

Legal Sidebar

When Does Sovereign Immunity Protect Property Owned by State Sponsors of Terrorism?

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As Congress’s first veto override of the Obama Administration, the Justice Against Sponsors of Terrorism Act ([JASTA](#)) brought [national](#) and [international](#) attention to the circumstances in which foreign nations may be sued in U.S. courts under the Foreign Sovereign Immunities Act ([FSIA](#)). Unless an exception applies, foreign sovereigns enjoy two types of immunity under FSIA: immunity [from suit](#) and immunity [from attachment](#). By creating a [new exception](#) to immunity from suit, JASTA allows U.S. nationals to file civil claims against foreign sovereigns for aiding and abetting acts of international terrorism in certain cases (detailed in this earlier [post](#)). JASTA, however, does not address the separate legal protections that limit when a plaintiff can attach—or [seize](#) pursuant to a court order—a foreign state’s assets in order to collect on a judgment.

Even before JASTA was enacted, FSIA contained an exception to immunity from suit ([28 U.S.C. § 1605A](#)) for certain claims against [state sponsors of terrorism](#). U.S. courts have awarded victims of terrorism [billions of dollars](#) in judgments under this exception, but the limited availability of defendants’ assets in the United States often makes it [difficult](#) for plaintiffs to collect on judgments and receive monetary compensation. Further, even when a plaintiff successfully obtains a judgment *and* locates the defendant’s assets in the United States, FSIA still requires that the plaintiff identify a separate [exception](#) to immunity from attachment before a court can allow the seizure of a sovereign’s property.

Immunity from Attachment

FSIA begins with a [presumptive rule](#) that property owned by a foreign sovereign entity is immune from attachment, but it also lists a series of exceptions in [28 U.S.C. § 1610](#). For property owned by a foreign state to be exempt from immunity, it must be “used for a commercial activity in the United States” and meet other enumerated conditions. Property owned by an instrumentality of a foreign state (such as state-owned [corporation](#) or [financial institution](#)) may also be exempt, but only if the instrumentality is “engaged in commercial activity in the United States” and other requirements are satisfied. Moreover, under the Supreme Court’s decision in [First National City Bank v. Banco Para El Comercio Exterior De Cuba](#) (“*Bancec*”), there is a presumption of separateness between a foreign state and its instrumentalities, meaning that a plaintiff with a judgment against a foreign state cannot attach property owned by the state’s instrumentalities unless certain conditions—known as the [Bancec factors](#)—demonstrate the state had sufficient control over or interest in the property.

In 2008, Congress added a [new provision](#) to FSIA, subsection (g) of § 1610, which modifies the exceptions to immunity from attachment. The new subsection states:

[T]he property of a foreign state against which a judgment is entered under [the state sponsor of terrorism exception to immunity from suit], and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity . . . is subject to attachment . . . as provided in this section, regardless of [the *Bancec* factors].

Over the course of three decisions issued in 2016, a split has begun to emerge among the United States Circuit Courts of Appeals as to precisely what subsection (g) is intended to allow.

The Emerging Circuit Split over Immunity from Attachment and State Sponsors of Terrorism

A panel of the United States Court of Appeals for the Ninth Circuit was the first to directly address the scope of § 1610(g). In [*Bennett v. Islamic Republic of Iran*](#), a group of 90 plaintiffs with just under \$1 billion in terrorism-related judgments against Iran cited subsection (g) (among other provisions) as a basis for attaching money that two [American companies](#) contractually owed to [Bank Melli](#), an Iranian state bank. Bank Melli opposed the attachment, arguing that, while § 1610(g) eliminated *Bancec*'s presumption of separateness in certain cases, it did not create a new stand-alone exception to immunity from attachment. Under this interpretation, which was also advanced by the United States as *amicus curiae*, a judgment-holder relying on subsection (g) still must satisfy the requirements for exemption from immunity elsewhere in § 1610, including the requirement of a nexus to “commercial activity” in the United States, which Bank Melli argued did not exist. The Ninth Circuit, however, disagreed with this approach and allowed the attachment, reasoning that “subsection (g) contains a freestanding provision for attach[ment]” that is unconnected to the commercial activity requirements elsewhere in § 1610.

Just over one month later, on July 19, a panel of the Seventh Circuit reached the opposite result. In [*Rubin v. Islamic Republic of Iran*](#), the victims of a Hamas suicide bombing and their relatives sought to enforce a \$71.5 million default judgment against Iran by attaching several collections of [ancient Persian artifacts](#) allegedly owned by Iran but held by the Chicago Field Museum of Natural History and the University of Chicago. Departing from its own *dicta* in [prior cases](#) and the Ninth Circuit's reasoning in *Bennett*, the Seventh Circuit held that § 1610(g) “is not itself an exception to execution immunity for terrorism-related judgments[,]” and that the plaintiffs must still satisfy § 1610's commercial activity requirements that pre-date subsection (g). Because Iran was not using the artifacts as part of commercial activity in the United States, the court denied the attachment.

Most recently, on August 2, a panel of the D.C. Circuit indirectly addressed the issue in a way that appears to align with the Ninth Circuit's approach in *Bennett*. In [*Weinstein v. Islamic Republic of Iran*](#), a group of terrorism-related judgment-holders sought to attach the country-based internet domain names for several current or former state sponsors of terrorism—“[.ir](#)” for Iran, “[.sy](#)” for Syria, and “[.kp](#)” for North Korea. The court ultimately denied the request on the ground that the attachment would unduly harm the interests of the Internet Corporation for Assigned Names and Numbers ([ICANN](#)), a third-party which manages the domain name system. But, in the course of its decision, the D.C. Circuit appeared to treat § 1610(g) as an independent “[terrorist activity exception](#)” to immunity from attachment that is not intertwined with the so-called “[commercial activity exception](#)” of § 1610.

With plaintiffs seeking new and creative ways to collect on billions of dollars in outstanding judgments against state sponsors of terrorism like Iran, and with JASTA creating the potential for more terrorism-related judgments against foreign sovereigns, this emerging circuit split and other issues of immunity from attachment in FSIA may continue to be of interest to Congress.

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