UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID M. ROEDER, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 08-0487 (EGS)
	)	Judge: Emmet G. Sullivan
THE ISLAMIC REPUBLIC OF IRAN,	)	
	)	
Defendant.	)	
	)	
	)	

MEMORANDUM IN SUPPORT OF UNITED STATES' MOTION TO DISMISS

INTRODUCTION

On November 4, 1979, Iranian militants seized the American Embassy in Tehran, Iran, and took as hostages more than 50 U.S. diplomatic and military personnel who were stationed there. Roeder v. Islamic Republic of Iran, 195 F. Supp. 2d 140, 146 (D.D.C. 2002), aff'd, Roeder v. Islamic Republic of Iran, 333 F. 3d 228 (D.C. Cir. 2003) (both referred to herein as "Roeder I"). The plaintiffs in this putative class action, former U.S. hostages or their family members, seek compensation from Iran for the heinous wrongs they have suffered arising out of the hostage taking. The gratitude of the United States for the service and dedication of these brave individuals cannot be overstated, nor can the suffering and abuse they endured on behalf of this country be exaggerated; these matters are beyond dispute.

To obtain the release of the plaintiff hostages, the United States, through an international agreement known as the Algiers Accords, agreed to preclude the prosecution of any claims against Iran arising out of the hostage taking. That binding international commitment must be honored by the United States unless and until Congress (1) abrogates the Algiers Accords

expressly in conjunction with relevant legislation, or (2) unambiguously creates a cause of action for the embassy hostage plaintiffs against Iran. Congress has done neither. Accordingly, plaintiffs have failed to state a claim upon which relief can be granted. The United States has sought intervention in this case, and now moves to dismiss, in order to carry out its obligations under the Algiers Accords.

By statute, foreign states are immune from suit unless Congress creates an exception to immunity. Beginning in 1996, Congress passed a series of laws which together created an exception to foreign sovereign immunity to allow individuals harmed by acts of terrorism to sue state sponsors of terrorism in certain circumstances and also created a cause of action against foreign officials and later against foreign governments. Plaintiffs in this case previously sued Iran in 2000, but their case was dismissed because Congress had not created a private right of action against Iran in abrogation of the Algiers Accords. Plaintiffs' present case is based on a purported new cause of action against Iran arising from Section 1083 of the National Defense Authorization Act for Fiscal Year 2008, Pub. L. 110-181, 122 Stat. 3, § 1083 ("Section 1083"), enacted in January 2008, which in specified circumstances creates a private right of action against foreign governments that engage in terrorism.

While Section 1083 may create a private right of action against foreign governments like Iran for other terrorist acts, it stops far short of creating a private right of action for claims arising out of the 1979 hostage taking. Because of the Court's dismissal of plaintiffs' prior suit, Congress was well aware that only a clearly expressed abrogation of the Algiers Accords would permit a cause of action arising out of the 1979 hostage taking. Nevertheless, Section 1083 makes no mention of the Accords. Alternatively, Congress could have explicitly stated in

Section 1083 that it was creating a private right of action against Iran for claims arising out of the 1979 Iranian hostage taking; but Section 1083 contains no such unambiguous language. For the Court to read the statute to repudiate an international executive agreement like the Algiers Accords without a clear signal of intent to create a cause of action for the 1979 hostage taking would be contrary to longstanding precedent and would seriously compromise the United States' foreign relations. See Bennett v. Iran, __ F. Supp. 2d __, 2009 WL 841135, *14 (D.D.C. March 31, 2009) (noting the United States' appearance in order "to uphold its obligations under multi-national treaties in furtherance of broader foreign policies objectives").[1]

LITIGATION HISTORY

In 1996, Congress passed the Federal Anti-Terrorism, and Effective Death Penalty Act (the "Anti-Terrorism Act"), and the Flatow Act,[2] which respectively removed foreign sovereign immunity for acts of terrorism through an exception to the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602 et seq., and created a cause of action for individuals harmed by state-sponsored acts of terrorism. A predecessor case brought by plaintiffs' class of former hostages and their families, Roeder I, commenced in 2000 and was based on that legislation.[3] The United

[1] While Congress has not chosen to expressly waive the Accords, it directly awarded compensation to the hostages for their ordeal. See, e.g., Victims of Terrorism Compensation Act, Pub. L. No. 99-399, §§ 802, 803, 100 Stat. 853 (1986) (providing for payments of $50 for each day of captivity as well as medical, educational, and other benefits); Hostage Relief Act of 1980, Pub. L. No. 96-449, 94 Stat. 1967 (1980) (providing compensation for hostages' tax liabilities as well as other benefits).

[2] Courts frequently refer to the Flatow Act as the "Flatow Amendment," even though it did not actually amend the Foreign Sovereign Immunities Act and is instead a separate law, reprinted as a note to 28 U.S.C. § 1605.

