Nos. 07-1090 & 08-539

In The
Supreme Court of the United States

REPUBLIC OF IRAQ,

Petitioner,

v.

JORDAN BEATY, et al.,

Respondents.

REPUBLIC OF IRAQ,

Petitioner,

v.

ROBIN SIMON, et al.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF FOR RESPONDENTS JORDAN BEATY, ET AL.

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QUESTIONS PRESENTED

1. Whether the Republic of Iraq's sovereign immunity, abrogated in part under 28 U.S.C. § 1605(a)(7), was restored under § 1503 of the Emergency Wartime Supplemental Appropriations Act, Pub. L. No. 108-11, 117 Stat. 559 (2003), as implemented by Presidential Determination 2003-23.

2. Whether the President's waiver exercised pursuant to § 1083 of the National Defense Appropriations Act for 2008, Pub. L. No. 110-181, 122 Stat. 342 (2008), retroactively divested the federal courts of jurisdiction under 28 U.S.C. § 1605(a)(7) over cases pending against Iraq prior to the waiver, thereby eliminating the Respondents' right to a substantive cause of action.

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The order of the D.C. Circuit granting summary affirmance is unreported and is reproduced in the Joint Appendix at page JA313. The opinion of the District Court is reported *sub nom*. *Beaty v. Republic of Iraq*, 480 F. Supp. 2d 60 (D.D.C. 2007) and is reproduced in the Joint Appendix at page JA219.

APPLICABLE STATUTES

The text of the relevant statutes is set forth in the appendix to this reply.

STATEMENT OF THE CASE

The Respondents, Jordan Beaty; A.M.B., a minor by her next friend Robin Beaty; William R. Barloon; Bryan C. Barloon; and Rebecca L. Barloon, are the children of Kenneth Beaty and William Barloon, both of whom were Plaintiffs in *Daliberti v. Republic of Iraq*, 146 F. Supp. 2d 19 (D.D.C. 2001).

Following the conclusion of hostilities between the United States and Petitioner Republic of Iraq ("Iraq") in 1991, Kenneth Beaty ("Beaty") and William Barloon ("Barloon") each resided in Kuwait on a temporary basis. JA381. Mr. Beaty worked as an oil rig drilling supervisor. *Id*. Mr. Barloon supervised aircraft maintenance and overhaul. *Id.*

On April 25, 1993, Mr. Beaty was traveling to an oil rig in Kuwait, but within sight of the Iraqi border. JA383. Mr. Beaty stopped at a border checkpoint. *Id.* He was asked to and displayed his credentials to the Iraqi border guards. *Id*. Mr. Beaty explained that he did not want to enter Iraq. Instead, he desired to travel to the oil rig using roads within Kuwait. *Id*. The border guards responded by arresting Mr. Beaty. *Id*. The Iraqi guards then blindfolded Mr. Beaty and transported him at gunpoint, first to Basra, Iraq, and later to Baghdad. JA384.

Once in Baghdad, Mr. Beaty was initially confined in a car park, converted into a prison, in a cell that lacked water or a toilet. *Id*. He had only a steel cot for a bed. *Id*. He was later transferred to Abu Ghraib prison in Baghdad. *Id.* He lived in a cell infested with vermin and shared a toilet with more than 200 other prisoners. *Id*. During his 205 days in captivity, Mr. Beaty was denied adequate food, water and medical attention. JA382 and 384. Iraq held Mr. Beaty as a hostage for ransom. JA385. Ultimately, he was released when the ransom of $5,000,000 was paid to the Iraqi government. *Id*.

On or about March 13, 1995, William Barloon was traveling near the Kuwait-Iraqi border when he encountered an Iraqi border guard. *Id*. The border guard checked Mr. Barloon's identification, which demonstrated that he was a citizen of the United States. *Id*. The border guard then took Mr. Barloon into custody. *Id*.

Mr. Barloon was transported at gunpoint to Basra, Iraq, and later to Baghdad. JA221. He was held captive at Abu Ghraib prison. *Id*. During his 126 days in captivity, Mr. Barloon was tortured, beaten, subjected to mock executions and deprived of adequate, food, water, medical care and access to toilet facilities. *Id*. Mr. Barloon lost a significant amount of weight and became hopeless and despondent. JA385.

Respondents endured severe mental anguish, depression, humiliation, anxiety, and pain and suffering as a direct result of their fathers' captivity. Throughout their ordeal, Respondents were acutely aware of the circumstances surrounding their fathers' hostage-taking and mistreatment. Respondents knew that their fathers were being held captive by Petitioner without any legal justification. Through various media sources, Respondents were able to see where their fathers were being held. Through these and other sources, Respondents contemporaneously learned and understood that their fathers were deprived of adequate food, water and medical care, had lost substantial weight and were emotionally distraught.

Because of their fathers' captivity, Respondents were totally dependent upon their mothers for financial and emotional support. However, Respondents' mothers were not in a position to provide such support because they too suffered extreme emotional distress as a result of their husbands' ordeals. JA388. Mrs. Beaty and Mrs. Barloon were devoting themselves to the various efforts to secure their husbands'

release. JA384. Such efforts often took them away from their children, both physically and emotionally, for extended periods. JA384.

Respondents' severe mental anguish did not end, even after their fathers' return. Although their fathers were physically present, they were emotionally absent, and unable to provide the love and support their children desperately needed. JA387. As Judge Oberdorfer recognized in *Daliberti*:

> Following their release, [Mr. Beaty and Mr. Barloon] exhibited marked changes in personality, such as anger, feelings of detachment and isolation, nightmares, and insomnia. Each [of them] has suffered significant damage to his marriage and has ongoing problems with intimacy and personal relationships. . . . [T]hese men will experience these effects for the rest of their lives.

Id.

In 2003, Respondents filed an action against Iraq, under the state-sponsored terrorism exception to sovereign immunity codified in the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1605(a)(7), in the U.S. District Court for the District of Columbia for intentional infliction of emotional distress under state common law. They also attempted to assert claims for violations of customary international law as incorporated into federal common law and loss of solatium under federal common law. JA220.

Iraq filed a motion to dismiss the case asserting lack of jurisdiction under § 1605(a)(7), failure to state a cause of action under federal and state common law, and presentation of a non-justiciable political question. *Id*. Respondents moved for summary judgment as to liability on all causes of actions alleged in the Third Amended Complaint. *Id*.

On March 20, 2007, the District Court entered a comprehensive Memorandum Opinion granting in part and denying in part Iraq's motion to dismiss, and granting in part and denying in part Plaintiffs' motion for partial summary judgment. JA219-308 The District Court held that Respondents stated a cause of action under state common law; jurisdiction existed under § 1605(a)(7); and the suit was not barred by the political question doctrine, the act of state doctrine or the doctrine of foreign affairs preemption. JA310. It granted Iraq's Motion to Dismiss as to Respondents' other claims. *Id*.

Iraq appealed the District Court's denial of its claim of sovereign immunity as a collateral order and moved the District Court to certify its decision for interlocutory appeal under 28 U.S.C. § 1292(b). The District Court granted Iraq's motion to certify its order for interlocutory appeal on April 19, 2007.

Iraq then filed a petition for initial hearing *en banc* of the District Court's decision regarding its sovereign immunity, urging the D.C. Circuit to reconsider its decision in *Acree*. On June 7, 2007,

Respondents moved for summary affirmance on the basis of *Acree*. JA2.

On November 6, 2007, the D.C. Circuit denied the petition for initial hearing *en banc*. JA6. On November 21, 2007, the D.C. Circuit summarily denied Iraq's appeal and stated:

> The District Court correctly held that the Republic of Iraq's sovereign immunity, waived or abrogated under 28 U.S.C. § 1605(a)(7), has not been restored under the Emergency Wartime Supplemental Appropriations Act ("EWSAA"), Pub. L. No. 108-11, 117 Stat. 559 (2003), and Presidential Determination 2003-23. *See Acree v. Republic of Iraq*, 370 F.3d 41, 51 (D.C. Cir. 2004).

Id. Subsequently, Iraq filed the instant Petition. JA7.

On December 19, 2007, in Iraq's interlocutory appeal, *In re: Republic of Iraq*, No. 07-8004 (D.C. Cir. 2007), the D.C. Circuit ordered on its own motion that the case be held in abeyance pending resolution of *Simon v. Republic of Iraq*, No. 06-7175 (D.C. Cir. 2006). Following the resolution of the appeal in *Simon*, Iraq filed a motion requesting that the case be held in abeyance until the resolution of the instant appeal. On September 24, 2008, the D.C. Circuit granted Iraq's unopposed motion and has held the case in abeyance pending a future order of the Court.

