

IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 03-5232

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CLIFFORD ACREE, COLONEL, et al.,  
Appellees,

v.

REPUBLIC OF IRAQ, et al.,  
Appellees,

UNITED STATES OF AMERICA,  
Appellant.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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BRIEF FOR THE APPELLANT

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**CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

**A. Parties**

Plaintiffs in this case (appellees here) are: Clifford Acree; M. Craig Berryman; Troy Dunlap; David Eberly; Jeffrey Fox; Guy Hunter; David Lockett; H. Michael Roberts; Russell Sanborn; Lawrence Slade; Joseph Small; Daniel Stamaris; Dale Storr; Robert Sweet; Jeffrey Tice; Robert Wetzel; Jeffrey Zaun; Cynthia Acree; Leigh Berryman; Gail Stubbeffield; Ronald Dunlap; Barbara Eberly; Timm Eberly; Robert Fox; Terrence Fox; Patricia Borden; Nancy Gunderson; Timothy Fox; Mary Hunter; Laura Hunter; William Hunter; Mary Elizabeth Hunter; Patricia Roberts; Starr Barton; Anna Slade; Leanne Small; David Storr; Douglas Storr; Diane Storr; Arthur Sweet; Mary Ann Sweet; Michael Sweet; Jacqueline Wetzel; William Wetzel; James Wetzel; Edward Wetzel; Margaret Wetzel; Paul Wetzel; Kathleen Farber; Anne Kohlbecker; Sally Devin; Marjorie Zaun; Linda Zaun Lesniak; and Calvin Zaun.

Defendants in this case (appellees here) are the Republic of Iraq; the Iraqi Intelligence Service; and Saddam Hussein, in his official capacity as the former President of Iraq.

The United States (appellant here) moved unsuccessfully for leave to intervene in the district court.

**B. Rulings Under Review**

The rulings under review are the district court's July 7, 2003 default judgment in favor of the plaintiffs (JA 265) and its August 6, 2003 order denying the United States' motion to intervene for the purpose of challenging the district court's subject-matter jurisdiction (JA 402).

**C. Related Cases**

This case has not previously been before this Court or any other court, except the district court below.

In a related case, plaintiffs sought unsuccessfully to execute their default judgment against former Iraqi assets vested by the President in the Department of the Treasury. Acree v. Snow, 276 F. Supp. 2d 31 (D.D.C.), aff'd, 2003 WL 22335011 (D.C. Cir. Oct. 7, 2003) (No. 03-5159).

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December 29, 2003

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## GLOSSARY

DFI	Development Fund for Iraq
EIS	environmental impact statement
E.O.	Executive Order
EWSAA	Emergency Wartime Supplemental Appropriations Act of 2003, Pub. L. No. 108-11, 117 Stat. 559
FSIA	Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1601-1611
JA	Joint Appendix
IEEPA	International Emergency Economic Powers Act, 50 U.S.C. § 1701-1706
NEPA	National Environmental Policy Act of 1969
TRIA	Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, 116 Stat. 2322
UNSCR	United Nations Security Council Resolution

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BRIEF FOR THE APPELLANT

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**JURISDICTIONAL STATEMENT**

In filing this lawsuit against the Republic of Iraq and other defendants, plaintiffs invoked the jurisdiction of the district court under 28 U.S.C. §§ 1330(a) and 1605(a)(7), which confer subject-matter jurisdiction over certain claims against any foreign country "designated as a state sponsor of terrorism." JA 31. As explained below, the district court was divested of jurisdiction by section 1503 of the Emergency Wartime Supplemental Appropriations Act of 2003 and the May 7, 2003, Presidential Determination No. 2003-23, which made inapplicable

to Iraq any "provision of law that applies to countries that have supported terrorism," including 28 U.S.C. § 1605(a)(7).

On July 7, 2003, the district court entered a default judgment for the plaintiffs. JA 265. On July 21, 2003, the United States filed a motion to intervene and a motion to vacate the judgment for lack of subject-matter jurisdiction. JA 23. On August 6, 2003, the district court upheld its own subject-matter jurisdiction and denied the motion to intervene. JA 402. On August 22, 2003, the United States filed a notice of appeal. JA 417. This Court has jurisdiction under 28 U.S.C. § 1291.

#### **STATEMENT OF THE ISSUES**

1. Whether section 1503 of the EWSAA and Presidential Determination No. 2003-23 divested the district court of subject-matter jurisdiction over this case.

2. Whether the district court erred in denying the United States' motion to intervene for the purpose of contesting subject-matter jurisdiction.

#### **STATUTES AND EXECUTIVE ORDERS**

The pertinent statutes and executive orders are contained in an addendum to this brief.

#### **STATEMENT OF THE CASE AND OF THE FACTS**

This case presents the question whether section 1503 of the EWSAA and Presidential Determination No. 2003-23 divested the district court of subject-matter jurisdiction over this case. In

April 2002, the plaintiffs invoked the district court's jurisdiction under 28 U.S.C. §§ 1330(a) and 1605(a)(7), which abrogate sovereign immunity for certain claims against any foreign state formally "designated as a state sponsor of terrorism." Subsequently, however, section 1503 of the EWSAA (enacted in April 2003) and Presidential Determination No. 2003-23 (promulgated in May 2003) made inapplicable to Iraq any "provision of law that applies to countries that have supported terrorism." The default judgment in this case was entered some two months later, in July 2003.

#### **A. The Foreign Sovereign Immunities Act**

The Foreign Sovereign Immunities Act of 1976 ("FSIA") establishes a general rule that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States" (28 U.S.C. § 1604), subject only to the exceptions specifically enumerated in 28 U.S.C. §§ 1605 to 1607. The FSIA gives the federal district courts jurisdiction over civil actions against a foreign state when, but only when, one of these immunity exceptions is applicable. 28 U.S.C. § 1330(a). This statutory scheme is the "sole basis for obtaining jurisdiction over a foreign state in our courts." Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434 (1989).

The FSIA represents the third phase in the development of the United States' approach to foreign sovereign immunity. Prior

to 1976, the Executive Branch filed "suggestions of immunity" in individual cases, and the courts "consistently \* \* \* deferred" to those suggestions. See Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 486-87 (1983). From the Nation's founding until 1952, the United States "generally granted foreign sovereigns complete immunity from suit in the courts of this country." Id. at 486. Then, between 1952 and 1976, the Executive Branch advocated, and the courts applied, a "restrictive" theory of immunity under which foreign states were granted immunity for sovereign acts, but not for commercial acts. See id. at 487. Finally, in 1976, the FSIA largely codified the restrictive theory of immunity, in part to relieve the Executive Branch of the "diplomatic pressures" associated with its prior "case-by-case" immunity determinations. See id. at 488. Under the FSIA as originally enacted, as under the predecessor absolute and restrictive theories of immunity, foreign states retained immunity for the acts of their military or police forces outside of the United States, including even gross human rights violations such as acts of torture. See, e.g., Saudi Arabia v. Nelson, 507 U.S. 349, 361-63 (1993); Princz v. Federal Republic of Germany, 26 F.3d 1166, 1173-74 & n.1 (D.C. Cir. 1994).

In 1996, Congress amended the FSIA to restrict the sovereign immunity of any foreign country "designated as a state sponsor of

terrorism" under the Export Administration Act of 1979 or the Foreign Assistance Act of 1961. See 28 U.S.C. § 1605(a)(7). As relevant here, section 1605(a)(7) abrogates foreign sovereign immunity for acts of torture committed by a foreign state while it is so designated. Section 1605(a)(7) applies to claims "arising before, on, or after the date of [its] enactment." Pub. L. No. 104-132, § 221(c), 110 Stat. 1214, 1243 (1996).

**B. Legislative and Executive Actions Regarding Iraq**

1. For more than a quarter-century, Iraq was ruled by the despotic regime of Saddam Hussein. Under Saddam, Iraq invaded neighboring countries without justification, used chemical weapons against its own citizens, supported international terrorism, and defied numerous United Nations Security Council resolutions designed to abate his egregious misconduct. See, e.g., Authorization For Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1501.

On September 13, 1990, the Secretary of State designated Iraq as a state sponsor of terrorism under the Export Administration Act. See 55 Fed. Reg. 37793 (Sept. 13, 1990). As a result, Saddam's regime was subjected to a wide range of legal and economic sanctions, including loss of Department of Defense assistance (10 U.S.C. § 2249a(a)), loss of military contracts (id. § 2327(b)), loss of grants and fellowships to Iraqi nationals (15 U.S.C. § 7410(b)), loss of foreign aid (22 U.S.C.

§ 2371(a)), loss of foreign tax credits (26 U.S.C. § 901(j)(2)(iv)), and restrictions on United States imports (50 U.S.C. App. § 2505(j)). In 1991, a United States-led coalition drove Iraq out of Kuwait, which Saddam had invaded, by military force. JA 151.

