shaping their primary conduct," the Court held that such conduct-shaping is not the purpose of foreign sovereign immunity. *Id*. at 696. Rather, "such immunity reflects *current* political realities and relationships, and aims to give foreign states and their instrumentalities some *present* 'protection from the inconvenience of suit as a gesture of comity.'" *Id*. (citation omitted; first emphasis added). Noting that "[t]hroughout history, courts have resolved questions

of foreign sovereign immunity by deferring to the 'decisions of the political branches * * * on whether to take jurisdiction,'" the Court held that in the "*sui generis* context" of foreign sovereign immunity, "we think it more appropriate, absent contraindications, to defer to the most recent such decision * * *." *Id.* (citation omitted).[2]

That holding applies here. *Altmann* held that the FSIA—the most recent political decision applicable to that case—applied even though the defendant nation was immune at the time of the primary conduct, because an earlier immunity determination engenders no protectable interest or settled expectation. *Id.* *See also id.* at 711 (Breyer, J., concurring) ("foreign sovereign immunity respects current status"). In this case, the most recent political decision was the President's EWSAA determination.[3] Just as the *Altmann* Court applied the FSIA to pre-enactment conduct without employing any anti-retroactivity presumption, so too does the EWSAA determination govern this case.

Beaty ignores *Altmann*'s holding. And Simon incorrectly asserts that it governs only statutes "that directly address[] the sovereign immunity of foreign nations," rather than the application of EWSAA § 1503 to former Section 1605(a)(7). Simon Br. 48. The anti-retroactivity presumption covers only the

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[2] *Cf. United States* v. *Schooner Peggy*, 5 U.S. (1 Cr.) 103, 110 (1801) (applying treaty retrospectively because anti-retroactivity presumption applies "in mere private cases between individuals" but not "in great national concerns where individual rights acquired by war are sacrificed for national purposes").

[3] In fact, there was a later decision that had the same effect: the 2008 repeal of former Section 1605(a)(7) and waiver of its replacement as to Iraq.

"*application* * * * of new statutes that would have genuinely 'retroactive' *effect*." *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 277 (1994) (emphasis added). *See* Beaty Br. 11 (presumption applies only if the "*application* of the statute *to the conduct at issue* would result in a retroactive *effect*") (emphasis added). Thus, one must evaluate not the statute's general subject, but its effect as applied. Under *Altmann*, applying the EWSAA to Iraq's sovereign immunity has no genuinely retroactive effect, and the presumption therefore does not govern this case.

Indeed, the restoration of Iraq's immunity is not even arguably retroactive as applied here because the underlying events occurred between 1990 and 1995, when Iraq was absolutely immune from lawsuits like these. *See* JA166, 176, 383-87; Pet Br. 5. The EWSAA determination merely restored Iraq's status to what it was at the time of that conduct. It is therefore not retroactive because it does not "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf*, 511 U.S. at 280. Because Iraq was absolutely immune before 1996, respondents' actions then were not taken in reliance on their non-existent ability to sue. Given *Altmann*'s holding that foreign nations have no settled expectations about their *own* immunity status even where a change in that status results in liability that could not have been imposed when the underlying events occurred, these plaintiffs surely have no settled expectations where they could not even have sued at that time.[4]

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[4] Their attorneys filed complaints in 2003, between eight and twelve years after the underlying events. But that is not

Moreover, respondents do not dispute that they lacked any settled expectations given that claims of this sort against foreign sovereigns are always inherently subject to espousal by the Executive. *See* Pet. Br. 31-32, 42 n.11. Given that the President could have wholly eliminated their claims at any time in furtherance of foreign policies, respondents cannot complain that settled expectations were disrupted when he took the lesser step—under express statutory authorization—of making an exception to immunity inapplicable while preserving the claims for diplomatic negotiation.

Even if application of the EWSAA were not covered by *Altmann*'s "*sui generis*" rule for foreign sovereign immunity, it is also the kind of jurisdictional determination to which the anti-retroactivity presumption does not apply. *See Landgraf*, 511 U.S. at 274 (referring to statutes that "speak to the power of the court rather than to the rights or obligations of the parties"). Like the FSIA, the President's EWSAA determination "simply limits the jurisdiction of federal and state courts to entertain claims against foreign sovereigns. [It] does not create or modify any causes of action, nor does it purport to limit *foreign* countries' decisions about what claims against which defendants their courts will entertain." *Altmann*, 541 U.S. at 695 n.15

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the relevant "primary conduct," *Altmann*, 541 U.S. at 696, the anti-retroactivity presumption addresses. Indeed, these cases underscore the lack of any reasonable settled expectations regarding Iraq's status. The complaints were filed in February and March 2003, when the invasion of Iraq was imminent and shortly before the downfall of the Saddam Hussein regime. This belated rush to file thus indicates that respondents, like any reasonable observer, expected that Iraq's status might well change in the near future.

(emphasis in original). *See also id.* at 703 (Scalia, J., concurring) ("Federal sovereign-immunity law limits the jurisdiction of federal and state courts to entertain those claims, but not respondent's right to seek redress elsewhere.") (citation omitted). Thus, like other jurisdictional changes, the determination did not operate retroactively. *See Republic Nat'l Bank of Miami* v. *United States*, 506 U.S. 80, 100 (1992) ("the 'determinative event' for retroactivity purposes would be the final termination of the litigation, since statutes affecting jurisdiction speak to the power of the court") (Thomas, J., concurring).