SUMMARY OF ARGUMENT

Because Iraq requests that this Court hold that EWSAA § 1503 and NDAA § 1083 retroactively repealed 28 U.S.C. § 1605(a)(7) jurisdiction in pending cases, the questions presented are resolved in the negative simply by the fact that neither statute contains an express directive from Congress that the statutes are to apply retroactively. Notwithstanding the foregoing, as described below, Iraq's arguments must also fail because the plain language of EWSAA § 1503 and NDAA § 1083 did not authorize a repeal of § 1605(a)(7) in pending cases. Accordingly, this Court should affirm the District Court and the Circuit Court in all respects.

ARGUMENT

I. BECAUSE EWSAA § 1503 AND NDAA § 1083 DO NOT CONTAIN A CLEAR DIRECTIVE FROM CONGRESS THAT THEY WERE TO APPLY RETROACTIVELY, A RETROACTIVE DIVESTITURE OF THE RESPONDENTS' ACTIONS AGAINST IRAQ UNDER EITHER STATUTE IS IMPERMISSIBLE.

Under Iraq's construction of EWSAA[1] § 1503 and NDAA[2] § 1083, these statutes would apply retroactively

[1] Emergency Wartime Supplemental Appropriations Act of 2003 ("EWSAA"), Pub. L. No. 108-11, 117 Stat. 559 (2003).

[2] National Defense Authorization Act for 2008 ("NDAA"), Pub. L. No. 110-181, 122 Stat. 342 (2008).

to eliminate the lower court's jurisdiction over Respondents' pending cases and thereby divest them of their right to bring a cause of action against Iraq in any forum. As such, Iraq urges this Court to hold that Congress, without debating the issue or making an explicit statement in the statutes, intended to provide total amnesty to Iraq for all of its prior acts of torture and hostage taking. This construction must be rejected because it is contrary to the plain language of the statutes and the traditional rules of statutory interpretation.

Nothing in the language of EWSAA § 1503, Presidential Determination 2003-23[3], or NDAA § 1083 indicates that Congress or the President intended either statute to retroactively divest the federal courts of their jurisdiction to hear cases pursuant to 28 U.S.C. § 1605(a)(7). Under the traditional presumption against retroactivity and the rules of construction developed therefrom, the absence of such a directive is highly significant because the federal courts acting under § 1605(a)(7) provide the only forum in which Respondents' claims can be heard. This Court has established that, without an unambiguous directive from Congress stating otherwise, a jurisdiction-stripping statute that divests plaintiffs in pending cases of their right to bring a cause of action in any forum can only be applied **prospectively**. *See,*

[3] Presidential Determination No. 2003-23, 68 Fed. Reg. 26459 (May 7, 2003)

e.g., Hamdan v. Rumsfeld, 548 U.S. 557, 576-577 (2006); *see, e.g., Hughes Aircraft Co. v. U.S.*, 520 U.S. 939, 951 (1997). Accordingly, EWSAA § 1503 and NDAA § 1083 cannot be construed to divest Respondents of their right to bring actions against Iraq, because they do not contain an unambiguous directive clearly indicating that Congress intended such a retroactive divestiture.

The traditional presumption against the retroactive application of statutes was described in *United States Fidelity & Guaranty Co. v. U.S.*, 209 U.S. 306, 314 (1908) as follows:

> There are certain principles which have been adhered to with great strictness by the courts in relation to the construction of statutes, as to whether they are or are not retroactive in their effect. The presumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive such a construction if it is susceptible of any other. **It ought not to receive such a construction unless the words used are so clear, strong, and imperative that no other meaning can be annexed to them**, or unless the intention of the legislature cannot be otherwise satisfied.

(emphasis added). The foregoing principle remains a primary rule of statutory interpretation in contemporary jurisprudence. *Immigration and Naturalization Servs. v. St. Cyr*, 533 U.S. 289, 316 (2001) ("[C]ongressional enactments . . . will not be construed to have

retroactive effect unless their language requires this result."), *quoting Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

This Court has frequently noted, "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994); *see Dash v. Van Kleeck*, 7 Johns. *477, *503 (N.Y. 1811) ("It is a principle of the *English*, common law, as ancient as the law itself, that a statute, even of its omnipotent parliament, is not to have a retrospective effect."). This presumption has been strictly adhered to by the courts with little variance throughout the course of U.S. legal history. *See Kaiser Aluminum & Chem., Corp. v. Bonjorno*, 494 U.S. 827, 842-44 (1990) (Scalia, J., concurring) ("During all of the 19th and most of the 20th centuries, our cases expressed and applied, to my knowledge without exception, the principle that legislation is to be applied only prospectively unless Congress specifies otherwise."). The rule is premised upon notions of fundamental fairness and the preference for predictability of outcomes which are hallmarks of American jurisprudence. *See GMC v. Romein*, 503 U.S. 181, 191 (1992) ("Retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions."); *Landgraf*, 511 U.S. at 272-73 ("Requiring clear intent assures that Congress itself has considered the

potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits.").

To determine whether a statute will apply to pending cases, the courts first look to whether Congress has directed with the requisite clarity that the law be applied retroactively. *Martin v. Hadix*, 527 U.S. 343, 352 (1999).[4] If there is no congressional directive on the temporal reach of a statute, the court determines whether the application of the statute to the conduct at issue would result in a retroactive effect. *Id*. If the statute is found to have a retroactive effect, then in keeping with the traditional presumption against retroactivity, the statute is presumed not to apply to the pending cases it would affect. *Id*.; *Landgraf*, 511 U.S. at 280.

A. Congress did not direct that EWSAA § 1503 or NDAA § 1083 was to have retroactive temporal reach.

The standard for finding that Congress intended a statute to have retroactive temporal reach is a demanding one. *St. Cyr*, 533 U.S. at 316-17. "[C]ases where this Court has found truly 'retroactive' effect adequately authorized by statute have involved

[4] In determining whether a statute's terms would produce a retroactive effect, and in determining a statute's temporal reach, the normal statutory rules of construction apply. *Lindh v. Murphy*, 521 U.S. 320, 326 (1997).

statutory language that was so clear that it could sustain only one interpretation." *Lindh*, 521 U.S. at 328. In order to find that a statute is to apply retroactively there must be "clear evidence of congressional intent" in the form of "express command[s]" and "unambiguous directive[s]." *Landgraf*, 511 U.S. at 263-64, 272-73 (statutes "will not be construed to have retroactive effect unless their language requires this result"). In *Landgraf*, the Court offered the following as an example of language that might qualify as a clear statement that a statute was to apply retroactively: "[T]he new provisions shall apply to all proceedings pending on or commenced after the date of enactment." *Id*. at 260.

In EWSAA § 1503, Congress did not provide any directive that the powers conferred to the President were intended to apply retroactively. *See* Appendix at App. 1. The relevant language of § 1503 states:

> [T]he President may make inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961 or any other provision of law that applies to countries that have supported terrorism. . . .

The language of the provision, including the key phrase "may make inapplicable", is framed in the present tense and makes no reference to pending actions. There is simply no indication that Congress intended the President's authority to extend retroactively, let alone an unambiguous express directive that could sustain only one such interpretation. The same is true of the language utilized by the President

in Presidential Determination No. 2003-23, which implemented his powers under the Act. *See* JA396. Presidential Determination No. 2003-23 states in pertinent part:

> I hereby . . . make inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961, Public Law 87-195, as amended (the "FAA"), and any other provision of law that applies to countries that have supported terrorism.

Because neither passage contains an explicit unambiguous statement defining the statute's temporal reach, the statute must be applied prospectively if it is found to have retroactive effect.

A prospective application of the President's powers under § 1503 is also in harmony with the congressional purpose of § 1503, which was to release the restrictions on economic aid to Iraq. Congress did not need to give Iraq complete amnesty for all its past actions to achieve this purpose. This goal was accomplished simply by removing Iraq's present designation under the statutes that sanctioned Iraq for its prior violations of international law.[5]

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[5] Mitchell Daniels, then Director of the Office of Management and Budget, in a letter forwarded to Speaker Hastert, explained the purpose and effect of § 1503:

> This provision would repeal the Iraq Sanctions Act of 1990, which requires the President to continue an embargo on Iraq and impose certain mandatory sanctions against Iraq, including prohibitions on arms

(Continued on following page)

NDAA § 1083 similarly lacks any indication that the repeal of § 1605(a)(7) was to apply retroactively. The relevant language of § 1083(b) states:

> (b) CONFORMING AMENDMENTS. –
>
> (1) GENERAL EXCEPTION. – Section 1605 of title 28, United States Code, is amended –
>
> (A) in subsection (a) – . . .
>
> (iii) by striking paragraph (7)

Again, nothing in the foregoing language could be interpreted to indicate that the repeal of § 1605(a)(7) was to be anything but prospective. The language is again framed in the present tense and makes no mention of pending cases.