2. On March 19, 2003, another United States-led coalition began military operations to disarm Iraq and remove Saddam and his regime from power. The coalition has achieved that objective: Baghdad was liberated on April 9, 2003; major combat operations in Iraq ended on May 1, 2003; and Saddam himself was captured on December 13, 2003.

As military operations successfully progressed, Congress and the President took various further steps to stabilize Iraq and reconstruct it as quickly as possible. In so doing, they recognized the need to ensure significant funding for reconstruction, the importance of reconstruction to the national security and foreign policy of the United States, and the threat to reconstruction from exposing a fragile new Iraqi government, during the period of its infancy, to potentially ruinous liability for the misdeeds of the ousted Hussein regime.

a. On March 20, 2003, the President, acting pursuant to the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. §§ 1701-1706, issued Executive Order 13290. That order confiscated approximately \$2 billion in previously frozen Iraqi

assets, vested those assets in the Department of the Treasury, and directed that the assets be used "to assist the Iraqi people and to assist in the reconstruction of Iraq." 68 Fed. Reg. 14307. In E.O. 13290, the President specifically found that the use of these assets for reconstruction "would be in the interest of and for the benefit of the United States." Ibid.

b. On April 16, 2003, Congress enacted the Emergency Wartime Supplemental Appropriations Act of 2003 ("EWSAA"), Pub. L. No. 108-11, 117 Stat. 559. Section 1503 of the EWSAA, the provision most directly at issue here, authorized the President to "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." Id. at 579. On May 7, 2003, the President exercised the full extent of that authority by issuing Presidential Determination No. 2003-23, which "ma[d]e inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961 and any other provision of law that applies to countries that have supported terrorism." 68 Fed. Reg. 26459 (citation omitted). On May 22, 2003, in a formal report to Congress, the President confirmed that "28 U.S.C. § 1607(a)(7)" was among the provisions of law thus made inapplicable to Iraq. See Message to Congress Reporting the Declaration of a National Emergency With Respect to the

Development Fund for Iraq (hereafter "Message to Congress"), 39 Weekly Comp. Pres. Doc. No. 21, at 647-48.

c. On May 22, 2003, the President, acting pursuant to IEEPA, issued Executive Order 13303. That order prohibits and nullifies "any attachment, judgment, decree, lien, execution, garnishment, or other judicial process" against the Development Fund for Iraq (a fund dedicated to Iraqi reconstruction), against Iraqi petroleum products, and against revenue derived from the sale of those products. 68 Fed. Reg. 31931-32. In E.O. 13303, the President found that the "threat of attachment or other judicial process" against these Iraqi assets "obstructs the orderly reconstruction of Iraq, the restoration and maintenance of peace and security in the country, and the development of political, administrative, and economic institutions in Iraq." Id. at 31931. The President concluded that "[t]his situation constitutes an unusual and extraordinary threat to the national security and foreign policy of the United States." Id.

In his report to Congress, the President elaborated that "[a] major national security and foreign policy goal of the United States is to ensure that the newly established Development Fund for Iraq and other Iraqi resources, including petroleum and petroleum products, are dedicated for the well-being of the Iraqi people, for the orderly reconstruction and repair of Iraq's infrastructure, for the continued disarmament of Iraq, for the

costs of indigenous civilian administration, and for other purposes benefitting the people of Iraq." Message to Congress, supra, at 647. The President also explained that the entry or enforcement of judgments against Iraq would "jeopardiz[e] the full dedication of such assets to purposes benefitting the people of Iraq," and thereby threaten the national security and foreign policy of the United States. See id.

\_\_\_\_\_d. The United States also helped to secure the adoption, on May 22, 2003, of United Nations Security Council Resolution 1483. That resolution instructs the Secretary-General of the United Nations to transfer \$1 billion into the Development Fund for Iraq (§ 17) and obligates member states to "freeze without delay" any Iraqi assets within their borders and to "immediately \* \* \* cause their transfer to" the DFI (§ 23(b)). The resolution confers upon the DFI "immunities equivalent to those enjoyed by the United Nations," and it provides for Iraqi petroleum products to be immune from "any form of attachment, garnishment, or execution" until December 31, 2007. § 22. The resolution contemplates that claims arising from misconduct by the Hussein regime will be resolved when, but only when, a new Iraqi government is firmly established. See id. § 23(b) (claims "may be presented to the internationally recognized, representative government of Iraq").

e. Finally, the President has engaged in diplomatic efforts to make all Iraqi assets available for reconstruction. In June 2003, the Secretary of the Treasury requested his foreign counterparts to "return assets of the former Iraqi regime for the good of the Iraqi people." Treasury Department Press Release, June 27, 2003. More recently, the President appointed former Secretary of State James Baker as his personal envoy to help reduce Iraq's official debt. In so doing, the President explained that the debt "incurred to enrich Saddam Hussein's regime" now "endangers Iraq's long-term prospects for political health and economic prosperity" and should be adjusted "in a manner that is fair and that does not unjustly burden a struggling nation at its moment of hope and promise." Statement of the President on James A. Baker III, December 5, 2003.

### **C. The Litigation Below**

1. Plaintiffs in this case are 17 former American prisoners of war tortured by the Hussein regime during the 1991 Gulf War, eight of their spouses, and 29 of their children, parents, and siblings. JA 42-51. In April 2002, plaintiffs filed this suit against the Republic of Iraq, the Iraqi Intelligence Service, and Saddam Hussein in his official capacity. JA 19. As the sole basis for district court jurisdiction, plaintiffs invoked 28 U.S.C. §§ 1330 and 1605(a)(7). JA 31.

On July 7, 2003, the district court entered a default judgment for the plaintiffs. The court awarded between \$19 million and \$35 million to each former POW, \$10 million to each spouse, \$5 million to each child, parent, or sibling, and \$306 million in punitive damages. JA 265-67. The total judgment exceeded \$959 million. Ibid.

The district court also filed lengthy findings of fact and conclusions of law. JA 147-264. As the sole basis for its own subject-matter jurisdiction, the court invoked 28 U.S.C. §§ 1330 and 1605(a)(7). JA 235-38. However, the court nowhere addressed the question whether section 1605(a)(7) had been made inapplicable to Iraq by section 1503 of the EWSAA and by Presidential Determination No. 2003-23.

2. On July 18, 2003, plaintiffs filed a separate lawsuit against Secretary of the Treasury John Snow. In that action, plaintiffs attempted to enforce their default judgment against the former Iraqi assets vested in the Department of the Treasury by Executive Order 13290. Plaintiffs invoked section 201 of the Terrorism Risk Insurance Act of 2002 ("TRIA"), which permits execution of judgments entered under 28 U.S.C. § 1605(a)(7) against certain "blocked assets" of a "terrorist party." Pub. L. No. 107-297, § 201, 116 Stat. 2322, 2337. The district court ruled for the government on the ground that section 1503 of the EWSAA and Presidential Determination No. 2003-23 had made TRIA

inapplicable to Iraq. Acree v. Snow, 276 F. Supp. 2d 31, 32-33 (D.D.C. 2003). Without reaching that question, this Court affirmed on the alternative ground that assets confiscated from a foreign government and vested in a federal agency pursuant to IEEPA are no longer "blocked assets" of a "terrorist party" subject to execution through TRIA. Acree v. Snow, 2003 WL 22335011 (D.C. Cir. 2003); see Smith v. Federal Reserve Bank of New York, 346 F.3d 264 (2d Cir. 2003).

Throughout the litigation of Acree v. Snow, plaintiffs took the position that the district court's jurisdiction to enter the underlying judgment against Iraq should be resolved through a direct appeal in Acree v. Iraq, and not through what plaintiffs characterized as a collateral attack in Acree v. Snow. See, e.g., Reply Brief For Appellants at 16, Acree v. Snow, D.C. Cir. No. 03-5159 (argument heading: "The Court Should Decide Jurisdictional Issues in the Direct Appeal in the Other Action, Not by an Expedited Collateral Attack Here.").

3. On July 21, 2003, the United States moved to intervene in Acree v. Iraq in order to contest subject-matter jurisdiction. JA 23. Through a proposed motion to vacate, to be filed under and within the time limits prescribed by Fed. R. Civ. P. 59(e), the government sought to argue that section 1503 of the EWSAA and Presidential Determination No. 2003-23 had made 28 U.S.C.

§ 1605(a) (7) inapplicable to Iraq, and thereby divested the court of subject-matter jurisdiction.