While the lack of an available foreign forum means that these claims will be addressed diplomatically by the United States and Iraqi governments, they have not been extinguished. Thus, even under Beaty's cited authority—which is immaterial in light of *Altmann*'s specific holding and the facts of these cases—the EWSAA determination is not impermissibly retroactive. As respondents themselves note, in *Hallowell* v. *Commons*, 239 U.S. 506, 508 (1916), the Court applied a new statute that entirely eliminated a judicial forum for pending claims and instead remitted them to the "sole discretion" of the Secretary of the Interior. Beaty Br. 19.[5] This case is no different. In either event, there is no judicial forum, but the claims will be addressed by the United States government in its discretion.

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[5] By contrast, in *United States Fid. & Guar. Co.* v. *United States*, 209, U.S. 306, 315 (1908), Congress had substantively modified a cause of action upon which a commercial transaction had been rpedicated.

C. NDAA Section 1083(c)(4) Does Not Affect The President's EWSAA Determination.

NDAA § 1083(c)(4) has no effect on this case. It is possible for Congress to effectively amend a statute by declaring a construction of an existing provision.[6] But that is not what happened here. *See* Pet. Br. 35; U.S. Br. 29. The NDAA was enacted five years after the President took his actions under the EWSAA and three years after his EWSAA authorities expired. Accordingly, like the laws in the cases Iraq has cited, *see* Pet. Br. 35-36, Section 1083(c)(4) is nothing but "the opinion of individual members of the [later] legislature as to what the rule of law previously was," which "can have no binding effect." *Koshkonong* v. *Burton*, 104 U.S. (14 Otto) 668, 678 (1881).

Respondents contend that Section 1083(c)(4)'s value is determined by the degree of overlap between members of the 108th and 110th Congresses, or the amount of time (nearly five years) between the EWSAA and NDAA. *See* Beaty Br. 33-35; Simon Br. 41-42. This arithmetic is arbitrary and baseless. The salient fact is that the President acted in 2003, long before the NDAA, and the validity of his actions should therefore be judged on the statutory language before him when he acted.

But even if Section 1083(c)(4) would otherwise have affected Iraq's rights in this case, the President waived its application. Section 1083(c)(4) is not some incontrovertible "statement of fact," Beaty Br. 35, but

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[6] *Cf. Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, 444 U.S. 572, 595-96 (1980) (applying 1972 law to later administrative action); *Red Lion Broad. Co.* v. *FCC*, 395 U.S. 367, 380-81 (1969) (applying 1959 amendment to 1969 regulations); *FHA* v. *Darlington, Inc.*, 358 U.S. 84, 91 (1958).

rather an ineffective, after-the-fact legal conclusion contained in a statutory provision that Congress gave the President specific authority to waive. At the President's insistence following his veto, Congress gave him the authority to determine, in his foreign policy judgment, whether application of Section 1083(c)(4) should be waived to the extent it might affect Iraq at all, and he determined that it should. Simon's assertion that Section 1083(c)(4) could not be waived because it "affects" only court jurisdiction and not Iraq itself, Simon Br. 42, is baseless. To the extent Section 1083(c)(4) could have been employed to invalidate the President's EWSAA determination and thus subject Iraq to claims for which it would otherwise be immune, it would unquestionably have "affect[ed]" Iraq and was therefore expressly subject to waiver under Section 1083(d)(1).

D. The Expiration Of The EWSAA's Authorities Did Not Nullify The President's Exercise Of Them.

Simon incorrectly argues that the President's EWSAA determination became void when the "authorities" in the EWSAA expired. Simon Br. 43-45. Simon relies on dicta from *Acree*—where no party briefed the issue—but fails to address the explanations of Iraq or the United States as to why this sunset provision has no bearing on this case.

All that expired were the "authorities" the EWSAA granted to the President to act. Nothing in the statute says that the effect of the President's *actions* would be nullified, even though Congress knows how to say so when it wants. *See* U.S. Br. 20; 19 U.S.C. § 2432(c)(3) ("A waiver with respect to any country shall terminate on the day after the waiver

authority granted by this subsection ceases to be effective with respect to such country"). And contrary to Simon's assertions, any other holding would have the drastic result of immediately re-imposing on Iraq all the onerous sanctions of the ISA, which was never repealed. *See* Pet. Br. 34; U.S. Br. 20. Although Iraq's *administrative* designation as a terrorism-sponsor was rescinded in 2004, the ISA contains its own *legislative* designation. *See* ISA § 586F(c). And the statute itself directs a panoply of sanctions, both dependent on and independent of that designation, that would all re-emerge if the President's suspension were nullified. *See* JA347-364.[7] Congress could not have intended that result.