The negative inference arising from the absence of any such directive in the repealing section is reinforced by a similar absence of such direction found in a related section of the statute § 1083(c), titled "APPLICATION TO PENDING CASES." Section 1083(c)(1), titled "IN GENERAL", states that "[t]he amendments made by this section shall apply to any claim arising under section 1605A of title 28, United States Code." Because the repeal of § 1605(a)(7) is

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> sales, certain exports, foreign assistance and Export-Import Bank Credits. It would also authorize the President to make inapplicable with respect to Iraq section 620A, and section 620G, and section 307 of the Foreign Assistance Act.

Appendix of *Simon* Respondents' Brief in Opposition at 8a.

carried out solely through the above quoted § 1083(b) conforming amendment, this section is significant in that it does not provide that the § 1083 amendments apply to pending actions that arose under 28 U.S.C. § 1605(a)(7). If the conforming amendments apply only to claims arising under § 1605A, then the negative inference would be that they do not apply to effect claims brought under § 1605(a)(7) and do not repeal jurisdiction as conferred under that section as to those claims. Accordingly, pending § 1605(a)(7) actions would survive the enactment of § 1083.

Further, § 1083(c)(2), titled "PRIOR ACTIONS", is equally devoid of a directive that the repeal of § 1605(a)(7) is to apply retroactively. This section addresses only a limited class of cases that were brought under § 1605(a)(7) and § 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, which were adversely affected by the fact that these provisions failed to create a cause of action. *See, e.g., Acree v. Republic of Iraq*, 370 F.3d 41, 43 (D.C. Cir. 2004) (dismissing plaintiff's claims under § 1605(a)(7) on the grounds neither § 1605(a)(7) nor the Flatow Amendment creates a private right of action against foreign governments). Section 1083(c)(2) provides these plaintiffs with the opportunity to move to have these cases deemed re-filed under § 1605A, which explicitly states that it creates such a private right of action. *See* 28 U.S.C. § 1605A(c).

Finally, § 1083(c)(3), titled "RELATED ACTIONS", is the clearest contextual indicator that Congress did

not intend the statute to be retrospective. Section 1083(c)(3) provides plaintiffs who filed an action under § 1605(a)(7) with the right to file "any other action arising out of the same act or incident" under § 1605A within 60 days of "(A) the date of the entry of judgment in the original action; or (B) the date of the enactment of this Act." As the D.C. Circuit in *Simon v. Republic of Iraq*, 529 F.3d 1187, 1193 (D.C. Cir. 2008) found, it would be nonsensical for Congress to state that a plaintiff in a pending § 1605(a)(7) action could litigate their case to a final judgment more than sixty days after the enactment of the NDAA, if on its enactment § 1083 divested the courts of jurisdiction to hear such cases. Equally absurd is the idea that Congress, after eliminating a § 1605(a)(7) plaintiff's original action, would provide the plaintiff with the opportunity to file "other actions" related to the same act that gave rise to the § 1605(a)(7) action under § 1605A, but not the original action itself.

From the plain language of § 1083(b), the context provided by § 1083(c), and the total lack of any unambiguous directive from Congress that the statute was to apply retroactively, it is clear that the repeal of § 1605(a)(7) under § 1083 was intended to be solely prospective in application. *Acree*, 529 F.3d at 1193 ("The text and structure of the NDAA thus compel the conclusion that, notwithstanding the enactment of the NDAA, a court may still enter a judgment on the merits in such a case, which it could not do if it did not have jurisdiction over the case.").

B. Under the construction urged by Iraq EWSAA § 1503 and NDAA § 1083 would have an impermissible retroactive effect.

Given that neither EWSAA § 1503 nor NDAA § 1083 provide a clear and unambiguous directive from Congress that the statutes were to be applied retroactively, the Court must now determine whether the statutes, under the construction urged by Iraq, would have a retroactive effect. A court's inquiry into whether a statute operates retroactively "demands a commonsense, functional judgment about whether the new provision affects the substantive rights of the parties." *Martin*, 527 U.S. at 357-58, *quoting Landgraf*, 511 U.S. at 270. "This judgment should be informed and guided by 'familiar considerations of fair notice, reasonable reliance, and settled expectations.'" *Id*.

This Court has established that if a jurisdiction-stripping statute totally divests a plaintiff of his ability to bring an action by removing the jurisdiction of the only forum in which a suit may be brought, the statute affects the substantive rights of the party and has an impermissible retroactive effect. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 576-577 (2006); *see Hughes Aircraft Co. v. U.S.*, 520 U.S. 939, 951 (1997); *see Landgraf*, 511 U.S. at 274; *see also U.S. Fidelity*, 209 U.S. at 316.

In *U.S. Fidelity*, this Court addressed whether an amendment to a federal statute that temporarily

withdrew the district courts' jurisdiction to hear cases under the statute, could be applied retroactively to pending cases. 209 U.S. at 538-39. The Court held that by temporarily divesting the plaintiff of its right to sue, the statute had an impermissible retroactive affect on the plaintiff's substantive rights. *Id.* at 316. The defendants, in *U.S. Fidelity*, had entered into a contract and executed a bond with the United States for the construction of a lighthouse. *Id*. at 306. The plaintiff supplied defendants with goods for the purposes of construction. *Id*. at 308. When the defendants failed to pay for the goods, the United States brought suit on their behalf, pursuant to a federal bond collection statute. *Id*. The defendants demurred on the grounds that an amendment to the statute prohibited the trial court from taking jurisdiction. *Id*. at 311. The amendment had been passed after the plaintiff had performed under its contract with defendants, but prior to the filing of the plaintiff's suit. *Id*. The amendment provided, *inter alia*, that "not until after the complete performance of the contract for the performance of which the bond was given, and until the expiration of six months after such completion" could a plaintiff other than the United States bring suit to recover under the bond. *Id*. at 312-13. The defendant argued that because the lighthouse contract had not been completed at the time the plaintiff's suit was filed, the trial court had prematurely assumed jurisdiction. *Id*. The lower court denied the demurrer and the defendants subsequently appealed. *Id*. at 306. On appeal, the defendants contended the amendment was merely procedural and

therefore could be applied retroactively to the plaintiff's pending action. *Id*. at 313. This Court held that because the statute temporarily divested the plaintiff of the right to sue, it affected the plaintiff's substantive rights and could not be applied retroactively absent a contrary congressional directive. *Id*. at 316. The Court stated:

> Although the time in which to commence an action may be shortened and made applicable to causes of action already accrued, provided a reasonable time is left in which such actions may be commenced, **yet that is a different principle from taking away absolutely a present right to sue until a period of time, measured possibly by years, shall have elapsed**.

Id. (emphasis added, internal citations omitted).

In *Hallowell v. Commons*, 239 U.S. 506, 508 (1916), this Court, deciding a similar issue, revisited its holding in *U.S. Fidelity*. The *Hallowell* Court was presented with the question of whether a federal statute that provided the Secretary of the Interior with the sole discretion to establish equitable title to land held for American Indian allottees, could be applied retroactively to strip the jurisdiction of courts in pending cases. *Id*. The appellant, an American Indian, whose pending suit to settle equitable title in a United States district court had been dismissed, argued that under the Court's holding in *U.S. Fidelity* the statute could not be applied retroactively. *Id*. This Court distinguished *U.S. Fidelity* and held that "the

reference of the matter to the Secretary, unlike the changes with regard to suits upon bonds, **takes away no substantive right, but simply changes the tribunal to hear the case**." *Id*. (emphasis supplied). Finding that the mere change of tribunal to hear the allottee's case was procedural, the Court affirmed. *Id*.

From *U.S. Fidelity* and *Hallowell*, the rule emerged that a statute that totally divests a plaintiff of the right to bring a cause of action, even for a limited period of time, would be deemed to affect the substantive rights of the parties and have an impermissible retroactive effect. *Hallowell*, 239 U.S. at 508; *U.S. Fidelity*, 209 U.S. at 316.

Later, in *Hughes Aircraft*, the Court was presented with the issue of whether a statutory amendment that extended federal jurisdiction under the False Claims Act applied retroactively to conduct that occurred before its effective date. 520 U.S. at 951. The Court looked back to its earlier decision on jurisdiction-stripping statutes to guide its decision on the jurisdiction-conferring statute at issue. *Id*. It noted that jurisdiction-stripping statutes that merely changed the jurisdiction of the Court to hear the case could be applied retroactively because the statute "takes away no substantive right but simply *changes* the tribunal that is to hear the case." *Id*. And stated, "[p]resent law normally governs in such situations because jurisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties.'" *Id*., *quoting Landgraf*, 511 U.S. at 274.

However, the Court noted that "**[s]uch statutes affect only *where* a suit may be brought, not *whether* it may be brought at all**." *Id*. (emphasis added). The Court then found that the statute in question created jurisdiction where none existed before and held that it therefore had an impermissible retroactive effect because it "speaks not just to the power of a particular court but to the substantive rights of the parties as well." *Id*. The Court held, "[s]uch a statute, even though phrased in jurisdictional terms, is as much subject to our presumption against retroactivity as any other." *Id*.