The district court upheld its own jurisdiction to enter the default judgment. The court did not dispute that 28 U.S.C. § 1605(a) (7) is a “provision of law that applies to countries that have supported terrorism.” Nonetheless, the court held that section 1503 of the EWSAA and Presidential Determination No. 2003-23 did not render 28 U.S.C. § 1605(a) (7) inapplicable to this case. The court reasoned that section 1605(a) (7) had “waived” Iraq’s foreign sovereign immunity prior to the enactment of section 1503 and that “[s]overeign immunity, once waived, cannot be reasserted.” JA 412 (quoting Aquamar S.A. v. Del Monte Fresh Produce N.A., Inc., 179 F.3d 1279, 1287 n.18 (11th Cir. 1999)). The court stated that its conclusion “comports with the rule that ‘absent a clear statement to the contrary, legislation should not \* \* \* be interpreted to oust a federal court’s \* \* \* jurisdiction over a present case.’” JA 413 (quoting Daingerfield Island Protective Society v. Lujan, 920 F.2d 32, 36 (D.C. Cir. 1990), cert. denied, 502 U.S. 809 (1991)). The court also reasoned that “the defense of sovereign immunity could be asserted only by Iraq” (JA 413) and that neither section 1503 nor the Presidential Determination encompassed judgments against the Iraqi Intelligence Service or Saddam Hussein, as opposed to judgments against Iraq (JA 414).

Despite fully addressing the jurisdictional question presented, the district court nonetheless denied the United States' motion to intervene. The court reasoned that the motion was untimely because the government had not sought to intervene immediately after the May 7 Presidential Determination. JA 405-09. The court further reasoned that its own "obligation" to determine subject-matter jurisdiction "sua sponte" would fully protect the government's interests. JA 412. And it reasoned that allowing intervention within the Rule 59(e) period would prejudice the plaintiffs "by prolonging litigation that is now over." JA 415-16.

#### **SUMMARY OF THE ARGUMENT**

After the United States removed the Hussein regime from power in Iraq, our foreign policy toward that nation changed fundamentally. Now, rather than seeking to impose sanctions on Iraq, Congress and the President have sought to provide assistance to facilitate the prompt and orderly reconstruction of Iraq, and thereby to promote the emergence of a stable, peaceful, and democratic new Iraqi government. This dramatic change in foreign policy is at the heart of this appeal.

I. A. The EWSAA and May 7 Presidential Determination are essential components of the Nation's new foreign policy toward Iraq. Through them, Congress and the President have rendered inapplicable to Iraq the numerous statutory provisions that had

applied to it as a state sponsor of terrorism. Both the text and purpose of the EWSAA confirm that section 1605(a)(7) is among the provisions that no longer apply to Iraq. By its plain language, section 1605(a)(7) is a "provision of law that applies to countries that have supported terrorism," as the section provides jurisdiction only over countries designated by the Secretary of State as state sponsors of terrorism. Moreover, rendering section 1605(a)(7) inapplicable to Iraq was important to achieving the goals of our new foreign policy toward Iraq. As is evident from the President's Message to Congress as well as Executive Order 13303 and United Nations Security Council Resolution 1483, the prospect of judgments against Iraq like that obtained by plaintiffs here threatened the critical task of reconstruction. Even if there were some ambiguity as to the EWSAA's scope, the President's construction of this foreign policy statute is, at the very least, reasonable and entitled to deference.

B. Although the district court did not dispute that section 1605(a)(7) had been rendered inapplicable to Iraq, it erroneously refused to give immediate effect to the EWSAA and Presidential Determination in this case.

1. The district court first incorrectly relied upon a "waiver" rationale. However, waiver is inapplicable here. The court's jurisdiction did not depend on Iraq's waiver of its

immunity, but on the abrogation and subsequent restoration of that immunity by Congress and the President.

2. The district court also erred in refusing to give immediate effect to the May 7 Presidential Determination respecting section 1605(a)(7) absent a "clear statement" that it applied to pending litigation. The most natural reading of section 1503 and the Presidential Determination is that on May 7, 2003, section 1605(a)(7) was immediately rendered unavailable as a basis for rendering judgment against Iraq. This straightforward construction is confirmed by the context and purpose behind section 1503 and the Presidential Determination. The prospect of judgments and attachments growing out of pending litigation posed an immediate threat to the Iraqi reconstruction effort, as recognized and addressed in Executive Order 13303 and UNSCR 1483.

Contrary to the district court's understanding, there is no "clear statement rule" that limits the immediate application of jurisdiction-ousting statutes. Rather, the Supreme Court and this Court repeatedly have held that jurisdiction-stripping enactments are to be given immediate effect in pending cases absent a savings clause that preserves the courts' jurisdiction over previously filed suits. These principles apply where a new law eliminates a judicial forum, leaving the plaintiff with only an administrative remedy.

Plaintiffs are not helped by the presumption against immediate application of statutes that create jurisdiction where none previously existed by eliminating a prior defense to suit. At least four Justices have indicated that the rule concerning statutes that create jurisdiction has no application to jurisdiction-ousting statutes. That is especially so here, where plaintiffs' underlying claims have not been extinguished, but left for resolution through the Executive Branch.

The elimination of a judicial forum for plaintiffs' claims has not deprived them of vested rights or settled expectations of the kind that the presumption of non-retroactivity is meant to protect. There is reduced room for such expectations in the context of foreign affairs, especially with respect to claims concerning the sovereign acts of foreign states. Such claims have traditionally been resolved not through litigation, but through espousal by the Executive Branch. Moreover, plaintiffs' claims were not subject to judicial resolution at the time of their injuries. The fact that such claims are subject to unilateral action by the President has been recognized in cases holding that settlement, or even waiver, of such claims does not constitute a "taking" for purposes of the Fifth Amendment.

As the Supreme Court has confirmed, such foreign policy considerations are critical in assessing the temporal scope of intervening statutes. It was error for the district court to

frustrate the manifest foreign policy purposes of section 1503 and the Presidential Determination through invocation of a "clear statement" rule.

3. The district court's alternative rationale for rejecting the United States' jurisdictional arguments, that only Iraq could assert its immunity from suit, was also erroneous. Under the terms of the FSIA, as the Supreme Court has made clear, the district court has an independent obligation to ascertain its jurisdiction over a claim against a foreign state. Indeed, the district court's reasoning was inconsistent with its own recognition that it had a responsibility to consider the jurisdictional question sua sponte.

4. Finally, the district court erred in holding that, even if it had been deprived of jurisdiction over Iraq, it retained jurisdiction over the Iraqi Intelligence Service and the Saddam Hussein sued in his official capacity. The Iraqi Intelligence Service is a part of Iraq for purposes of the FSIA, and jurisdiction over it pursuant to section 1605(a)(7) fell at the same time that jurisdiction over Iraq pursuant to that provision ended. Nor could the district court continue to exercise jurisdiction under that provision over the former Iraqi President in his official capacity, which would be, in substance, the same thing as a claim against the government itself.

II. The district court's denial of the United States' motion to intervene was also reversible error.

The government's motion to intervene was plainly not untimely under the circumstances here. Although the district court held that the seventy-five day period between the Presidential Determination and the government's motion to intervene constituted undue delay, this Court has held that intervention within a similar period is sufficiently prompt. Nor is it of any moment that the United States' motion for purposes of taking an appeal was filed after judgment was entered. The timing of the United States' motion, which sought to raise only jurisdictional issues, did not prejudice plaintiffs in any way because the district court was required, with or without the United States' participation, to consider the question of its jurisdiction. The United States' foreign policy and national security interests in this case are weighty, and cannot be adequately protected absent intervention.

#### **STANDARDS OF REVIEW**

Jurisdictional rulings are subject to review de novo. See, e.g., Tri-State Hospital Supply Corp. v. United States, 341 F.3d 571, 575 (D.C. Cir. 2003).

The denial of a motion to intervene is reviewed de novo to the extent that it rests on issues of law, for clear error to the extent that it rests on findings of fact, and otherwise for abuse

of discretion. See, e.g., Fund for Animals, Inc. v. Norton, 322 F.3d 728, 732 (D.C. Cir. 2003).

### **ARGUMENT**

The legal issues in this case arise in the context of dramatic world events. The decision of Congress and the President to disarm Iraq and to oust the Hussein regime by military force was plainly one of profound importance to the United States' interests in the world. Similarly important was the related and still ongoing commitment to rebuild Iraq into a stable, democratic regime that will no longer threaten the United States or other nations. The President has declared that the latter goal, no less than the former, is critical to the Nation's larger war against international terrorism. See Address of the President to the Nation, September 7, 2003 (noting that "Iraq is now the central front" in the war on terror, and the effort to rebuild Iraq and Afghanistan "is essential to the stability of those nations, and therefore, to our own security"). As explained in detail below, the importance of that goal is at the heart of this case.