As in the EWSAA, when Congress provides a limited period for the exercise of statutory waivers, that does not mean that the waivers themselves will automatically be nullified once the authority to issue them expires. For example, Congress time-limited the authorities to waive certain requirements for commissioning military officers and for granting U.S. citizenship to Filipino veterans. *See* Pub. L. No. 105-261, § 516, 112 Stat. 2008 (1998); Pub. L. No. 105-119, § 112(d), 111 Stat. 2460 (1997); Pub. L. No. 101-649, § 405, 104 Stat. 5039 (1990). Yet when those waiver authorities expired, officers obviously did not lose their commissions and naturalized Filipinos did not lose their citizenship. Similarly, companies whose product registration fees were waived under 7 U.S.C. § 136a-1(i)(5)(H) certainly will not have to pay

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[7] The ISA allows a Presidential waiver, *see* ISA § 586H(a), but that authority narrowly covers only the specific sanctions of ISA § 586G(a), and not the many other ISA sanctions, including those dependent on Iraq's legislative designation as a terrorism-sponsor.

them back when the waiver authority expires in 2012. And landowners who traded property with the United States did not have the transactions nullified when the exchange authorities expired. *See* 16 U.S.C. §§ 346a-5, 698(d).

The EWSAA's expiration meant that the President could not broaden his determination and it ended his reporting requirements. But it did not nullify his prior exercise of his authorities, which occurred while the authorization was in effect and which the President has never rescinded.

E. EWSAA Section 1503 Is Constitutional.

Simon (but not Beaty) contends—almost in passing—that EWSAA § 1503 is unconstitutional. *See* Simon Br. 46-48. These respondents have not come close to sustaining their heavy burden to invalidate an Act of Congress.

1. Simon contends that Section 1503 violates the Presentment Clause by purportedly delegating to the President the authority to "repeal" statutes. *Id*. at 46. That is wrong. The President's exercise of his EWSAA authority did not repeal any statute; it simply made extant statutes inapplicable to Iraq while retaining their applicability to all other nations. Indeed, the statute at issue—Section 1605(a)(7)—was not repealed until 2008, and that repeal was duly accomplished through legislation enacted by *Congress*. For this reason, respondents' invocation of the presumption against "implied repeals" of statutes, Beaty Br. 40-41; Simon Br. 31-32, also fails. The President's determination did not repeal any statute, and his authority was in any event express, not implied.

The EWSAA determination was thus no different in effect from waivers of existing legal requirements that the President and agencies are routinely authorized to issue. *See Acree* v. *Republic of Iraq*, 370 F.3d 41, 64 n.3 (D.C. Cir. 2004) (Roberts, J., concurring) ("The actions authorized by the EWSAA are a far cry from the line-item veto at issue in *Clinton* and are instead akin to the waivers that the President is routinely empowered to make in other areas, particularly in the realm of foreign affairs."). The U.S. Code is chock full of statutes that Executive branch officials are authorized to waive, on a discretionary basis, as to certain parties or in certain instances. *See*, *e.g.*, *Defenders of Wildlife* v. *Chertoff*, 527 F. Supp. 2d 119, 124 & n.5 (D.D.C. 2007) (upholding constitutionality of waiver provision and noting that "there are myriad examples of waiver provisions in federal statutes") (citing statutes), *cert. denied*, 128 S. Ct. 2962 (2008).[8] They range from routine waivers of fees and penalties, *e.g.* 18 U.S.C. § 3612(h), to major policy decisions like the Federal Reserve Board's power to waive bank reserve ratios, 12 U.S.C. § 3105(a)(1)(A). And many, like EWSAA § 1503, authorize the Executive to waive application of statutes in an exercise of foreign policy discretion.[9]

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[8] An electronic search of "may waive" in the unannotated U.S. Code yields more than 900 statutes, the vast majority of which authorize Executive branch or State officials to waive application of a provision of law on a discretionary basis.

[9] *See*, *e.g.*, 10 U.S.C. § 2249a (waiver of prohibition against using funds to assist terrorism sponsors); *id*. § 2410i (waiver of prohibition on contracting with entities boycotting Israel); 21 U.S.C. § 1903 (waiver of sanctions against foreign narcotics traffickers); 22 U.S.C. § 2347c (waiver of requirements for foreign countries' participation in military exchanges); *id*. § 2370c-1 (waiver of prohibition on selling military equipment to

Yet under Simon's flawed reasoning, each of those waivers would be an unconstitutional "partial repeal." That is not the law. Unlike the Line Item Veto Act considered in *Clinton* v. *City of New York*, 524 U.S. 417 (1998), which gave the President "the unilateral power to change the text of duly enacted statutes," *id*. at 446-47, the text of every statute made inapplicable as to Iraq under the EWSAA continued to exist in its exact form, and retained full "legal force [and] effect," *id*. at 437, as to all other countries. And the *Clinton* Court also expressly distinguished statutes that operate in the "foreign affairs arena," where the President has "'a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.'" *Id.* at 445 (quoting *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936)). The EWSAA is precisely such a statute.