Recently, in *Hamdan v. Rumsfeld*, 548 U.S. 557, 567 (2006), the Court addressed the issue of whether the provision of the Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680, 2739-44 that deprived the courts of jurisdiction over habeas petitions filed by persons detained at Guantanamo Bay applied to habeas cases pending when it was enacted. Although the Court held that the statute did not apply to pending cases under ordinary principles of statutory construction, it again acknowledged the rule that where a jurisdiction-stripping statute affects the substantive rights of the parties, it will be held to have an impermissible retroactive effect. *Id*. at 577.

In his dissent, Justice Scalia, citing to *Republic of Austria v. Altmann*, 541 U.S. 677 (2004) and *Hughes Aircraft,* argued that the Court had historically drawn a distinction between jurisdiction-conferring statutes and jurisdiction-stripping statutes, stating a

retroactivity analysis should only be applied to the former. *Id*. at 662. The majority declined to follow Justice Scalia's argument and held that no such distinction exists. *Id*. at 583. The Court stated:

> While the Court in both of these cases [*Altmann* and *Hughes Aircraft*] recognized that statutes "creating" jurisdiction may have retroactive effect if they affect "substantive" rights, we have applied the same analysis to statutes that have jurisdiction-stripping effect.

Id. at 583 fn12.

Following the Court's decisions in *U.S. Fidelity* and *Hallowell*, two rules of statutory construction have governed whether jurisdiction-stripping statutes will be construed to have retroactive effect. First, if a jurisdiction-stripping statute merely changes the tribunal which can hear a case, it will be applied to pending cases. *Hallowell*, 239 U.S. at 508. Under these circumstances the statute is deemed to have no retroactive effect because it creates a procedural change that affects only the power of the court, not the rights of the parties. *Landgraf*, 511 U.S. at 274. Conversely, if a jurisdiction-stripping statute removes the jurisdiction of the only forum in which the plaintiff's case can be heard, it will not be applied to pending cases. *Hughes Aircraft*, 520 U.S. at 951. Such a statute is deemed to have retroactive effect because

it affects the substantive right of the party to have their case heard at all. *Id*.; *Hamdan* at 583.[6]

[6] Iraq erroneously argues that, in *Bruner v. United States*, 343 U.S. 112 (1952), the Court adopted a different rule that all jurisdiction-stripping statutes apply to pending cases regardless of retroactive effect. Iraq's argument is without merit. *Bruner* does not conflict with *U.S. Fidelity* or *Hallowell*. The jurisdiction-stripping statute in question, in *Bruner*, did not divest the plaintiff of the right to bring a cause of action, but merely changed the tribunal that would hear the case from the district courts to the Court of Claims. *Id*. at 117. Citing to *Hallowell*, the Court held: "Congress has not altered the nature or validity of petitioner's rights or the Government's liability but has simply reduced the number of tribunals authorized to hear and determine such rights and liabilities." *Id*. Moreover, the Court noted that its holding was still subject to the rule that a statute having retroactive effect is not to be applied absent an unambiguous directive. *Id*.

The cases cited to by the *Bruner* Court in support of its holding, *Merchants' Insurance Co. v. Ritchie*, 72 U.S. 541 (1866) and *The Assessors v. Osbornes*, 76 U.S. 567 (1869), are also consistent with the rules established in *U.S. Fidelity* and *Hallowell*. Both *Merchants' Insurance* and *The Assessors*, dealt with the question of whether the Internal Revenue Act of 1866, which had repealed a jurisdictional conferring provision of an Act of 1833, applied to strip federal circuit court's jurisdiction in pending cases. 72 U.S. at 543-44; 76 U.S. at 572-73. The Court held, in both cases, that the jurisdiction-stripping Act of 1866 did apply to pending cases. 72 U.S. at 545; 76 U.S. at 575. However, the Act of 1866 did not divest plaintiffs in pending cases of their causes of action, which were still available to them in state courts. 72 U.S. at 543; 76 U.S. at 574. Because the Act of 1866 did not affect the substantive rights of the parties, the Court's decisions, like that in *Hallowell*, do not conflict with the rule established in *U.S. Fidelity* or the traditional presumption against retroactivity. As such, Iraq's contentions are misplaced.

Under Iraq's interpretation of EWSAA § 1503 and NDAA § 1083, these statutes remove the jurisdiction of the only forum in which the Respondents' causes of action against Iraq can be heard. As such, the statutes are jurisdiction-stripping statutes that totally divest the parties of their rights to a substantive cause of action, thereby effectively providing Iraq with complete amnesty for the acts of torture and hostage taking perpetrated under the former regime. It would be absurd to suggest that such a result is merely procedural and does not affect the parties' substantive rights. By denying the Respondents any form of relief, the statutes' impact on the substantive rights of the Respondents and similarly situated parties could not be more profound. Moreover, as the negative legal consequences of Iraq's past actions would be totally obviated, the substantive benefit Iraq would reap from such a construction cannot be ignored. In light of this Court's prior holdings, particularly *U.S. Fidelity* in which it held that a mere delay of a plaintiff's right to bring suit created impermissible retroactive effect, it would be a grave injustice for this Court to hold that the permanent divestiture of the Respondents' rights was not an impermissible retroactive effect. Accordingly, even assuming, *arguendo*, that the statutes provided for the repeal of § 1605(a)(7), the statutes can only be applied prospectively and have no affect on the court's jurisdiction to hear Respondents' cases.

From the foregoing it is evident that Iraq's argument that EWSAA § 1503 and NDAA § 1083 should

be applied retroactively to Respondents' pending actions is unsupported by the plain language of the statutes and the traditional rules of statutory construction. Accordingly, Iraq's unwarranted request for total amnesty for its prior acts of terrorism must be rejected.

II. AS A RESULT OF THE PRESIDENT'S WAIVER OF ALL PROVISIONS OF NDAA § 1083 TOWARD IRAQ, THE REPEAL OF 28 U.S.C. § 1605(a)(7) UNDER § 1083(b) DOES NOT APPLY TO RESPONDENTS' PENDING CASES.

Iraq presents two arguments on appeal. First, that the Court should hold that the President's May 7, 2003 exercise of his EWSAA § 1503 waiver power repealed § 1605(a)(7) jurisdiction retroactively as to pending cases against Iraq. Alternatively, Iraq argues that in the event this Court does not find that the President's § 1503 waiver repealed § 1605(a)(7) jurisdiction, then it should hold that, when NDAA § 1083 was enacted in 2008, that act retroactively divested the courts of § 1605(a)(7) jurisdiction over pending cases. Iraq's argument in the alternative is addressed herein.

Assuming, *arguendo*, that the repeal of § 1605(a)(7) under § 1083(b) applied retroactively to pending cases (which it cannot), the President's waiver of all provisions of § 1083 affecting Iraq, as permitted by § 1083(d), waived the § 1083(b) statutory repeal and restored jurisdiction.

Congress granted the power to the President under § 1083(d) to waive provisions of § 1083 that affect Iraq. *See* § 1083(d)(1). Upon the enactment of the NDAA, the President immediately exercised the § 1083(d) waiver power to the full extent of his authority. *See* Presidential Determination No. 2008-9, 73 Fed. Reg. 6571 (2008) ("I hereby waive all provisions of section 1083 of the Act with respect to Iraq and any agency or instrumentality thereof."). Given the President's categorical exercise of this authority, the § 1083(d) waiver encompassed all provisions of § 1083 that "**affect** Iraq or any agency or instrumentality thereof." *See* § 1083(d)(1).

Iraq argues that the § 1083(b) statutory repeal of § 1605(a)(7) jurisdiction applied retroactively to divest the courts of jurisdiction to hear Respondents' cases. If this is true, the § 1083(b) repeal would affect Iraq because it would release Iraq from its potential liability as a defendant in pending cases. However, if this is true, then it is also true that the President's § 1083(d) waiver of all provisions of § 1083 affecting Iraq would also waive the § 1083(b) repeal of § 1605(a)(7) jurisdiction because it is a provision affecting Iraq.