#### **I. THE DISTRICT COURT LACKED SUBJECT-MATTER JURISDICTION TO RENDER ITS JULY 8 DEFAULT JUDGMENT AGAINST IRAQ**

##### **A. Section 1503 of the EWSAA and Presidential Determination No. 2003-23 Made 28 U.S.C. § 1605(a)(7) Inapplicable To Iraq**

1. The district court did not dispute that section 1503 of the EWSAA and Presidential Determination No. 2003-23 made 28

U.S.C. § 1605(a) (7) at least prospectively inapplicable to Iraq. Section 1503 authorized the President to "make inapplicable with respect to Iraq" section 620A of the Foreign Assistance Act or "any other provision of law that applies to countries that have supported terrorism." 117 Stat. at 579. The President fully exercised that power in Presidential Determination No. 2003-23, in which he decided to "make inapplicable with respect to Iraq" section 620A and "any other provision of law that applies to countries that have supported terrorism." 68 Fed. Reg. at 26459. Those provisions plainly encompass 28 U.S.C. § 1605(a) (7), the sole alleged basis for subject-matter jurisdiction in this case.

Section 1605(a) (7) is manifestly a "provision of law that applies to countries that have supported terrorism." By its terms, section 1605(a) (7) abrogates foreign sovereign immunity for certain claims against countries "designated as a state sponsor of terrorism" under section 6(j) of the Export Administration Act or under section 620A of the Foreign Assistance Act. 28 U.S.C. § 1605(a) (7) (A). Section 6(j) of the Export Administration Act authorizes the Secretary of State to determine whether a foreign country "has repeatedly provided support for acts of international terrorism," and restricts the export of goods to any country so designated. 50 U.S.C. app. § 2405(j) (1). Section 620A of the Foreign Assistance Act similarly authorizes the Secretary of State to determine whether

a foreign country "has repeatedly provided support for acts of international terrorism," and precludes foreign assistance to any country so designated. 22 U.S.C. § 2371(a). Because 28 U.S.C. § 1605(a)(7) turns on whether the defendant country has been formally designated as a state sponsor of terrorism, that provision falls within the scope of section 1503 and the Presidential Determination. See Smith v. Federal Reserve Bank of New York, 280 F. Supp. 2d 314, 322-23 (S.D.N.Y.), aff'd on other grounds, 346 F.3d 264 (2d Cir. 2003); Acree v. Snow, 276 F. Supp. 2d at 32-33.

2. This construction is consistent with the policies underlying section 1503 and the various terrorism-based provisions to which it is addressed. Because Iraq formerly supported international terrorism, United States law imposed on it a wide range of legal and economic sanctions designed to discourage that misconduct and to deprive Iraq of resources. See, e.g., 10 U.S.C. § 2249a(a) (loss of Department of Defense assistance); id. § 2327(b) (loss of military contracts); 15 U.S.C. § 7410(b) (loss of grants and fellowships to Iraqi nationals); 22 U.S.C. § 2371(a) (loss of aid under Foreign Assistance Act); 26 U.S.C. § 901(j)(2)(iv) (loss of foreign tax credits); 50 U.S.C. App. § 2505(j) (trade restrictions under Export Administration Act). One important component of these sanctions was the special provisions regarding entry and

enforcement of judgments against state sponsors of terrorism: 28 U.S.C. § 1605(a)(7), which restricts the foreign sovereign immunity of designated state sponsors of terrorism; 28 U.S.C. § 1610(a)(7), which restricts foreign sovereign immunity from execution of judgments based on § 1605(a)(7); and section 201 of TRIA, which further restricts that immunity from execution (see 116 Stat. at 2337-40).

With the ouster of Saddam Hussein and his regime from power, our national security and foreign policy interests towards Iraq have changed fundamentally. Now, rather than seeking to impose sanctions on Iraq, Congress and the President have sought to provide assistance to facilitate the prompt and orderly reconstruction of Iraq, and thereby to promote the emergence of a stable, peaceful, and democratic new Iraqi government. In the EWSAA itself, Congress appropriated almost \$2.5 billion "for rehabilitation and reconstruction in Iraq." 117 Stat. at 573. Subsequently, Congress appropriated an additional \$18.4 billion in reconstruction assistance. See Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan, 2004, Pub. L. No. 108-106, 117 Stat. 1209, 1225-26 (Nov. 6, 2003). Similarly, the President has sought to ensure the availability of Iraqi and other assets for reconstruction, by committing vested assets to reconstruction activities (E.O. 13290, 68 Fed. Reg. at 14307); by nullifying any United States

"judgment" or "execution" against specified Iraqi assets (E.O. 13303, 68 Fed. Reg. at 31931-32); and by urging other nations to reduce Iraq's large foreign debt and to make Iraqi assets immediately available for reconstruction. The President has also determined that adequate funding for reconstruction is "in the interest of and for the benefit of the United States" (E.O. 13290, 68 Fed. Reg. at 14307); that the entry and enforcement of judgments against major Iraqi assets constitutes an "unusual and extraordinary threat to the national security and foreign policy of the United States" (E.O. 13303, 68 Fed. Reg. at 31931); and that "other Iraqi resources" likewise should not be subject to "judgment" or "execution" during the reconstruction process (Message to Congress, supra, at 647). These policy judgments of Congress and the President are shared by the United Nations, which itself has undertaken to provide substantial funding for Iraqi reconstruction (UNSCR 1483 § 17), to confer litigation immunities upon the principal Iraqi assets at this juncture (id. § 22), and to reserve claims against Iraq until a new "internationally recognized, representative government of Iraq" is safely constituted (id. § 23).

Against this backdrop, section 1503 cannot plausibly be construed to exclude 28 U.S.C. § 1605(a)(7) from its coverage of "any provision of law that apply to countries that have supported terrorism." In this case alone, plaintiffs obtained a nearly

billion-dollar judgment against Iraq for atrocities committed by the ousted regime of Saddam Hussein. There was unfortunately no shortage of such atrocities, and there has been no shortage of litigation under section 1605(a)(7) seeking to impose liability on Iraq for such actual or alleged atrocities. See, e.g., Smith v. Islamic Emirate of Afghanistan, 262 F. Supp. 2d 217 (S.D.N.Y. 2003) (alleged Iraqi involvement in terrorist attacks of September 11, 2001); Hill v. Iraq, 175 F. Supp. 2d 36 (D.D.C. 2001) (hostage taking during First Gulf War); Daliberti v. Iraq, 146 F. Supp. 2d 19 (D.D.C. 2001) (torture and hostage taking during First Gulf War). It is hardly surprising that a Congress and a President concerned with ensuring the prompt and orderly reconstruction of Iraq, and the emergence of a stable and democratic Iraqi government, would act, following the elimination of Saddam's regime, to restore to Iraq the same degree of foreign sovereign immunity afforded in United States courts to virtually every other country. Such a restoration would not extinguish any terrorism-based claims against Iraq on the merits, but would (consistent with traditional practice and with UNSCR 1483) preserve such claims pending the establishment of a successor government capable of negotiating the diplomatic or other resolution of claims arising from the misdeeds of its predecessor.

3. The President has construed section 1503 of the EWSAA to encompass 28 U.S.C. § 1605(a)(7). In extending Presidential

Determination No. 2003-23 to section 620A of the Foreign Assistance Act and "any other provision of law that applies to countries that have supported terrorism" (68 Fed. Reg. 26454), the President plainly intended to make his order coextensive with the identically-worded section 1503. Then, in a formal report to Congress, the President construed both provisions to encompass "28 U.S.C. § 1605(a)(7)." See Message to Congress, supra, at 647-48. Because Congress entrusted the implementation of section 1503 to the President, and because the President has independent constitutional authority in the area of foreign affairs in any event, the courts should not lightly second-guess his construction of that provision. See, e.g., Dames & Moore v. Regan, 453 U.S. 654, 668 (1981) (Presidential action in foreign affairs context, authorized by Congress, "'would be supported by the strongest of presumptions and the widest latitude of judicial interpretation'" (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring))). The President's construction of section 1503 to encompass 28 U.S.C. § 1605(a)(7) is at least a permissible (if not compelled) reading of that provision. For that additional reason, this Court should adopt the President's construction.

**B. The District Court Erred In Refusing To Give Effect To Section 1503 And The Presidential Determination In This Case**

The district court did not dispute that section 1605(a)(7) is a "provision of law that applies to countries that have supported terrorism" and, accordingly, that section 1503 and the Presidential Determination have now made section 1605(a)(7) inapplicable to Iraq. Nonetheless, the court refused to give immediate effect to those provisions in this case. In declining to do so, the court erred in several respects.

**1. The Doctrine Of Waiver Is Inapposite**

Initially, the district court held that section 1503 and the Presidential Determination are inapplicable to this case because section 1605(a)(7) had "waived" Iraq's foreign sovereign immunity when the case was filed and "'sovereign immunity, once waived, cannot be reasserted.'" JA 412 (quoting Aguamar S.A. v. Del Monte Fresh Produce N.A., Inc., 179 F.3d 1279, 1287 n.18 (11th Cir. 1999)). That analysis confuses the FSIA's waiver provision, 28 U.S.C. § 1605(a)(1), with the partial abrogation of foreign sovereign immunity effected by section 1605(a)(7).