In any event, like the statute upheld in *Field* v. *Clark*, 143 U.S. 649 (1892), and unlike the Line Item Veto Act, the President's EWSAA determination was not "based on the same conditions Congress evaluated" when it passed the statute; nor did the President "reject[] the policy judgment made by Congress." *Clinton*, 524 U.S. at 443, 444. The EWSAA was considered by Congress before the fall of the Hussein regime. The President's later determination following enactment thus was made under vastly different circumstances. And the determination plainly effectuated the policy of the EWSAA, which was to help rebuild and normalize relations with Iraq if conditions in Iraq warranted

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certain countries); *id*. § 2429a-2 (waiver of prohibition against assisting countries violating IAEA agreements); *id*. § 4316 (waiver of travel restrictions on foreign personnel).

those actions. But the Court need not rely on these distinctions to uphold the EWSAA, because it repealed nothing.[10]

2. Simon also suggests that the EWSAA is an unconstitutional delegation of legislative power to "determin[e] the jurisdiction of the courts." Simon Br. 48. That argument is equally far-fetched. In its entire history, the Court has invalidated only two statutes as unconstitutional delegations, *see Whitman* v. *Am. Trucking Associations*, 531 U.S. 457, 474 (2001) (citing cases), and it has *never* invalidated a delegation to the President affecting foreign affairs.

That is because the limitations on delegation applicable to domestic legislation do not apply when the Executive has "'independent authority over the subject matter.'" *Loving* v. *United States*, 517 U.S. 748, 772 (1996) (citation omitted). Thus, Congress routinely "authoriz[es] action by the President in respect of subjects affecting foreign relations which * * * leave the exercise of the power to his unrestricted judgment." *Curtiss-Wright*, 299 U.S. at 324. *See* Pet. Br. 30. Here, Congress properly authorized the President to exercise his own foreign-

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[10] *Clinton* also noted that the law in *Field* (unlike the EWSAA and countless other waiver provisions) was non-discretionary. 524 U.S. at 443. But "in distinguishing *Field*, the *Clinton* Court did not purport to adopt a three-part test based on these distinctions to determine whether a particular waiver provision is constitutional." *Defenders of Wildlife*, 527 F. Supp. 2d at 125. Indeed, other statutes discussed in *Field*—dating to 1799—granted the President discretion to waive laws. *Field*, 143 U.S. at 684-91 (discussing laws allowing, but not requiring, President to discontinue foreign trade prohibitions). *Clinton* distinguished those delegations on the basis of their foreign-affairs nature. 524 U.S. at 445.

affairs power to waive a circumscribed subset of laws as to a single foreign nation, if he determined that Iraq's people and subsequent new government should be freed from onerous provisions applying to state sponsors of terrorism. Congress also required the President to report on his actions, both before and afterwards. *See* EWSAA § 1503. Far from violating separation-of-powers principles, EWSAA § 1503 embodies them, by delegating to the President the ability to act in his own foreign affairs domain.

Moreover, as applied here this delegation merely restored to the Executive a very limited portion of its pre-FSIA authority to determine the sovereign immunity of foreign nations. *See* Pet. Br. 4, 55; U.S. Br. 19. Under that authority, exercised by the Executive for more than 150 years, courts would "surrender[]" their jurisdiction—even if it had previously attached—upon the Executive's determination that a nation was immune. *Republic of Mex.* v. *Hoffman*, 324 U.S. 30, 34 (1945). Given that the Executive previously exercised this foreign-affairs power—almost since the Founding—without any express statutory authority, it cannot violate separation-of-powers for Congress to authorize, by statute, a limited restoration of a tiny sliver of that power. *Cf. Loving*, 517 U.S. at 768 ("[I]t would be contrary to precedent and tradition" to impose a "special limitation" on President's power and "contrary to the respect owed the President as Commander in Chief to hold that he may not be given wide discretion and authority").

Indeed, respondents do not dispute that the President has the foreign affairs authority, even *without* statutory authorization, to *entirely* eliminate pending claims against foreign governments. *See*

Pet. Br. 31; *Asociacion de Reclamantes* v. *United Mexican States*, 735 F.2d 1517, 1523 (D.C. Cir. 1984) (Scalia, J.). It necessarily follows that Congress does not violate separation-of-powers by delegating to the President, by statute, the lesser power to restore sovereign immunity while still preserving claims for diplomatic negotiation. That foreign sovereign immunity affects only jurisdiction and not the claims themselves only makes the validity of Section 1503 even clearer.

But even as a general matter, there is nothing unusual—much less unconstitutional—about delegating the Executive the authority to make determinations upon which federal jurisdiction or its absence may turn. For example, in *Jones* v. *United States*, 137 U.S. 202, 212 (1890), the Court applied a statute giving the Executive unreviewable authority to declare certain islands U.S. territories, which had the collateral effect of conferring federal criminal jurisdiction over them. Other such statutes exist today. *See*, *e.g.*, 28 U.S.C. § 1332(d)(9)(C) (jurisdiction dependent on Securities Act regulations); 28 U.S.C. § 1338(a) (jurisdiction dependent on issuance of patent by Patent Office); 28 U.S.C. § 1362 (jurisdiction over actions by Indian tribes "duly recognized by the Secretary of the Interior").

In fact, the jurisdictional provision invoked by *respondents* in these cases depends entirely on an Executive determination: the prior designation of Iraq as a state sponsor of terrorism. *See* 28 U.S.C. § 1605(a)(7)(A) (2000). If it violates separation-of-powers for Congress to delegate the President the authority to make determinations upon which federal jurisdiction may depend, then these cases cannot proceed even under respondents' own theory.