The Acting Solicitor General has expressed that the foregoing is the position of the United States. *See* Brief of the United States as Amicus Curiae Supporting Reversal ("Brief of the U.S.") at 27 ("The President immediately waived application to Iraq of 'all provisions' of Section 1083 – **necessarily including both its adoption of the new 28 U.S.C. 1605A and**

its repeal of 28 U.S.C. 1605(a)(7) – pursuant to the authority specially granted to the President in response to his withholding of his consent to H.R. 1585.") (emphasis added). The United States provides that prior to the passage of the NDAA, the President was aware that the enactment of § 1083 and the exercise of his authority under § 1083(d) would not affect pending cases. *Id*. It further states that as a compromise to speed the passage of the NDAA, the President specifically agreed with the Members of Congress who were the leading proponents of the NDAA that § 1083 would not affect such pending cases. *Id*.[7]

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[7] The relevant statements of the United States are as follows:

> **Under the compromise, it was understood that the President would exercise his waiver authority under Section 1083(d)(1), and claims against Iraq would be left in the same position as before H.R. 1585 passed Congress.** The NDAA contained hundreds of pages of other time-sensitive national security and defense authorities. The compromise permitted the expeditious passage of the broader NDAA, days after Congress's return following the President's withholding of his approval of H.R. 1585, without the delay that would have accompanied consideration of whether or how to adjust the legal status quo with regard to Iraq. *See* 154 Cong. Rec. E47 (daily ed. Jan. 17, 2008) (statement of Rep. Conyers) (President's exercise of his NDAA waiver authority would not affect "ongoing litigation" regarding the susceptibility of Iraq to suit "under current law").

Brief of the U.S. at 27 (emphasis added).

The United States' characterization of the events leading to the passage of the NDAA are fully supported by the legislative history of § 1083. *See infra* at 30-33. Addressing § 1083(d), Representative John Conyers, Chairman of the House Judiciary Committee, stated the following:

> It is important to note that this change does not affect rights under current law. **The President's waiver authority extends only to the provisions being newly enacted in this bill; by its clear terms, it does not extend to current law. There is ongoing litigation . . . under current law; if the President exercises his new waiver authority, that litigation will proceed unaffected by that waiver.**
>
> The difference is that, if the President exercises the waiver authority, [current plaintiffs] will not be helped by this new provision we wrote and passed, as we wanted them to be, and as they would be absent the waiver.

154 Cong. Rec. E46, 47 (daily ed. Jan. 17, 2008) (statement of Rep. Conyers) (emphasis added).

Under the plain language of § 1083(d) and Presidential Determination No. 2008-9, the President waived the jurisdictional repeal of § 1605(a)(7) in § 1083(b) as to Iraq. Further, as the illuminating statements of the United States have established, the President's waiver of § 1083(b) was intentional and furthered the purpose of rapidly enacting the NDAA. Accordingly, even assuming, *arguendo*, that the

§ 1083(b) jurisdictional repeal of § 1605(a)(7) could have applied retroactively to pending cases (which it could not), it was waived by the President and has no affect on the lower court's jurisdiction to hear Respondents' claims.

III. THE *ACREE* COURT CORRECTLY HELD THAT § 1503 OF THE EWSAA DID NOT PROVIDE THE PRESIDENT WITH THE AUTHORITY TO MAKE § 1605(a)(7) INAPPLICABLE TO IRAQ.

A. Through the enactment of NDAA § 1083(c)(4), Congress confirmed that the D.C. Circuit correctly decided *Acree*.

In NDAA § 1083(c)(4), Congress and the President recognized the propriety of the *Acree* decision by establishing in federal law that EWSAA § 1503 **did not** grant the President the authority to remove the jurisdiction of any court of the United States. Section 1083(c)(4) of H.R. 1585 states:

> **(4) PRESERVING THE JURISDICTION OF THE COURTS. –**
>
> Nothing in section 1503 of the Emergency Wartime Supplemental Appropriations Act, 2003 (Public Law 108-11, 117 Stat. 579) has ever authorized, directly or indirectly, the making inapplicable of any provision of chapter 97 of title 28, United States Code, or the removal of the jurisdiction of any court of the United States.

This statute is an explicit and unambiguous expression of congressional intent directed at the resolution of the instant appeal. As such, if it is not deemed to be controlling authority (which given the circumstances it should), it must at the least be accorded to carry great weight as to the decision of this issue. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 380-81 (1969).

On January 28, 2008, the National Defense Authorization Act for 2008 ("NDAA II"), H.R. 4986, was signed by the President. *Id*. NDAA II was drafted in response to the President's veto of Congress's initial NDAA for 2008 ("NDAA I"), H.R. 1585, 110th Cong. (2007), which had been passed by an overwhelming majority of Congress in December 2007. The President vetoed NDAA I over provisions in § 1083 directed at enhancing the ability of victims of state sponsored terrorism to recover against defendant states in actions under 28 U.S.C. § 1605, particularly as it applied to Iraq. *Memorandum of Disapproval*, 3 Weekly Comp. Pers. Doc. 1641 (Dec. 28, 2007).

Section 1083, initially titled "Justice for Marines and other Victims of State Sponsored Terrorism," was added to NDAA I by Senate Amendment 2251, on September 26, 2007. This amendment was sponsored by Senator Frank Lautenberg and co-sponsored by twenty Senators, including Senators Specter, Clinton, Dole, Lieberman and Nelson. *See* Library of Congress: Report on Senate Amendment 2251, *at* http://thomas.loc.gov/cgi-bin/bdquery/z?d110:SP02251:. Section 1083 was targeted specifically at addressing decisions

of the D.C. Circuit and tactics being employed by defendant states that Congress considered to impermissibly weaken the ability of plaintiffs to recover under 28 U.S.C. § 1605(a)(7). 154 Cong. Rec. S54-56 (daily ed. Jan. 22, 2008) (statement of Sen. Lautenberg). These tactics and decisions were addressed and disapproved through the revision of § 1605 and the establishment of a new section, 28 U.S.C. § 1605A. This new section, while substantially similar to § 1605, contained among other enhancements, the ability to place liens on a defendant state's assets and the removal of such state's ability to take interlocutory appeals. *Id*. Section 1083, as passed by the Senate and House in H.R. 1585 also contained § 1083(c)(4), a section targeted at Iraq's attempts to have the *Acree* decision reversed. Section 1083(c)(4) provides unequivocally that Congress did not intend § 1503 to authorize the President to remove the jurisdiction of any court of the United States, exactly as the D.C. Circuit held in *Acree*.

Immediately upon reconvening Congress in January 2008, a bipartisan group began negotiating a compromise with the Executive Branch over § 1083. 154 Cong. Rec. S53-54 (daily ed. Jan. 22, 2008) (statement of Sen. Levin). Congress was under considerable pressure to immediately pass NDAA II in order to provide funding for the ongoing actions in Iraq and Afghanistan. *Id*. Against the will of numerous members of Congress, the negotiations resulted in a revision of § 1083 that did not in any way modify NDAA I § 1605A, except to add a new section,

§ 1083(d).[8] *See* 154 Cong. Rec. H257-59 (daily ed. Jan. 16, 2008). As contained in H.R. 4986, § 1083(d) granted the President the authority to waive provisions of § 1605A as they would affect Iraq, subject to certain required presidential determinations.

Of overwhelming significance to the instant action, H.R. 4986 as passed by both houses of Congress and as signed into law by the President includes an unmodified § 1083(c)(4). Section 1083(c)(4) along with § 1083(d) waiver provision were codified as notes to 28 U.S.C. § 1605A and are now in force as binding provisions of federal law.

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[8] Along with other members of Congress, Senate Majority Leader Harry Reid expressed his dissatisfaction with the § 1083 compromise during discussions on the revised NDAA. During the January 22 meeting of the Senate, Senator Reid stated:

> I also want to reiterate that it is my belief that the Government of Iraq should take responsibility for what has taken place there in years past, including the brutal torture of American POWs. **Congress has gone on record repeatedly – most recently, in overwhelmingly passing section 1083 of the conference report to H.R. 1585 last year in both the House and Senate and sending it to the President – to support the efforts of these Americans who have suffered so much for their country to hold the torturers accountable.** This administration has been fighting for years to oppose efforts to win compensation for these soldiers, which is, frankly, a disgrace.

154 Cong. Rec. S57 (daily ed. Jan. 22, 2008) (emphasis added).

It is a longstanding principle of English and American jurisprudence that "[s]ubsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction." *Red Lion*, 395 U.S. at 380-81; *accord Glidden Co. v. Zdanok*, 370 U.S. 530, 541 (1962) ("Especially is this so when the Congress has been stimulated by decisions of this Court to investigate the historical materials involved and has drawn from them a contrary conclusion."); *accord Federal Housing Administration v. Darlington, Inc.*, 358 U.S. 84, 90 (1959) ("later law is entitled to weight when it comes to the problem of construction"). The weight of such legislation is particularly great "when the precise intent of the enacting Congress is obscure." *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 598 (1980).

Section 1083(c)(4), was passed by Congress only five years after the EWSAA was enacted with a majority of its membership still intact.[9] It is not merely a statute that suggests the intent of Congress indirectly, but is rather an explicit unambiguous statement targeted directly at the resolution of the

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[9] *Compare* Senate Roll Call Votes for S.1689 (EWSAA 2003) April 3, 2003, *at* http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=108&session=1&vote=00400; *with* Senate Roll Call Votes for H.R.4986 (NDAA 2008), *at* http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=110&session=2&vote=00001. *Compare* House Roll Call Votes for H.R.1559 (EWSAA 2003), http://clerk.house.gov/evs/2003/roll108.xml; *with* House Roll Call Votes for H.R.4986 (NDAA 2008), *at* http://clerk.house.gov/evs/2008/roll011.xml.

precise question presented to this Court. Under these circumstances, the congressional intent expressed in § 1083(c)(4) should not only be given great weight, but should be deemed controlling. *F.T.C. v. Jantzen, Inc.*, 386 U.S. 228, 235 (1967) ("The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed."), *quoting Johnson v. U.S.*, 163 F. 30 (1st Cir. 1908); *U.S. v. Hutcheson*, 312 U.S. 219, 235 (1941).