Section 1605(a)(1) makes foreign sovereign immunity inapplicable to cases "in which the foreign state has waived its immunity either expressly or by implication." Consistent with general concepts of waiver, that provision applies only where a foreign state at some point has deliberately "indicated its

amenability to suit.” Princz v. Federal Republic of Germany, 26 F.3d 1166, 1174 (D.C. Cir. 1994); see Johnson v. Zerbst, 304 U.S. 72, 90 (1938) (“waiver” is “intentional relinquishment or abandonment of a known right”). Plaintiffs accordingly did not, and could not, assert jurisdiction in this case based on section 1605(a)(1). And the principle that sovereign immunity “once waived, cannot be reasserted” follows only from the text of that specific FSIA provision. See 28 U.S.C. § 1605(a)(1) (waiver is effective “notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver”), quoted in Aguamar, 179 F.3d at 1287 n.18.

Section 1605(a)(7) is fundamentally different. That provision does not turn on waiver at all, but instead reflects a decision by Congress to restrict the sovereign immunity of foreign countries that sponsor terrorism. Despite the district court’s erroneous statement that waiver cases decided under section 1605(a)(1) “can be applied to § 1605(a)(7)” (JA 413 n.5), this Court repeatedly has held that foreign states do not constructively “waive” their immunity by engaging even in the kind of egregious misconduct addressed by section 1605(a)(7). See Joo v. Japan, 332 F.3d 679, 686-87 (D.C. Cir. 2003) (no constructive waiver for sexual enslavement); Princz, 26 F.3d at 1173-74 (same for enslavement during Holocaust); see also Sampson v. Federal Republic of Germany, 250 F.3d 1145, 1156 (7th Cir.

2001) (same); Smith v. Socialist People's Libyan Arab Jamahiriya, 101 F.3d 239 (2d Cir. 1996) (same for aircraft sabotage); cf. College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 527 U.S. 666, 680-83 (1999) (distinguishing "waiver" and "abrogation" of state sovereign immunity). Moreover, although section 1605(a)(1) by its terms restricts the ability of defendants to withdraw prior waivers, section 1605(a)(7) does not (and could not) purport to restrict the ability of future Congresses to immediately adjust the rules governing abrogation of foreign sovereign immunity, as warranted by changed circumstances in Iraq or elsewhere.

## **2. Section 1503 And The Presidential Determination Apply To Pending Cases**

The district court did not dispute that section 1503 and the Presidential Determination, insofar as they make 28 U.S.C. § 1605(a)(7) inapplicable to Iraq, are most naturally read to preclude judgments against Iraq that are jurisdictionally based on section 1605(a)(7) and entered after May 7, 2003 (the date on which the Presidential Determination was promulgated). Nonetheless, the court reasoned that that "'absent a clear statement to the contrary, legislation should not \* \* \* be interpreted to oust a federal court's \* \* \* jurisdiction over a present case.'" JA 413 (quoting Daingerfield Island Protective Society v. Lujan, 920 F.2d 32, 36 (D.C. Cir. 1990), cert. denied, 502 U.S. 809 (1991)). The court applied that putative clear

statement rule to render section 1503 and the Presidential Determination entirely ineffective with respect to cases filed under section 1605(a)(7), but not litigated to judgment, prior to the enactment of section 1503. All of that was error.

a. Section 1503 and the Presidential Determination are most naturally construed to preclude the entry of terrorism-based judgments against Iraq after May 7, 2003. On that date, acting with express authorization by Congress, the President undertook to “make inapplicable” to Iraq any “provision of law that applies to countries that have supported terrorism.” 117 Stat. at 579; 68 Fed. Reg. at 26459. Use of the present tense (“make inapplicable”) suggests that any “provision of law that applies to countries that have supported terrorism” (here, 28 U.S.C. § 1605(a)(7)) became immediately inapplicable to Iraq on May 7, 2003. At that time, section 1605(a)(7) was made “inapplicable” as a predicate for the exercise of subject-matter jurisdiction against Iraq under 28 U.S.C. § 1330, thus barring the entry of future judgments based on those provisions. Critically, neither section 1503 nor the Presidential Determination contains any hint of an exception for previously-filed cases.

The context and purpose of section 1503 and the Presidential Determination reinforce this straightforward construction. As explained above, while Saddam’s regime was being driven from power, Congress and the President acted repeatedly to facilitate

the prompt and orderly reconstruction of Iraq. They recognized (including in EWSAA itself) that Iraq urgently needed substantial funding for reconstruction. See, e.g., 117 Stat. at 573; id. at 1225-26; E.O. 13290, 68 Fed. Reg. at 14307. They recognized the threat posed by existing litigation to ongoing reconstruction efforts, and the President (with express authorization from Congress) therefore undertook not only to prohibit the entry of future judgments against certain particularly important Iraqi assets, but also to nullify existing judgments against such assets. E.O. 13303, 68 Fed. Reg. at 13931-32 ("any attachment, judgment, decree, lien, execution, garnishment, or other judicial process" against the DFI or Iraqi petroleum products "is prohibited, and shall be deemed null and void"). They encouraged the United Nations to extend additional litigation immunities designed precisely to defer the resolution of claims against Iraq until a new "internationally recognized, representative government of Iraq" has been safely constituted. UNSCR 1483, § 23(b). And they underscored, of course, the urgency of these various efforts to the national security and foreign policy of this Country. See, e.g., E.O. 13303, 68 Fed. Reg. at 31931 (litigation against Iraq constitutes an "unusual and extraordinary threat posed to the national security and foreign policy of the United States"). Against this backdrop, there is plainly no justification for reading into section 1503 an implied

exception for this and every other terrorism-based case pending against Iraq on the date of its enactment.

b. i. The district court erred in insisting upon a clear statement before giving immediate effect to section 1503 and the Presidential Determination insofar as they ousted the district courts of jurisdiction over pending cases. In Landgraf v. U.S.I. Film Products, 511 U.S. 244, 273 (1994), the Supreme Court explained that statutes "ousting jurisdiction" ordinarily become immediately applicable to pending cases "whether or not jurisdiction lay when the underlying conduct occurred or when suit was filed" (emphasis added). The Supreme Court has invoked and applied that principle repeatedly. See, e.g., Bruner v. United States, 343 U.S. 112, 116-17 (1952) ("when a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law"; this rule "has been adhered to consistently by this Court"); Hallowell v. Commons, 239 U.S. 506, 508 (1916) (ousting provision "made no exception for pending litigation, but purported to be universal, and so to take away the jurisdiction that for a time had been conferred upon the courts of the United States"); Sherman v. Grinnell, 123 U.S. 679, 680 (1887) ("if a law conferring jurisdiction is repealed without a reservation as to pending cases, all such cases fall with the law'" (quoting Railroad Co. v. Grant 98 U.S. (8 Otto) 398, 401 (1878))); The Assessors v. Osbornes, 76 U.S. (9

Wall.) 567, 575 (1869) ("Jurisdiction \* \* \* was conferred by an act of Congress, and when that act of Congress was repealed the power to exercise such jurisdiction was withdrawn, and inasmuch as the repealing act contained no saving clause, all pending actions fell, as the jurisdiction depended entirely upon the act of Congress."); Ex parte McCardle, 74 U.S. (7 Wall.) 506, 514 (1868) ("Jurisdiction is the power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."); ibid. ("no judgment could be rendered in a suit after the repeal of the act under which it was brought and prosecuted").