II. THE NDAA'S REPEAL OF SECTION 1605(a)(7) ELIMINATED ANY CLAIMED BASIS FOR JURISDICTION.

A. Congress Did Not Retain Section 1605(a)(7) For Pending Cases.

Alternatively, because former Section 1605(a)(7) was repealed in 2008 without reservation, it cannot supply the jurisdictional basis for these cases. Respondents merely parrot some of the D.C. Circuit's flawed reasoning on this point, without responding to the flaws identified in the opening brief.

1. As an initial matter, under *Altmann* and the plain language of 28 U.S.C. § 1330(a), the repeal of Section 1605(a)(7) applies to all cases. *See supra* at 6-11; Pet. Br. 38-40. That is so even under respondents' *own* view of the law. *See* Beaty Br. 22 (where repeal "merely changes the tribunal which can hear a case, it will be applied to pending cases"); Simon Br. 49. As respondents do not dispute, in repealing Section 1605(a)(7) Congress did not deprive any pending claimants of a judicial forum, but rather bestowed a replacement jurisdictional provision—new Section 1605A(a)—that covers *all* pending cases. *See* Pet. Br. 41. It was the *President's* waiver that eliminated Section 1605A as a potential jurisdictional basis for claims against Iraq, but that waiver indisputably applied to pre-existing and pending claims. *Id*.

2. Nothing in the NDAA provisions cited by respondents says anything about the continued applicability of Section 1605(a)(7), much less resurrects the repealed statute for these cases. And respondents ignore other NDAA provisions confirming that the repeal was not illusory. *See* Pet.

Br. 42-43. As respondents' own amici correctly note, "[p]ost NDAA the power of the court to hear a claim against a foreign state, for a terrorist act, is found under § 1605A." *Peterson* Amicus Br. 20.[11]

a. **Section 1083(c)(1).** Respondents repeat without elaboration the D.C. Circuit's erroneous view that *nothing* in NDAA § 1083—including its repeal of Section 1605(a)(7)—can ever apply to any pending case because Section 1083(c)(1) provides that the amendments apply to "any claim arising under" Section 1605A. NDAA § 1083(c)(1).[12] Beaty candidly labels this argument a mere "negative inference," Beaty Br. 15, but no such inference can properly be drawn. As Iraq has noted, Pet. Br. 45, the Section 1083 amendments must apply to pending cases, because Section 1083(c)(2)(A) specifically authorizes the filing of a motion *in pending cases*. *See* NDAA § 1083(c)(2)(A) ("pending" action "brought under section 1605(a)(7)" will be given effect under Section 1605A "on motion made by plaintiffs"). If, as respondents assert, nothing in NDAA § 1083 could

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[11] These amici purport to disagree with Iraq's position but their arguments support it. They are concerned only with enforcement of prior judgments against Iran, and merely assert that they can enforce the judgments "under a *new* warrant of jurisdictional authority created by the NDAA." *Id*. at 7 (emphasis added). The execution provisions amici rely on show that Congress knew how to make limited ongoing reference to former Section 1605(a)(7) when it wanted to. *Compare id*. at 13 *with* Pet. Br. 42-43.

[12] The United States also suggests that view. *See* U.S. Br. 30-31. But its lawyers' opinions on the interpretation of an FSIA amendment—unlike the President's stated views on a statute he was entrusted to administer—"merit no special deference." *Altmann*, 541 U.S. at 701.

ever apply to any pending case, then that conversion motion could never be filed in the first place.

Indeed, respondents belie their own theory by arguing that a provision of NDAA § 1083—Section 1083(c)(4)—applies to these pending cases. While respondents' reliance on that provision is erroneous for many reasons, *see supra* at 11-13; Pet. Br. 48, even they do not contend that Section 1083 is wholly inapplicable to pending cases.

Under respondents' theory, the repeal of Section 1605(a)(7) applies only to claims actually asserted under the new Section 1605A(c) cause of action. *Cf.* U.S. Br. 31. But that would create a bizarre hybrid jurisdictional regime. Under that regime, even *future* claims invoking the state-sponsor-of-terrorism immunity exception but alleging state, foreign, or other federal causes of action would remain governed by repealed Section 1605(a)(7), because those claims would "arise under" a cause of action other than Section 1605A(c) and the repeal of Section 1605(a)(7) would therefore not apply to them. *See* Pet. Br. 46 n.13. But that cannot be what Congress intended when it *repealed* that statute to "consolidate" all FSIA provisions relating to terrorism-sponsors in new Section 1605A. H.R. Rep. No. 110-477, at 1000.

Read correctly, Section 1083(c)(1) provides that the NDAA amendments apply to "any" claim potentially cognizable under (*i.e.*, "arising under") new Section 1605A, including claims then-pending under repealed Section 1605(a)(7). *See* Pet. Br. 45-46. Congress used the broad term "claims arising under," which encompasses inchoate claims. *Id.* A claim "arises" when the predicate facts establishing a violation occur. *See*, *e.g.*, *Int'l Bhd. of Elec. Workers* v. *Hechler*, 481 U.S. 851, 865 n.6 (1987). Congress

did not limit the amendments' applicability to lawsuits actually "*filed* under" Section 1605A(c), even though it knew how to use that different language when it wanted. *See* NDAA § 1083(a)(1) (enacting 28 U.S.C. §§ 1605A(a)(2)(A)(i)(I), (II), which refer to claims "filed under this section"); *cf.* 28 U.S.C. § 1331 ("actions" arising under federal law).