Iraq attempts to marginalize the significance of § 1083(c)(4) by stating that it is legislative history created by a later Congress and therefore to be accorded little weight. It supports this characterization by citation to inapposite cases dealing with true legislative history or expressions of congressional intent far removed from the date the original statute was enacted. *See Rainwater v. U.S.*, 356 U.S. 590, 593 (1958) (more than fifty years passed between enactment of original statute and later amendment interpreting statute); *see Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 839-40 (1988) (amendment occurred ten years after enactment of original statute); *see U.S. v. Monsanto*, 491 U.S. 600, 610 (1989) (post-enactment comments of three legislators in congressional record); *see South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 355-56 (1998) (various references in congressional record some as much as one hundred years after the passage of the original statute). The statute in question is not mere legislative history, such as the comments in *Monsanto*

or *Yankton Sioux*, but is legislation itself. And it was not enacted by a Congress far removed from the one that passed the original statute, such as in *Rainwater* and *Mackey*. Iraq ignores the facts that at the time NDAA § 1083(c)(4) was passed the membership of Congress had changed relatively little since the 108th Congress had passed the EWSAA, and that President Bush had not yet left office. Under these circumstances, Iraq's argument that § 1083(c)(4) bears little relevance cannot be accepted.

Iraq also argues that even if § 1083(c)(4) is controlling, the President waived § 1083(c)(4) when he categorically exercised his § 1083(d) waiver power. While it is true that the President categorically waived all provisions of § 1083 as to Iraq, Iraq's argument is unavailing as § 1083(c)(4) is not standard legislation that confers rights or limits actions, rather it is a statement of fact. A fact is an "actual or alleged event or circumstance, as distinguished from its legal effect, consequence, or interpretation." BLACK'S LAW DICTIONARY (8th ed. 2004), fact. To state that the President ordered the waiver of the existence of a fact for the purposes of a legal proceeding is akin to stating that the President can order the judiciary to ignore truth and reality. Such an argument is repugnant to the basic principles of justice upon which our system of government is based and should be rejected accordingly.

It is clear that because NDAA § 1083(c)(4) was passed shortly after the enactment of EWSAA § 1503 and is federal law targeted directly at the resolution

of the question presented in the instant case, it should be accorded great weight in answering the question presented.

B. The *Acree* Court's holding was consistent with the congressional purpose of EWSAA § 1503 and the context of the proviso within the statute.

Iraq argues that the waiver proviso of EWSAA § 1503 should be construed only by examining the language of the proviso itself, ignoring the EWSAA's legislative history and its context in the statute as a whole. Iraq argues that it was error for the *Acree* Court to do otherwise. Iraq's argument is without merit. Because the statutory language in question was couched as a proviso to a principal clause and the construction urged by Iraq was a jurisdictional repeal by implication, under the traditional rules of statutory interpretation, the *Acree* Court was required to look beyond the language of the proviso.

i. The Historical Context of EWSAA § 1503

Following Iraq's invasion and occupation of Kuwait in August of 1990, Congress designated Iraq as a state sponsor of terrorism and passed several statutes that sanctioned the Iraqi government. *See* Presidential Determination No. 2004-52, 69 Fed. Reg. 58793 (September 24, 2004). Principal among these statutes was the Iraq Sanctions Act of 1990 ("ISA"),

which established a comprehensive trade embargo and increased penalties for violating other trade restrictions. *See* Pub. L. No. 101-513, §§ 586-586J, 104 Stat. 1979, 2047-55 (1990). In addition to its own restrictions, ISA § 586F(c) also limited the economic aid that could be provided to Iraq by requiring that § 620A of the Foreign Assistance Act of 1961 ("FAA"), added by Pub. L. No. 94-329, § 303 (1976), be enforced against it. FAA § 620A prohibits the provision of economic assistance to any country determined by the Secretary of State to have repeatedly provided support for acts of international terrorism. 22 U.S.C. § 2371.

In 2003, after the United States led coalition invasion of Iraq had succeeded in ousting the Saddam Hussein regime, the nation's foreign policy toward Iraq drastically changed. Congress wanted to quickly free up aid to assist Iraqi citizens affected by the war and to reconstruct Iraq's infrastructure. Problematically, Iraq's designation under the ISA and FAA could only be removed through a certification process in which the President presented certain findings to Congress regarding the government of Iraq. *See* ISA § 586H, 104 Stat. 1979, 2052-53; FAA, 22 U.S.C. § 2371(c). Iraq's designation as a state sponsor of terrorism could also only be removed by a similar certification carried out by the Secretary of State. *See* 50 U.S.C.App. § 2405(j)(4). Because there was no government in place in Iraq at that time, the certification process could not proceed under the statutes.

In response to this problem, in April 2003, Congress included in the Emergency Wartime Supplemental Appropriations Act, which provided funding for the military operations in Iraq and Afghanistan, a section that authorized an expedited means of removing Iraq's designations under the ISA and FAA. Pub. L. No. 108-11, § 1503, 117 Stat. 559 (2003). EWSAA § 1503 provided the President with the authority to "suspend the application of any provision of the Iraq Sanctions Act of 1990." As one of several provisos to the President's authority, § 1503 "[p]rovided further, [t]hat the President may make inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961 or any other provision of law that applies to countries that have supported terrorism."

On May 7, 2003, in Presidential Determination No. 2003-23, President Bush exercised his authority under EWSAA § 1503. Presidential Determination No. 2003-23 states in pertinent part:

> I hereby:
>
> (1) suspend the application of all of the provisions, other than section 586E, of the Iraq Sanctions Act of 1990, Public Law 101-513, and
>
> (2) make inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961, Public Law 87-195, as amended (the "FAA"), and any other provision of law that applies to countries that have supported terrorism.

On May 22, 2003, the President in a message to Congress stated his belief that the § 1503 waiver power he had exercised on May 7, 2003, had encompassed the terrorism exception to the FISA, 28 U.S.C. § 1605(a)(7). *See Message to the Congress*, 39 Weekly Comp. Pres. Doc. 647 (May 22, 2003).

Shortly thereafter, the D.C. Circuit, in *Acree v. Republic of Iraq*, 370 F.3d 41 (D.C. Cir. 2004), was presented with the question of whether the President's waiver had in fact applied to strip the federal courts of § 1605(a)(7) jurisdiction. The D.C. Circuit held that the authority granted to the President under EWSAA § 1503 to make certain laws inapplicable to Iraq did not by implication include the authority to strip the federal courts of § 1605(a)(7) jurisdiction. *Id*. at 43. In arriving at this holding the Court carefully examined the waiver proviso in light of the circumstances surrounding its passage and its context within the statute. *Id*. at 52-58.

ii. The Propriety of the *Acree* Decision

In *Acree*, Iraq argued as it does here that the language "any other provision of law that applies to countries that have supported terrorism" should be construed independently of the statute as a whole and its legislative history. *Id*. at 52. Iraq's argument for a limited reading of the proviso must be rejected, because the language is couched as a proviso and Iraq seeks to have the language construed as a repeal by implication. To do otherwise would be a blind

approval of a repeal by implication, an intensely disfavored construction, and a rejection of the traditional rules that (1) provisos must be read in context and (2) that legislative intent must be clear and manifest for a repeal by implication. *See TVA v. Hill*, 437 U.S. 153, 189-90 (1978) (holding repeals by implication are intensely disfavored in appropriations acts and requiring "that 'the intention of the legislature to repeal must be clear and manifest'" for such a finding), *quoting Posadas v. Nat'l City Bank*, 296 U.S. 497, 503 (1936).

Because EWSAA § 1503 does not explicitly provide for the repeal of § 1605(a)(7), the repeal urged by Iraq is a repeal by implication. *See Rodriguez v. U.S.*, 480 U.S. 522, 524 (1987) ("Since § 3147 does not explicitly divest sentencing judges of their authority under § 3651, the Court of Appeals' judgment amounts to the conclusion that § 3147 is an implicit partial repeal of § 3651.").