These principles apply regardless of whether or not there is an alternative judicial forum with continuing jurisdiction over the pending claim. In Hallowell, for example, the Supreme Court gave immediate effect to a statute that divested the district courts of jurisdiction to review certain Indian probate determinations made by the Secretary of the Interior. See 239 U.S. at 507-08. Speaking unanimously through Justice Holmes, the Court concluded that the statute "takes away no substantive right," but, by making "final and conclusive" an Executive Branch determination, "simply changes the tribunal that is to hear the case." Id. at 508. Similarly, in Bruner, the Supreme Court gave immediate effect to an amendment that, by restricting the applicable provision of the Tucker Act, restored the federal

government's sovereign immunity from the disputed claim at issue. See 343 U.S. at 113-14. Anticipating its subsequent analysis in Landgraf, the Court specifically explained that "this jurisdictional rule does not affect the general principle that a statute is not to be given retroactive effect unless such construction is required by explicit language or by necessary implication." Id. at 117 n.8 (quoted in Landgraf, 511 U.S. at 274 n.27).

ii. The district court erroneously claimed support (JA 413) from Daingerfield Island. That case involved a statute divesting the courts of jurisdiction to consider the "factual and legal sufficiency" of an environmental impact statement ("EIS") prepared under the National Environmental Policy Act of 1969. See 920 F.3d at 35-36. However, the statute contained another provision stating that the EIS was "separate from, independent of, and in no way intended to affect or modify any pending litigation." See id. at 35. Applying the plain language of both provisions, this Court held that the intervening statute did divest the district court of jurisdiction over a NEPA claim pending before that court when the statute was enacted, but did not divest the court of jurisdiction over other claims independent of any challenge to the EIS. See id. at 36-37. To be sure, the Court did briefly state (without elaboration) that a "clear statement" is necessary to "oust" jurisdiction in pending

cases, see id. at 36, but it did not cite Hallowell, Bruner, or any of the other contrary Supreme Court cases, much less attempt to reconcile its own dictum with those cases. In any event, to the extent Dangerfield Island might suggest that a “clear statement” is necessary to give immediate effect to statutes ousting a court of jurisdiction, that suggestion is flatly inconsistent with subsequent decisions in Landgraf (511 U.S. at 274) and LaFontant v. INS, 135 F.3d 158, 161-63 (D.C. Cir. 1998), which explain at length that Hallowell and Bruner remain good law. Indeed, in LaFontant, this Court specifically applied Hallowell to give immediate effect to a statute barring any judicial review of certain administrative orders of deportation. See id. at 165. The court explained that the provision at issue, by making conclusive administrative adjudications rendered by the Executive Branch, “takes away no substantive right, but simply changes the tribunal that is to hear the case.” Id. at 162 (quoting Hallowell, 238 U.S. at 508).

iii. The district court did not claim support from Hughes Aircraft Co. v. United States ex rel. Schumer, 520 U.S. 939 (1997). That case recognized that, if a statute “creates jurisdiction where none previously existed,” it can affect “substantive rights” in ways relevant to a proper analysis of statutory retroactivity. Id. at 951 (emphasis in original). Hughes involved an amendment removing a jurisdictional bar to

certain qui tam suits under the False Claims Act. The Court reasoned that, because the amendment “eliminate[d] a defense” (id. at 948) and “permitt[ed] actions by an expanded universe of plaintiffs” (id. at 950), it affected “substantive rights” as well as “jurisdiction” for retroactivity purposes. See id. at 950-51. Accordingly, the Court held the amendment inapplicable (absent a clear statement to the contrary) to primary conduct occurring prior to the date of its enactment. See id. at 941.

Hughes is unhelpful to plaintiffs here. To begin with, Hughes addressed statutes that create jurisdiction, and it is far from clear that the case has any relevance at all to jurisdiction-ousting statutes like those at issue in Hallowell and Bruner. See Lindh v. Murphy, 521 U.S. 320, 342-43 & n.3 (1997) (Rehnquist, C.J., dissenting) (“nothing in Hughes disparaged our longstanding practice of applying jurisdiction-ousting statutes to pending cases” (citing Hallowell and Bruner)). The majority in Lindh did not reach that issue because, as this Court later explained in LaFontant, the Lindh majority relied on “what it held to be a clear expression of legislative intent” that the statute at issue not apply to cases pending on the date of its enactment. 135 F.3d at 162; see 521 U.S. at at 326 (“[t]he statute reveals Congress’s intent to apply the amendments to chapter 153 only to such cases as were filed after the statute’s enactment”). In any event, this Court

specifically has held that neither Hughes nor Lindh undermine Hallowell's square holding that jurisdiction-ousting statutes do not affect substantive rights (and thus presumptively apply to judgments rendered immediately after their enactment) at least where the underlying claims can be referred to the Executive Branch for resolution. See LaFontant, 135 F.3d at 162-65. As explained below, that principle applies to this case.

c. In this case, an analysis regarding the temporal scope of section 1503 and the Presidential Determination must take into account the sensitive foreign policy context in which those provisions arise. Ultimately, the presumption against statutory retroactivity is designed to protect "vested rights" or "settled expectations" from being too lightly upset. INS v. St. Cyr, 533 U.S. 289, 320-21 (2001); see Landgraf, 511 U.S. at 240 ("familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance" in determining whether a statute "operates 'retroactively'" at all). Accordingly, as this Court has recognized, an analysis of the temporal scope of foreign affairs statutes must take into consideration that there is "reduced room for justifiable expectation" in that context. Natural Resources Defense Council v. United States Nuclear Regulatory Commission, 580 F.2d 698, 699 (D.C. Cir. 1978). In the foreign affairs context, foreign countries have always enjoyed absolute or broad immunities from suit in United States

courts, see, e.g., Saudi Arabia v. Nelson, 507 U.S. at 355-63; Verlinden, 461 U.S. at 486-88, and the Executive Branch has always possessed broad Article II authority to negotiate the diplomatic settlement of claims by United States citizens against foreign governments with or without the citizens' consent. See, e.g., Dames & Moore, 453 U.S. at 679; Roeder v. Islamic Republic of Iran, 333 F.3d 228, 333 (D.C. Cir. 2003). Thus, while a foreign sovereign might well have its "settled expectations" upset by the application of new abrogations of sovereign immunity to cases arising from pre-enactment conduct, see, e.g., Joo v. Japan, 332 F.3d 679, 684-85 (D.C. Cir. 2003), it is difficult to envision a case where the immediate application of a restoration of foreign sovereign immunity would upset the "settled expectations" of a claimant in any way that might trigger Landgraf concerns. This is plainly not such a case.

In 1991, at the time of the primary conduct at issue, plaintiffs had no right to litigate their claims against Iraq in the courts of the United States. Section 1605(a)(7) was not inserted into the FSIA until 1996, and the FSIA prior to 1996 preserved sovereign immunity for (and thus did not confer subject-matter jurisdiction over) claims of "wrongful arrest, imprisonment, and torture" committed by the police or military of a foreign state outside the United States. Saudi Arabia v. Nelson, 507 U.S. at 361-63; see Princz, 26 F.3d at 1173-74 (no

immunity exception for claims arising out of the Holocaust); Smith v. Socialist People's Libyan Arab Jamahiriya, 101 F.3d at 247 (no immunity exception for claims against Libya for terrorist bombing of Pan Am Flight 103).

In addition, although section 1605(a)(7) later provided a basis for subject-matter jurisdiction, it did not confer upon the plaintiffs any private right of action. By its terms, that provision merely defines circumstances in which "[a] foreign state shall not be immune from the jurisdiction" of the United States courts, 28 U.S.C. § 1605(a) (emphasis added), and it is well-settled that jurisdictional statutes do not give rise to private rights of action, see, e.g., Touche Ross & Co. v. Reddington, 442 U.S. 560, 577 (1979); United States v. Testan, 424 U.S. 392, 398 (1976). Moreover, in providing that section 1605(a)(7) would apply to "any cause of action arising before, on, or after the date of the enactment of this Act" (110 Stat. at 1243), Congress confirmed that the cause of action, if any, would arise from other sources of law. Furthermore, Congress later did provide a cause of action for the conduct specified in section 1605(a)(7), but it restricted that cause of action to any "official, employee, or agent of a foreign state" designated as a state sponsor of terrorism, see 28 U.S.C. § 1605 note (Flatow Amendment), and it conspicuously declined to "list 'foreign states' among the parties against whom \* \* \* an action may be

brought.” Price v. Socialist People's Libyan Arab Jamahiriya, 294 F.3d 82, 87 (D.C. Cir. 2002). Although this Court has not yet finally resolved the question whether section 1605(a)(7) creates an implied private right of action (or the related question whether the Flatow Amendment permits plaintiffs to sue foreign states), it has repeatedly expressed skepticism on this point. See, e.g., Roeder, 333 F.3d at 234 & n.3 (question is “unclear”); Price, 294 F.3d at 87 (question is “far from clear”).<sup>1</sup> In making section 1605(a)(7) inapplicable to Iraq, section 1503 and the Presidential Determination thus did not deprive plaintiffs of any cause of action. Instead, they simply ousted the courts of jurisdiction, and thereby returned plaintiffs to the identical legal position they were in at the time of the underlying misconduct.

Plaintiffs’ expectations also must be assessed in light of the traditional authority of the Executive Branch, in the exercise of its foreign affairs powers under Article II, to preclude or settle claims by United States citizens against foreign governments. The Executive branch has routinely exercised that authority to resolve major foreign policy disputes with or without its citizens’ consent. See, e.g., American Insurance Ass’n v. Garamendi, 123 S. Ct. 2374, 2387 (2003)

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<sup>1</sup> These questions are presented in Cicippio-Puleo v. Islamic Republic of Iran, D.C. Cir. No. 02-7085 (argued Dec. 15, 2003).