If Congress wanted to preserve Section 1605(a)(7) for pending cases, it would have said so directly rather than through an alleged convoluted "negative inference" that does not even mention that statute. Instead, it repealed that provision without qualification and established detailed procedures under which all pending claims could be re-filed under the new law.

b. **Section 1083(c)(3).** Respondents repeat, again without elaboration, the D.C. Circuit's holding that because NDAA § 1083(c)(3) allows re-filing of pending cases under new Section 1605A after "entry of judgment in the original action," Congress must have intended (without ever saying so) to preserve Section 1605(a)(7) for those cases. But they do not address—much less refute—Iraq's explanation that this provision protects plaintiffs by allowing re-filing after judgments of dismissal for lack of jurisdiction or judgments in cases involving alternative jurisdictional bases. *See* Pet. Br. 47-48.

Thus, Section 1083(c)(3) is not "nonsensical" given the repeal of Section 1605(a)(7). Beaty Br. 16. In fact, it is quite generous to plaintiffs in state-sponsor-of-terrorism cases by allowing them multiple opportunities to preserve their claims under Section 1605A. To our knowledge, almost all of them have done so by filing amended complaints, conversion motions, new duplicative actions, or combinations of

these things. *See*, *e.g.*, *Certain Underwriters at Lloyds London* v. *Great Socialist People's Libyan Arab Jamahiriya*, Nos. 06-CV-731, 08-CV-504 (D.D.C.). Plaintiffs against Iraq, of course, cannot do so because Section 1605A was waived as to Iraq. But even now, if the Court holds that Section 1605(a)(7) has been repealed and thus cannot govern pending cases, *any* plaintiffs with pending claims against other countries who still wish to re-file will be able to do so—without prejudice—within 60 days after their cases are dismissed for lack of jurisdiction. NDAA § 1083(c)(3). If plaintiffs nevertheless "cho[o]se to forego the opportunity" to re-file—perhaps because alternative jurisdictional bases suffice—they will not be "toss[ed] aside." Simon Br. 51. They will have made a conscious decision not to re-file.

c. **Section 1083(d)(1).** Simon notes that the waiver provision of Section 1083(d)(1) "was limited * * * to preventing claimants against Iraq from attaining the new bundle of §1605A rights." *Id*. That "bundle," however, includes the new immunity exception of Section 1605A(a). Thus, because Section 1605(a)(7) was repealed, the waiver of Section 1605A(a) means that there is no longer any potential jurisdictional basis for these cases.[13]

B. Congress Did Not Authorize The President To Re-Enact A Repealed Statute.

Beaty (but not Simon) also advances an alternative theory, arguing that the President's NDAA

[13] Respondents' rely on after-the-fact legislative "history" from one Congressman, Beaty Br. 28; Simon Br. 51-52, but without refuting Iraq's explanation why that statement is immaterial. Pet. Br. 44-45 n.12. Indeed, respondents misleadingly elide language showing that the statement applied to the different circumstances of *Acree*. *See id*.

waiver "waived the § 1083(b) statutory repeal [of Section 1605(a)(7)] and restored jurisdiction." Beaty Br. 25. *See also* U.S. Br. 27. The theory is wrong.

Congress nowhere authorized the President to re-enact a repealed statute through his own action. Much like the EWSAA, the NDAA simply authorized the President to "waive" application of provisions of law with ongoing effect at the time of his waiver. *See* NDAA § 1083(d)(1). The repeal of Section 1605(a)(7) happened immediately when the President signed the NDAA into law, at which point Section 1605(a)(7) ceased to exist. That was, of course, *before* he issued his waiver, since that waiver was authorized by the NDAA itself. The waiver allowed the President to relieve Iraq from the application of extant provisions of law, most notably Section 1605A(a). But it did not authorize him to rewrite the United States Code to re-enact—for one country only—a repealed law.

If there is any doubt on this point, it is conclusively answered by 1 U.S.C. § 108, which provides that "[w]henever an Act is repealed, which repealed a former Act, such former Act shall not thereby be revived, *unless it shall be expressly so provided*." 1 U.S.C. § 108 (emphasis added). Thus, even if *Congress* had expressly *repealed* NDAA § 1083 in its entirety, that repeal would not have revived Section 1605(a)(7) unless Congress expressly so provided. *A fortiori*, the President could not accomplish the same result through a general authority to waive Section 1083, for one country, that says nothing about reviving Section 1605(a)(7).

Any other interpretation would produce absurd results. If the President could unilaterally revive Section 1605(a)(7) as to Iraq without specific direction from Congress, there would be at least two

versions of the U.S. Code—an unwritten Executive-created version for just Iraq containing Section 1605(a)(7), and a codified version for all other nations without that section. And in respondents' view, there is also a third version, which contains Section 1605(a)(7) only for pending and future claims not filed under Section 1605A(c). Moreover, because the President's waiver authority has no time limit, under Beaty's theory the President could theoretically have re-enacted Section 1605(a)(7) years or even decades later.