"It is well settled . . . that repeals by implication are not favored, and will not be found unless an intent to repeal is 'clear and manifest.'" *Rodriguez*, 480 U.S. at 524 (internal citations omitted). "A law is not to be construed as impliedly repealing a prior law unless no other reasonable construction can be applied." *U.S. v. Jackson*, 302 U.S. 628, 631 (1938). "The principle carries special weight when we are urged to find that a specific statute has been repealed by a more general one." *U.S. v. United Cont'l Tuna Corp.*, 425 U.S. 164, 169 (1976). "[T]he policy applies with even greater force when the claimed repeal rests

solely on an Appropriations Act." *TVA*, 437 U.S. at 190. *See TVA v. Hill*, 437 U.S. at 189-90. As such, courts are required to find that the intent of Congress is clear and manifest to declare such a construction. *Id*.

Accordingly, under the traditional rules of construction, the *Acree* Court was required to determine whether it was the clear intent of Congress to repeal § 1605(a)(7) by implication. Such an analysis, cannot be undertaken by looking only at the language of the proviso devoid of its context. As described above, their was no mention in the legislative history of § 1605(a)(7) and the removal of § 1605(a)(7) was not necessary to accomplish the goal of Congress which was to repeal the ISA and free up aid to Iraq. As such, there was no evidence of the intent of Congress to authorize a repeal by implication. The *Acree* Court's analysis was therefore both necessary and correct.

Further, it is undeniable that the language at issue is in the context of a proviso. As such, the doctrines applicable to the construction of a proviso must be applied. It is a traditional presumption that "a proviso 'refers only to the provision to which it is attached.'" *U.S. v. McClure*, 305 U.S. 472, 478 (1939); *U.S. v. Morrow*, 266 U.S. 531, 535 (1925). "The general office of a proviso is to except something from the enacting clause, or to qualify and restrain its generality and prevent misinterpretation. Its grammatical and logical scope is confined to the subject-matter of the principal clause." *Morrow*, 266 U.S. at 534-35. Because the provision at issue is a proviso, the *Acree* Court appropriately applied "the cardinal rule that a

statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context." *Acree*, 370 F.3d at 52, *quoting King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991).

Under these traditional rules, the *Acree* Court correctly held that the proviso was limited by its context to apply only as a measure to free up aid to Iraq. None of the other language in the statute was related to achieving any purpose other than that of the principal clause, which was to provide the President with the ability to effectively "suspend the Iraq Sanction Act of 1990."

From the foregoing, it is clear that because the language of the President's waiver power was couched as a proviso and that the construction sought by Iraq was a repeal by implication, the *Acree* Court was correct to look beyond the language of the proviso. Further, the limited focus of the statute and the total absence of any discussion in the legislative history of foreign sovereign immunity or § 1605(a)(7) could only lead to the *Acree* Court's conclusion that congressional intent was not sufficiently clear to warrant such a repeal. *See Acree*, 370 F.3d at 424-25; *see TVA*, 437 U.S. at 190; *see St. Cyr*, 533 U.S. at 320 fn44 ("In a case where the construction of legislative language such as this makes so sweeping and so relatively unorthodox a change as that made here, I think judges as well as detectives may take into consideration the fact that a watchdog did not bark in

the night.") (*quoting Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 602 (1980) (Rehnquist, J., dissenting).

CONCLUSION

For the reasons stated herein, the Respondents respectfully request that this Court affirm the District Court and the Circuit Court in all respects.

Respectfully submitted,

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Emergency Wartime Supplemental Authorization Act, 2003, Pub. L. No. 108-011, § 1503, 117 Stat. 559, 579 (2003)

SEC. 1503. The President may suspend the application of any provision of the Iraq Sanctions Act of 1990: *Provided*, That nothing in this section shall affect the applicability of the Iran-Iraq Arms Non-Proliferation Act of 1992 (Public Law 102-484), except that such Act shall not apply to humanitarian assistance and supplies: *Provided further*, That the President may make inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961 or any other provision of law that applies to countries that have supported terrorism: *Provided further*, That military equipment, as defined by title XVI, section 1608(1)(A) of Public Law 102-484, shall not be exported under the authority of this section: *Provided further*, That section 307 of the Foreign Assistance Act of 1961 shall not apply with respect to programs of international organizations for Iraq: *Provided further*, That provisions of law that direct the United States Government to vote against or oppose loans or other uses of funds, including for financial or technical assistance, in international financial institutions for Iraq shall not be construed as applying to Iraq: *Provided further*, That the President shall submit a notification 5 days prior to exercising any of the authorities described in this section to the committee on Appropriations of each House of the Congress, the Committee on Foreign Relations of the Senate, and the Committee on International Relations of the

House of Representatives: *Provided further*, That not more than 60 days after enactment of this Act and every 90 days thereafter the President shall submit a report to the Committee on Appropriations of each House of the Congress, the Committee on Foreign Relations of the Senate, and the Committee on International Relations of the House of Representatives containing a summary of all licenses approved for export to Iraq of any item on the Commerce Control List contained in the Export Administration Regulations, 15 CFR Part 774, Supplement 1, including identification of end users of such items: *Provided further*, That the authorities contained in this section shall expire on September 30, 2004, or on the date of enactment of a subsequent Act authorizing assistance for Iraq and that specifically amends, repeals or otherwise makes inapplicable the authorities of this section, whichever occurs first.

National Defense Authorization Act for Fiscal Year 2008, Public Law No. 110-181

SEC. 1083. TERRORISM EXCEPTION TO IMMUNITY.

(a) TERRORISM EXCEPTION TO IMMUNITY. –

(1) IN GENERAL. – Chapter 97 of title 28, United States Code, is amended by inserting after section 1605 the following:

§ 1605A. Terrorism exception to the jurisdictional immunity of a foreign state

(a) IN GENERAL. –

(1) NO IMMUNITY. – A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.

(2) CLAIM HEARD. – The court shall hear a claim under this section if –

(A)(i)(I) the foreign state was designated as a state sponsor of terrorism at the time the act described in paragraph (1) occurred, or was so designated as a

result of such act, and, subject to subclause (II), either remains so designated when the claim is filed under this section or was so designated within the 6-month period before the claim is filed under this section; or

(II) in the case of an action that is refiled under this section by reason of section 1083(c)(2)(A) of the National Defense Authorization Act for Fiscal Year 2008 or is filed under this section by reason of section 1083(c)(3) of that Act, the foreign state was designated as a state sponsor of terrorism when the original action or the related action under section 1605(a)(7) (as in effect before the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) was filed;

(ii) the claimant or the victim was, at the time the act described in paragraph (1) occurred –

(I) a national of the United States;

(II) a member of the armed forces; or

(III) otherwise an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment; and

(iii) in a case in which the act occurred in the foreign state against which the claim has been brought,

the claimant has afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration; or

(B) the act described in paragraph (1) is related to Case Number 1:00CV03110 (EGS) in the United States District Court for the District of Columbia.

(b) LIMITATIONS. – An action may be brought or maintained under this section if the action is commenced, or a related action was commenced under section 1605(a)(7) (before the date of the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) not later than the latter of –

(1) 10 years after April 24, 1996; or

(2) 10 years after the date on which the cause of action arose.

(c) PRIVATE RIGHT OF ACTION. – A foreign state that is or was a state sponsor of terrorism as described in subsection (a)(2)(A)(i), and any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, shall be liable to –

(1) a national of the United States,

(2) a member of the armed forces,

(3) an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment, or

(4) the legal representative of a person described in paragraph (1), (2), or (3), for personal injury or death caused by acts described in subsection (a)(1) of that foreign state, or of an official, employee, or agent of that foreign state, for which the courts of the United States may maintain jurisdiction under this section for money damages. In any such action, damages may include economic damages, solatium, pain and suffering, and punitive damages. In any such action, a foreign state shall be vicariously liable for the acts of its officials, employees, or agents.

(d) ADDITIONAL DAMAGES. – After an action has been brought under subsection (c), actions may also be brought for reasonably foreseeable property loss, whether insured or uninsured, third party liability, and loss claims under life and property insurance policies, by reason of the same acts on which the action under subsection (c) is based.

(e) SPECIAL MASTERS. –

(1) IN GENERAL. – The courts of the United States may appoint special masters to hear damage claims brought under this section.

(2) TRANSFER OF FUNDS. – The Attorney General shall transfer, from funds available for the program under section 1404C of the Victims of Crime Act

of 1984 (42 U.S.C. 10603c), to the Administrator of the United States district court in which any case is pending which has been brought or maintained under this section such funds as may be required to cover the costs of special masters appointed under paragraph (1). Any amount paid in compensation to any such special master shall constitute an item of court costs.

(f) APPEAL. – In an action brought under this section, appeals from orders not conclusively ending the litigation may only be taken pursuant to section 1292(b) of this title.

(g) PROPERTY DISPOSITION. –

(1) IN GENERAL. – 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 that is –

(A) subject to attachment in aid of execution, or execution, under section 1610;

(B) located within that judicial district; and

(C) titled in the name of any defendant, or titled in the name of any entity controlled by any defendant if such notice contains a statement listing such controlled entity.