(claims arising from Holocaust) ("Making executive agreements to settle claims of American nationals against foreign governments is a particularly longstanding practice, the first example being as early as 1799 \* \* \*."); Dames & Moore, 453 U.S. at 679-80 (claims arising from Iranian hostage crisis) (finding it "undisputed that the United States has sometimes disposed of the claims of its citizens without their consent, or even without consultation with them, usually without exclusive regard for their interests, as distinguished from those of the nation as a whole"); Roeder, 333 F.3d at 235 (claims arising from Iranian hostage crisis) ("The authority of the President to settle claims of American nationals through executive agreements is clear"); Joo, 332 F.3d at 684-85 (1951 Treaty of Peace with Japan "manifests the parties' intent to resolve matters arising from World War II without involving the courts of the United States"). Given this established Executive Branch power to settle claims against foreign sovereigns through diplomacy, such settlements "cannot be said to have 'interfered with distinct investment-backed expectations'" for Takings Clause purposes. Belk v. United States, 858 F.2d 706, 710 (Fed. Cir. 1988) (quoting Penn Central Transp Co. v. New York City, 438 U.S. 104, 124 (1978)) (Algiers Accords, settling hostage claims against Iran, did not effect a taking); see also Abraham-Youri v. United States, 139 F.3d 1462, 1468 (Fed. Cir. 1997) (upholding mass settlement

pursuant to Algiers Accords) (“those who engage in international commerce must be aware that international relations sometimes become strained, and that governments engage in a variety of activities designed to maintain a degree of international amity”). There is no discernible reason why the far less disruptive action of restoring a traditional immunity of a foreign sovereign (which does not compromise the merits of any claim) should be deemed to interfere with the kind of “settled expectations” that Landgraf seeks to protect (511 U.S. at 240), for private parties cannot possibly have any “settled expectation” of being able to litigate to judgment their war-related claims against a foreign sovereign.

Indeed, the Supreme Court has confirmed the critical importance of foreign affairs considerations in assessing the temporal scope of intervening statutes. In United States v. The Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801), the Court gave immediate effect, in the case before it, to a treaty enacted after the court of appeals had rendered its judgment. The Court construed the treaty to require such immediate application (see id. at 108), and it specifically held that the intended construction could not be subverted by a retroactivity-based clear statement rule. Speaking unanimously through Chief Justice Marshall, the Supreme Court explained: “in mere private cases between individuals, a court will and ought to struggle hard

against a construction which will, by a retrospective operation, affect the rights of parties, but in great national concerns where individual rights, acquired by war, are sacrificed for national purposes, the contract making the sacrifice ought always to receive a construction conforming to its manifest import; and if the nation has given up the vested rights of its citizens, it is not for the court, but for the government, to consider whether it be a case proper for compensation." Id. at 110. Although Landgraf much later construed the treaty at issue in Schooner Peggy to apply "unambiguously" to pending cases (511 U.S. at 273), nothing in that construction undercuts the alternative ground of decision stated in Schooner Peggy itself: that concerns about statutory retroactivity are far diminished in the context of "great national concerns" such as war-related claims between citizens of this country and foreign governments.

Moreover, precisely because the Executive Branch can and does espouse such claims, plaintiffs are not left without any forum. See, e.g., Antolok v. United States, 873 F.2d 369, 375 (D.C. Cir. 1989) ("In international law the doctrine of 'espousal' describes the mechanism whereby one government adopts or 'espouses' and settles the claim of its nationals against another government."). Although section 1503 and the Presidential Determination operate to deprive plaintiffs of a domestic judicial forum, plaintiffs still may seek espousal of

their claims by the Executive Branch. Indeed, that is the traditional remedy for plaintiffs such as these. See, e.g., Johnson v. Eisentrager, 339 U.S. 763, 789 n.14 (1950) (“the rights of our citizens against foreign governments are vindicated only by Presidential intervention”); Note, Avoiding Expropriation Loss, 79 Harv. L. Rev. 1666, 1666 (1966) (where foreign sovereign immunity prevents litigation in United States courts, injured parties may seek espousal). To be sure, the form of such espousal may remain unclear at this juncture, see UNSCR 1483 § 23(b) (preserving claims against Iraq until new “internationally recognized” government is established), but that is hardly surprising given the unfinished business of Iraqi reconstruction. Cf. Joo, 332 F.3d at 684 (World War II claims against Japan settled by treaty in 1951). In any event, because plaintiffs may present their claims to the Executive Branch for espousal, the elimination of a judicial forum is plainly not retroactive at all. See Hallowell, 239 U.S. at 508 (statute that “restored to the Secretary” prior unreviewable authority “takes away no substantive right, but simply changes the tribunal that is to hear the case”); LaFontant, 135 F.3d at 160, 162, 165 (statute eliminating judicial review of administrative order “is not impermissibly retroactive because it does not attach new substantive legal consequences to those proceedings,” in case where agency denied discretionary relief) (emphasis in original).

When Congress abrogated foreign terrorist states' immunity in 1996, plaintiffs benefitted from a new foreign policy in that they were able to file a suit for which there would have been no jurisdiction at the time of their injuries. But given the well-established legal principles above, plaintiffs would reasonably have understood that Congress could oust the courts of jurisdiction if a change in the Nation's foreign policy so required. The decision to disarm Iraq and eliminate the Hussein regime by military force and the undertaking, in conjunction with our military partners, of responsibility for Iraq's reconstruction plainly qualify as a dramatic change in foreign policy. Congress and the President were free, in order to eliminate an obstacle to the Nation's changed post-war foreign policy goals, to terminate the district court's jurisdiction over plaintiffs' claims by rendering 28 U.S.C. § 1605(a)(7) "inapplicable" to Iraq. Cf. Joo, 332 F.3d at 684-85 (1951 treaty with Japan intended "to resolve matters arising from World War II without involving the courts of the United States").

### **3. The District Court Was Obligated To Determine Its Own Subject-Matter Jurisdiction**

The district court next reasoned that "[e]ven if the Presidential Determination operated to restore Iraq's \* \* \* sovereign immunity in this case, the defense of sovereign immunity could be asserted only by Iraq, not by the United States." JA 413. Under the FSIA, however, "subject matter

jurisdiction turns on the existence of an exception to foreign sovereign immunity." Verlinden, 461 U.S. at 494 n.20; see 28 U.S.C. § 1330(a) (conferring jurisdiction only if the defendant foreign state "is not entitled to immunity"). Accordingly, "even if the foreign state does not enter an appearance to assert an immunity defense, a district court still must determine that immunity is unavailable under the Act." Verlinden, 461 U.S. at 494 n.20 (emphasis added). Iraq's default thus would not even permit, much less compel, the district court to avoid the sovereign immunity questions raised by the enactment of section 1503 and the promulgation of the Presidential Determination.

The district court's own reasoning on this point is internally inconsistent. Despite asserting that "only" Iraq could assert the "defense of sovereign immunity" (JA 413), the district court also recognized that it remained under a continuing "obligation" to determine subject-matter jurisdiction "sua sponte" (JA 412), and it further recognized that 28 U.S.C. § 1330 "provides for original jurisdiction" only in cases where the defendant foreign state "is not entitled to immunity" (ibid.). Those correct premises required the district court to determine whether section 1503 and the Presidential Determination divested the court of jurisdiction in this case, which the court ultimately did in any event.

**4. The District Court Was Divested Of Jurisdiction Over Claims Against The Iraqi Intelligence Service And Saddam Hussein In His Official Capacity**

Finally, the district court concluded that section 1503 and the Presidential Determination affected the sovereign immunity only of Iraq, but not of the Iraqi Intelligence Service or Saddam Hussein in his official capacity. JA 414-15. The district court erred in attempting to distinguish claims against Iraq from claims against one of its constituent agencies and from claims against one of its officers sued in his official capacity.

The Iraqi Intelligence Service is obviously part of Iraq itself. Because that agency conducts governmental as opposed to commercial activities, it is treated as Iraq for all FSIA purposes. See, e.g., Roeder, 333 F.3d at 234-35; Transaero, Inc. v. La Fuerza Aerea Boliviana, 30 F.3d 148, 149-50 (D.C. Cir. 1994). Moreover, even if the Iraqi Intelligence Service were a mere commercial "agency or instrumentality" of Iraq, it would still be treated as Iraq for purposes of both subject-matter jurisdiction under 28 U.S.C. § 1330(a) and immunity under 28 U.S.C. §§ 1605-1607. See 28 U.S.C. § 1603 (defining "foreign state" for these purposes to include "an agency or instrumentality of a foreign state"). To be sure, neither section 1503 nor the Presidential Determination specifically define what constitutes "Iraq" for purposes of those provisions. Nonetheless, ordinary usage strongly suggests that "Iraq"

includes the governmental agencies through which that country necessarily must function, and a contrary construction would make section 1503 and the Presidential Determination virtually useless, not only as applied to 28 U.S.C. § 1605(a)(7), but also as applied to all other terrorism-based provisions that Congress and the President sought to make "inapplicable with respect to Iraq."