There is only one U.S. Code, *see* 1 U.S.C. § 204(a), and immediately upon the President's signing of the NDAA (which occurred before his waiver) Section 1605(a)(7) ceased to be part of it. The President could, and did, waive extant statutory provisions as to Iraq—notably Section 1605A(a)—but he was not authorized to, and did not, re-enact a repealed statute by his own unilateral action.

C. The "Pocket Veto" Argument Is Immaterial To This Case.

Simon muses about the President's view that the initial version of the NDAA was subject to a "pocket veto." Simon Br. 56-59. But that argument is immaterial.

First, it is *undisputed* that the NDAA containing the President's waiver authority became law on January 28, 2008, having been passed by Congress and signed by the President. Even Simon concedes that the "revised NDAA became law." *Id*. at 59. Therefore, both the repeal of Section 1605(a)(7) and waiver of Section 1605A occurred under an indisputably valid statute. The President's view that a pocket veto occurred would only have mattered if

Congress had voted to override that veto, because the only practical difference between a pocket veto and a regular "return" veto is that the former cannot be overridden. *See The Pocket Veto Case*, 279 U.S. 655, 676 (1929). But Congress chose not even to attempt an override. *See* 154 Cong. Rec. S57 (Jan. 22, 2008) (statement of Sen. Reid). Instead, it enacted a new statute that is concededly now law.

Second, the President in any event executed a return veto. "[T]o avoid unnecessary litigation," he returned the bill to the House of Representatives with a statement of objections—within the ten days provided by the Constitution—"*to leave no doubt that the bill [was] being vetoed*." JA414. That is all the Constitution requires for a valid return veto. *See* U.S. Const. art. I, § 7, cl. 2 ("he shall return [the bill], with his objections to that House in which it shall have originated"). If the President was correct that an adjournment prevented the return's effectiveness, then a pocket veto occurred. But if not, a valid return occurred. Either way, the bill was vetoed.[14]

III. THESE CLAIMS SHOULD BE ADDRESSED DIPLOMATICALLY.

Respondents do not dispute the critical foreign policy concerns that underlie the President's actions and the restoration of Iraq's sovereign immunity. Nor do they, or their amici, identify any instance where a friendly allied nation has ever been

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[14] If it mattered here, the President correctly viewed this as a pocket veto situation because an adjournment had "'prevent[ed]' the President from returning the bill to the House in which it originated within the time allowed." *The Pocket Veto Case*, 279 U.S. at 680. *See* U.S. Br. 28 n.4. But it does not matter.

subjected to jurisdiction in U.S. courts for similar claims based on the acts of a deposed regime.

Instead, Simon makes inapposite references to "international law." Simon Br. 53. Iraq does not argue that all claims have been "erased" by the regime change or that the United States has absolved any liability. *Id*. at 54. Rather, the claims will be addressed as similar claims have always been addressed in the past: through diplomatic negotiations. Simon's citation to recent comments by Secretary of State Clinton, *id*. at 55, only underscores that point. As she explained, the United States is "continu[ing] to engage with Iraq" on these issues. *Id*. at 12a. Nor is there any legal requirement for the United States to provide a judicial forum under which *other* nations can be sued for claims like these. If that were true, the FSIA itself would be invalid, because it bestows immunity on 97% of the world's nations—all those never designated as terrorism-sponsors—for such claims.

Iraq seeks only to be treated like other friendly allies—rather than as an outlaw nation—in light of its dramatically changed relationship with the United States. Both the President's EWSAA determination and the NDAA independently effectuate important foreign policy and diplomatic concerns. Either way, the Court should give effect to those valid actions rather than countermand them.

CONCLUSION

For these reasons, the judgments below should be reversed.

Respectfully submitted,

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APPENDIX

Provisions Of Law That Applied (As Of 2003) To Countries That Had Supported Terrorism

1 U.S.C. § 112b(e)(2)(B)(ii)	Requiring consultation with Secretary of State and transmittal of text of any bilateral agreement between the U.S. and a state sponsor of terrorism.
8 U.S.C. § 1735(a)	Prohibiting issuance of nonimmigrant visas to aliens from countries that are sponsors of international terrorism.
10 U.S.C. § 2249a(a)(3)	Prohibiting Department of Defense from obligating or expending financial assistance to countries that have committed an act of international terrorism or otherwise support terrorism.
10 U.S.C. § 2327(a)	Requiring disclosure in Department of Defense procurement contracts of any significant interest in firm or subsidiary owned by a foreign government that has repeatedly provided support for acts of international terrorism.

10 U.S.C. § 2327(b)(2)	Prohibiting head of an agency from entering into a contract with a firm or subsidiary in which a foreign government that has repeatedly provided support for acts of international terrorism owns or controls a significant interest.
12 U.S.C. § 635(b)(1)(B)	Permitting Export-Import Bank to deny applications for credit to state sponsors of international terrorism, or on basis of a foreign nation's lack of cooperation in efforts to eradicate terrorism.
12 U.S.C. § 635i-8(c)(2)	Conditioning reduction of debt owed to Export-Import Bank on whether country has repeatedly provided support for acts of international terrorism.