(2) NOTICE. – A notice of pending action pursuant to this section shall be filed by the clerk of the district court in the same manner as any pending action and shall be indexed by listing as defendants all named defendants and all entities listed as controlled by any defendant.

(3) ENFORCEABILITY. – Liens established by reason of this subsection shall be enforceable as provided in chapter 111 of this title.

(h) DEFINITIONS. – For purposes of this section –

(1) the term 'aircraft sabotage' has the meaning given that term in Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation;

(2) the term 'hostage taking' has the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages;

(3) the term 'material support or resources' has the meaning given that term in section 2339A of title 18;

(4) the term 'armed forces' has the meaning given that term in section 101 of title 10;

(5) the term 'national of the United States' has the meaning given that term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22));

(6) the term 'state sponsor of terrorism' means a country the government of which the Secretary of State has determined, for purposes of section 6(j) of

the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)), section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371), section 40 of the Arms Export Control Act (22 U.S.C. 2780), or any other provision of law, is a government that has repeatedly provided support for acts of international terrorism; and

(7) the terms 'torture' and 'extrajudicial killing' have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991 (28 U.S.C. 1350 note).".

(2) AMENDMENT TO CHAPTER ANALYSIS. – The table of sections at the beginning of chapter 97 of title 28, United States Code, is amended by inserting after the item relating to section 1605 the following:

1605A. Terrorism exception to the jurisdictional immunity of a foreign state.".

(b) CONFORMING AMENDMENTS. –

(1) GENERAL EXCEPTION. – Section 1605 of title 28, United States Code, is amended –

(A) in subsection (a) –

(i) in paragraph (5)(B), by inserting "or" after the semicolon;

(ii) in paragraph (6)(D), by striking "; or" and inserting a period; and

(iii) by striking paragraph (7);

(B) by repealing subsections (e) and (f); and

(C) in subsection (g)(1)(A), by striking "but for subsection (a)(7)" and inserting "but for section 1605A".

(2) COUNTERCLAIMS. – Section 1607(a) of title 28, United States Code, is amended by inserting "or 1605A" after "1605".

(3) PROPERTY. – Section 1610 of title 28, United States Code, is amended –

(A) in subsection (a)(7), by striking "1605(a)(7)" and inserting "1605A";

(B) in subsection (b)(2), by striking "(5), or (7), or 1605(b)" and inserting "or (5), 1605(b), or 1605A";

(C) in subsection (f), in paragraphs (1)(A) and (2)(A), by inserting "(as in effect before the enactment of section 1605A) or section 1605A" after "1605(a)(7)"; and

(D) by adding at the end the following:

(g) PROPERTY IN CERTAIN ACTIONS. –

(1) IN GENERAL. – Subject to paragraph (3), the 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, regardless of –

(A) the level of economic control over the property by the government of the foreign state;

(B) whether the profits of the property go to that government;

(C) the degree to which officials of that government manage the property or otherwise control its daily affairs;

(D) whether that government is the sole beneficiary in interest of the property; or

(E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

(2) UNITED STATES SOVEREIGN IMMUNITY INAPPLICABLE. – Any property of a foreign state, or agency or instrumentality of a foreign state, to which paragraph (1) applies shall not be immune from attachment in aid of execution, or execution, upon a judgment entered under section 1605A because the property is regulated by the United States Government by reason of action taken against that foreign state under the Trading With the Enemy Act or the International Emergency Economic Powers Act.

(3) THIRD-PARTY JOINT PROPERTY HOLDERS. – Nothing in this subsection shall be construed to supersede the authority of a court to prevent appropriately the impairment of an interest held by a person who is not liable in the action giving rise to a judgment in property subject to attachment in aid of execution, or execution, upon such judgment.”.

(4) VICTIMS OF CRIME ACT. – Section 1404C(a)(3) of the Victims of Crime Act of 1984 (42 U.S.C. 10603c(a)(3)) is amended by striking "December 21, 1988 with respect to which an investigation or" and inserting "October 23, 1983, with respect to which an investigation or civil or criminal".

(c) APPLICATION TO PENDING CASES. –

(1) IN GENERAL. – The amendments made by this section shall apply to any claim arising under section 1605A of title 28, United States Code.

(2) PRIOR ACTIONS. –

(A) IN GENERAL. – With respect to any action that –

(i) was brought under section 1605(a)(7) of title 28, United States Code, or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208), before the date of the enactment of this Act,

(ii) relied upon either such provision as creating a cause of action,

(iii) has been adversely affected on the grounds that either or both of these provisions fail to create a cause of action against the state, and

(iv) as of such date of enactment, is before the courts in any form, including on appeal or motion under rule 60(b) of the Federal Rules of Civil Procedure, that action, and any judgment in the action shall, on

motion made by plaintiffs to the United States district court where the action was initially brought, or judgment in the action was initially entered, be given effect as if the action had originally been filed under section 1605A(c) of title 28, United States Code.

(B) DEFENSES WAIVED. – The defenses of res judicata, collateral estoppel, and limitation period are waived –

(i) in any action with respect to which a motion is made under subparagraph (A), or

(ii) in any action that was originally brought, before the date of the enactment of this Act, under section 1605(a)(7) of title 28, United States Code, or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208), and is refiled under section 1605A(c) of title 28, United States Code, to the extent such defenses are based on the claim in the action.

(C) TIME LIMITATIONS. – A motion may be made or an action may be refiled under subparagraph (A) only –

(i) if the original action was commenced not later than the latter of –

(I) 10 years after April 24, 1996; or

(II) 10 years after the cause of action arose; and

(ii) within the 60-day period beginning on the date of the enactment of this Act.

(3) RELATED ACTIONS. – If an action arising out of an act or incident has been timely commenced under section 1605(a)(7) of title 28, United States Code, or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208), any other action arising out of the same act or incident may be brought under section 1605A of title 28, United States Code, if the action is commenced not later than the latter of 60 days after –

(A) the date of the entry of judgment in the original action; or

(B) the date of the enactment of this Act.

(4) PRESERVING THE JURISDICTION OF THE COURTS. – Nothing in section 1503 of the Emergency Wartime Supplemental Appropriations Act, 2003 (Public Law 108-11, 117 Stat. 579) has ever authorized, directly or indirectly, the making inapplicable of any provision of chapter 97 of title 28, United States Code, or the removal of the jurisdiction of any court of the United States.

(d) APPLICABILITY TO IRAQ. –

(1) APPLICABILITY. – The President may waive any provision of this section with respect to Iraq, insofar as that provision may, in the President's determination, affect Iraq or any agency or instrumentality thereof, if the President determines that –

(A) the waiver is in the national security interest of the United States;

(B) the waiver will promote the reconstruction of, the consolidation of democracy in, and the relations of the United States with, Iraq; and

(C) Iraq continues to be a reliable ally of the United States and partner in combating acts of international terrorism.

(2) TEMPORAL SCOPE. – The authority under paragraph (1) shall apply –

(A) with respect to any conduct or event occurring before or on the date of the enactment of this Act;

(B) with respect to any conduct or event occurring before or on the date of the exercise of that authority; and

(C) regardless of whether, or the extent to which, the exercise of that authority affects any action filed before, on, or after the date of the exercise of that authority or of the enactment of this Act.

(3) NOTIFICATION TO CONGRESS. – A waiver by the President under paragraph (1) shall cease to be effective 30 days after it is made unless the President has notified Congress in writing of the basis for the waiver as determined by the President under paragraph (1).

(4) SENSE OF CONGRESS. – It is the sense of the Congress that the President, acting through the Secretary of State, should work with the Government

of Iraq on a state-to-state basis to ensure compensation for any meritorious claims based on terrorist acts committed by the Saddam Hussein regime against individuals who were United States nationals or members of the United States Armed Forces at the time of those terrorist acts and whose claims cannot be addressed in courts in the United States due to the exercise of the waiver authority under paragraph (1).

(e) SEVERABILITY. – If any provision of this section or the amendments made by this section, or the application of such provision to any person or circumstance, is held invalid, the remainder of this section and such amendments, and the application of such provision to other persons not similarly situated or to other circumstances, shall not be affected by such invalidation.

28 U.S.C. § 1605(a)(7) (2000)

Sec. 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case –

* * *

(7) not otherwise covered by paragraph (2), in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources (as defined in section 2339A of title 18) for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency, except that the court shall decline to hear a claim under this paragraph –

> (A) if the foreign state was not designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371) at the time the act occurred, unless later so designated as a result of such act or the act is related to Case Number 1:00CV03110(EGS) in the United States District Court for the District of Columbia; and

(B) even if the foreign state is or was so designated, if –

(i) the act occurred in the foreign state against which the claim has been brought and the claimant has not afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration; or

(ii) neither the claimant nor the victim was a national of the United States (as that term is defined in section 101(a)(22) of the Immigration and Nationality Act) when the act upon which the claim is based occurred.