With respect to Saddam, plaintiffs sued him only "in his official capacity" as President of Iraq. JA 30. An official-capacity claim against a government official is in substance a claim against the government itself. See, e.g., Kentucky v. Graham, 473 U.S. 159, 165 (1985) (official-capacity suits "'represent only another way of pleading an action against an entity of which an officer is an agent,'" (quoting Monell v. New York City Dep't of Social Services, 436 U.S. 658, 690 n.55 (1978))). Accordingly, "a plaintiff seeking to recover damages in an official-capacity suit must look to the government entity itself." Id. at 166. To the extent that Iraq itself has sovereign immunity against the entry of damages judgments, it must also have sovereign immunity against what amounts to exactly the same thing: the entry of damages judgments, enforceable

against the state fisc, against officers sued in their official capacities.<sup>2</sup>

## **II. THE UNITED STATES' MOTION TO INTERVENE WAS A TIMELY EFFORT TO PRESERVE THE ISSUE OF THE DISTRICT COURT'S JURISDICTION FOR APPELLATE REVIEW**

Within the time allowed by Fed. R. Civ. P. 59(e), the United States sought to intervene for the sole purpose of contesting the district court's jurisdiction to enter a nearly billion-dollar default judgment against Iraq. Despite recognizing its own continuing duty to consider subject-matter jurisdiction at that stage of the case, the district court denied the motion to intervene as untimely, unnecessary to protect the government's interests, and unfairly prejudicial to the plaintiffs. The district court's denial of intervention was error.

A. The timeliness of an intervention motion is determined "in consideration of all the circumstances, especially weighing the factors of [1] time elapsed since the inception of the suit, [2] the purpose for which intervention is sought, [3] the need for intervention as a means of preserving the applicant's rights, and [4] the probability of prejudice to those already parties to the case." Smoke v. Norton, 252 F.3d 468, 471 (D.C. Cir. 2001). Each of those considerations supports intervention.

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<sup>2</sup> Plaintiffs did not sue Saddam in his individual capacity. Had they done so, any ensuing damages judgment would have been enforceable only against his individual assets, rather than against the assets of Iraq itself. See, e.g., Hafer v. Melo, 502 U.S. 21, 25 (1991).

1. In a case such as this one, “[t]imeliness is measured from when the prospective intervenor ‘knew or should have known that any of its rights would be directly affected by the litigation.’” Roeder, 333 F.3d at 233 (quoting National Wildlife Federation v. Burford, 878 F.2d 422, 433-34 (D.C. Cir. 1989), rev’d on other grounds sub nom. Lujan v. National Wildlife Federation, 497 U.S. 871 (1990)); see JA 406. The government here filed its motion to intervene 75 days after the Presidential Determination became effective. On at least two occasions, this Court has ordered intervention given comparable waiting periods. In National Wildlife Federation, the Court held that a district court abused its discretion in denying as untimely a motion to intervene filed seventy-three days after the party learned its interests were at stake. 878 F.2d at 433-34 (stressing that intervenor had “acted promptly”). Similarly, in Fund for Animals v. Norton, 322 F.3d 728 (D.C. Cir. 2003), the Court reversed a denial of intervention where the would-be intervenor filed its motion within approximately two months of learning that its interests were at stake. Id. at 734-35 (finding timeliness and other intervention issues “not difficult at all”).

2. The United States sought to intervene solely for the purpose of contesting the district court’s subject-matter jurisdiction. As the district court recognized (JA 412), it remained under a continuing duty to consider subject-matter

jurisdiction so long as its judgment remained subject to further revision. See, e.g., Mansfield, Coldwater & Lake Mich. Ry v. Swan, 111 U.S. 379 (1884). Accordingly, the government's challenge to subject-matter jurisdiction, asserted within the time period for filing a motion to alter or amend a judgment under Fed. R. Civ. P. 59(e), was timely as a matter of law.

The district court erred (JA 408) in analogizing this case to NAACP v. New York, 413 U.S. 345 (1973), which held untimely a post-judgment motion to intervene filed seventeen days after the movant learned that its interests were at stake. Id. at 367. In that case, the putative intervenor sought, post-judgment, to interject new merits arguments into the case. See id. Moreover, the Supreme Court stressed that allowing intervention in that election case could disrupt "rapidly approaching primary elections in New York" (id. at 369) and that the putative intervenor could raise its objections by other means (id. at 368). Neither of those circumstances is present here. Moreover, despite the district court's erroneous suggestion to the contrary (JA 407-08), there is no general rule disfavoring post-judgment intervention. Even where merits claims are at issue, numerous cases have approved post-judgment intervention for the purpose of pursuing an appeal. See, e.g., Bryant v. Yellen, 447 U.S. 352, 366-68 (1980); United Airlines v. McDonald, 432 U.S. 385, 395-96 (1977); Smoke, 252 F.3d at 471.

3. Intervention here is essential for the United States to protect its weighty foreign policy interests. The district court erroneously suggested (JA 410-11) that the United States' interests were adequately protected by its successful defense against the attachment of former Iraqi assets attempted in Acree v. Snow. However, although the United States did have a clear interest in protecting vested assets from attachment, it also has a distinct foreign policy interest in ensuring that our courts give immediate effect to Iraq's restored sovereign immunity. As plaintiffs themselves have argued, "[e]ven if the Executive were to return all of the blocked [now vested] assets to Iraq \* \* \* the judgment would remain an obligation to be dealt with by any new government of Iraq and a failure to meet that obligation could mean substantial continuing legal difficulties for the new government." JA 328. That is precisely why section 1503 and the Presidential Determination made immediately inapplicable to Iraq not only terrorism-based attachment provisions such as section 201 of TRIA, but also terrorism-based abrogations of sovereign immunity such as 28 U.S.C. § 1605(a)(7), and it is precisely why the United States has a substantial foreign policy interest in ensuring that courts adhere to those provisions.

Moreover, although the defense of immunity may be Iraq's (JA 413-14), the United States nonetheless may intervene to protect this Nation's own foreign policy interests. For example,

in Persinger v. Islamic Republic of Iraq, 729 F.2d 835, 836-38 (D.C. Cir. 1984), this Court held that the United States may intervene as of right to raise jurisdictional and immunity defenses where, as here, a foreign government has failed to appear and the United States' own foreign policy interests are implicated. Similarly, in Roeder, this Court described the government interest supporting intervention not as "providing Iran with a defense," but as "upholding the Algiers Accords." 333 F.3d at 232-33. Here, the United States' own foreign policy interest in upholding the Presidential Determination provides the basis for its intervention.

Finally, the district court asserted (JA 411-12) that its own "sua sponte" consideration of subject-matter jurisdiction would adequately protect the United States' interests. That is manifestly incorrect. The district court has rejected the United States' jurisdictional contentions, and there is presently no Iraqi government in place that could raise those (or any other) contentions on appeal. Given the court's recognition that it was obligated to resolve the jurisdictional questions in any event, the denial of intervention here serves no purpose other than to make appellate review more difficult.

4. The district court erred in concluding (JA 415-16) that intervention would prejudice the plaintiffs by "prolonging litigation that is now over." As explained above, the court

remained under a continuing obligation to consider its own subject-matter jurisdiction, at least during the time when the judgment was subject to revision under Rule 59(e), and the court did, in fact, promptly consider and reject the jurisdictional objections raised by the United States. Thus, the only further risk to plaintiffs from intervention would be the opportunity for the United States to appeal to this Court, as a party, directly from the judgment against Iraq. Such appellate review, pursuant to 28 U.S.C. § 1291 and within the time frames provided by the Federal Rules of Appellate Procedure, cannot constitute legal prejudice.

B. In addition to its timeliness ruling, the district court denied intervention as a matter of right on the ground that the United States' interests were adequately protected (JA 410-12), and it denied permissive intervention on the ground that plaintiffs would suffer prejudice (JA 416). For the reasons given, those rulings are no more sustainable as freestanding holdings on intervention than they are as components of the court's erroneous timeliness holding.

**CONCLUSION**

For the foregoing reasons, this Court should reverse the district court's denial of the United States' motion to intervene, vacate the district court's July 7 default judgment, and remand the case with instructions to dismiss for lack of subject-matter jurisdiction.

Respectfully submitted,

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DECEMBER 2003

**CERTIFICATE OF COMPLIANCE**

In accordance with Fed. R. App. P. 32(a)(7)(C), I certify that this brief was prepared using WordPerfect 9 in a monospaced typeface (Courier New) with 10 characters per inch, and contains 11,996 words.

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December 29, 2003

**CERTIFICATE OF SERVICE**

I hereby certify that I have, this 29th day of December, 2003, served two copies of the foregoing Brief For The Appellant and one copy of the Joint Appendix on the counsel listed below by United States mail.

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