15 U.S.C. § 57b-2(b)(6)(D)	Prohibiting FTC custodian from making investigative documentation available to a foreign law enforcement agency from a country that has repeatedly provided support for acts of international terrorism.
15 U.S.C. § 7410(b)	Prohibiting grant or fellowship from Cyber Security Research and Development to any alien from a country that is a state sponsor of international terrorism.
18 U.S.C. § 175b(a)(1), (d)(2)(6)(G)	Prohibiting alien who is a national of a country that has repeatedly provided support for acts of international terrorism from shipping, transporting, or receiving biological agents or toxins.
18 U.S.C. § 2332d	Criminalizing financial transactions with any state sponsor of terrorism.

19 U.S.C. § 2462(b)(2)(F)	Making ineligible for President's designation as "beneficiary developing country" any state sponsor of terrorism.
22 U.S.C. § 262p-4q	Requiring executive directors of international financial institutions to vote against loans to any state sponsor of terrorism.
22 U.S.C. § 262p-4r	Authorizing measures to oppose funding through international financial institutions for those who commit, threaten to commit, or support terrorism.
22 U.S.C. § 286e-11	Instructing International Monetary Fund to oppose assistance to any country that permits entry to any person who has committed an act of international terrorism.
22 U.S.C. § 2227	Withholding U.S. proportionate share for certain programs of international organizations for several countries then designated as state sponsors of terror.

22 U.S.C. § 2349aa-9(a)	Permitting ban on importation into U.S. of any good or service from any country which supports terrorism or terrorist organizations or harbors terrorists or terrorist organizations.
22 U.S.C. § 2371(a)	Prohibiting U.S. assistance under the Foreign Assistance Act of 1961, Agricultural Trade Development and Assistance Act of 1954, Peace Corp Act or Export-Import Act of 1945 to any country that has repeatedly provided support for acts of international terrorism.
22 U.S.C. § 2377	Prohibiting assistance to any country that has repeatedly provided support for acts of international terrorism.
22 U.S.C. § 2378	Prohibiting assistance to those countries that provide lethal military equipment to state sponsors of terrorism.

22 U.S.C. § 2395a (note)	Making ineligible for cancellation of debt a country that has repeatedly provided support for acts of international terrorism. (Enacted by reference, Pub. L. No. 106-113, § 1000(a)(5))
22 U.S.C. § 2656f(a)	Requiring Secretary of State to submit to Congress annual detailed assessments regarding each country identified to Congress within preceding five years as a state sponsor of terrorism.
22 U.S.C. § 2712(e)(1)	Permitting Secretary of State to impose controls on provision of security services to a government that has repeatedly provided support for acts of international terrorism.
22 U.S.C. § 2778(a)(2)	Requiring consideration of whether export licenses to foreign country would support international terrorism.

22 U.S.C. § 2780(d)	Prohibiting provision of munitions item to a country that has repeatedly provided support for acts of international terrorism.
22 U.S.C. § 2798(a)(2)(B)	Requiring President to impose sanctions for proliferation of chemical or biological weapons if a foreign country's government has repeatedly provided support for acts of international terrorism.
22 U.S.C. § 4305	Prohibiting acquisition of real property in the U.S. by a foreign mission of a country that has repeatedly provided support for acts of international terrorism.
22 U.S.C. § 7205(a)(1)	Limiting to one-year licenses the export of agricultural commod-ities, medicine or medical devices to country that has repeatedly provided support for acts of international terrorism.

22 U.S.C. §§ 7532, 7533(b)	Making state sponsors of terrorism ineligible for U.S. assistance with drawdown of defense articles, defense services, and military education and training.
26 U.S.C. § 901(j)(2)(A)(iv)	Denying tax credits for any income, war profits, or excess profits taxes paid or accrued to a country that has repeatedly provided support for acts of international terrorism.
28 U.S.C. § 1605(a)(7) (repealed)	Abrogating immunity of state sponsors of terrorism from jurisdiction of U.S. courts in certain suits for money damages.
28 U.S.C. § 1610(f)(1)(A) & note	Exposing property in U.S. of a state sponsor of terrorism to attachment in aid of or from execution upon certain judgments; "blocked assets" of such nations subject to execution or attachment under § 201(d)(2) of Terrorism Risk Insurance Act.

50 U.S.C. §§ 1701 note & 1702(b)(3)	Permitting President to regulate imports of films, compact disks, news feeds and other media from state sponsors of terrorism.
50 U.S.C. § 2202	Prohibiting transfer of spoils of war in the possession, custody, or control of the U.S. to any country that has repeatedly provided support for acts of international terrorism.
50 App. U.S.C. § 2170(f)(4)(A)(i)	Authorizing President to suspend or prohibit certain mergers, acquisitions or takeovers, and consider the potential effects of the proposed transaction on sales of military goods, equipment or technology to any country that supports terrorism.

50 App. U.S.C. § 2402(8)	Declaring U.S. policy to use export controls to encourage other countries to prevent the use of their territories or resources to aid, encourage, or give sanctuary to persons involved in directing, supporting, or participating in acts of international terrorism.
50 App. U.S.C. § 2405(j)(1)(A)	Authorizing the Secretary of State to make a determination controlling export of goods and technology as to whether government of a country has repeatedly provided support for acts of international terrorism.
50 App. U.S.C. § 2410c(a)(2)(B)	Requiring President to impose procurement and import sanctions for contribution to proliferation of chemical and biological weapons on any country that has repeatedly provided support for acts of international terrorism.