[3] The instant case is actually the third lawsuit brought by Americans who had been taken hostage by Iran in 1979. The earliest lawsuit, Persinger v. Islamic Republic of Iran, 729 F.2d 835

States intervened in Roeder I and argued that the terrorism exception to the FSIA did not apply so as to remove Iran's immunity and thereby confer subject matter jurisdiction on the Court. While Roeder I was pending, Congress passed additional legislation, Pub. L. 107-77, 115 Stat. 748 (2001) ("Section 626(c)"), designed to confer jurisdiction. Even so, the Court found no clear expression of intent by Congress in the Flatow Act to abrogate the Algiers Accords and create a private right of action for the plaintiffs against Iran. The Court found that, while the Flatow Act created a private right of action against the officials of a foreign government, it did not create any private right of action against the foreign government itself. The Court also found that Section 626(c) only affected the Court's jurisdiction and did not abrogate the Accords to provide a cause of action.

In January 2008, the FSIA was amended to create, in specified circumstances, a private right of action against a foreign government for acts of hostage taking and torture. Section 1083. The case now before the Court was brought after enactment of Section 1083 by the same class of former hostages and their families that brought Roeder I.

STATUTORY BACKGROUND

The FSIA grants foreign states immunity from liability in United States courts, 28 U.S.C. § 1604; Roeder I, 195 F. Supp. 2d at 148, unless one of various specific exceptions to this immunity applies, Roeder I, 333 F.3d at 235; Roeder I, 195 F. Supp. 2d at 149. Unless a specific exception applies, a federal court lacks subject-matter jurisdiction over a claim against a foreign state. Roeder I, 195 F. Supp. 2d at 149. Through the Flatow Act, passed in 1996, Congress created a private right of action against foreign officials of a terrorist state. Through Section

(D.C. Cir. 1984), was dismissed on the ground that Iran was immune from suit under the FSIA.

626(c), enacted in 2001,Congress removed Iran's sovereign immunity for acts related to Roeder I, thereby arguably creating jurisdiction over Iran in Roeder I.[4] The statutory provision at issue here, Section 1083 of the National Defense Authorization Act for Fiscal Year 2008, Pub. L. 110-181, 122 Stat. 3, § 1083, incorporates the two prior amendments to the FSIA (i.e., the Anti-Terrorism Act and Section 626(c)), and in addition, creates a private right of action against foreign governments (as well as against foreign officials for whom the foreign government is vicariously liable).

1. The Anti-Terrorism Act

The Anti-Terrorism Act created a specific exception to the FSIA for certain state-sponsored acts of terrorism. 28 U.S.C. § 1605(a)(7). Foreign sovereign immunity is not applicable under the Anti-Terrorism Act if plaintiffs establish, inter alia, personal injury or death caused by an act of torture or hostage taking, provided that the foreign state was designated as a state sponsor of terrorism at the time the act occurred or as a result of the act. Roeder I, 195 F. Supp. 2d at 160. In Roeder I, the United States argued in district court that this exception to the FSIA created by the Anti-Terrorism Act did not apply to confer jurisdiction on the Court because Iran was not designated as a state sponsor of terrorism at the time of or as a result of the hostage taking. Roeder I, 333 F.3d at 235. This issue was overtaken by the passage of Section 626(c), described below.

2. The Flatow Act

[4] The Courts questioned whether Section 626(c) violated separation-of-powers principles by impermissibly directing the result of pending litigation. Roeder I, 333 F.3d at 237, n.5; Roeder I, 195 F. Supp. 2d at 166. That constitutional issue was never resolved, however, because Roeder I was ultimately dismissed on the ground that the Flatow Act did not create a private right of action for plaintiffs against Iran.

The Flatow Act, enacted in 1996 shortly after the passage of the Anti-Terrorism Act and reprinted as a note to the FSIA, created a civil cause of action for acts that satisfy the requirements of 28 U.S.C. § 1605(a)(7) (including, e.g., hostage taking by a state sponsor of terrorism). Pub. L. No. 104-208, § 589, 110 Stat. 3009-172 (reprinted as a note to 28 U.S.C. § 1605). But the Flatow Act created a private cause of action only against the "official, employee, or agent" of a state that participates in terrorist activity. Roeder I, 195 F. Supp. 2d at 172. It did not create a cause of action against a foreign state that sponsors terrorism. Id. Thus, Roeder I held that the Flatow Act did not provide plaintiffs with a private right of action against Iran.

3. Section 626(c)

In 2001, while Roeder I was pending, Congress passed another amendment to the FSIA. The amendment, Pub. L. 107-77, 115 Stat. 748 (2001) ("Section 626(c)"), as corrected for a typographical error, specifically referred to Roeder I, and removed Iran's sovereign immunity for acts "related to [Roeder I,] Case Number 1:00CV03110 . . . in the District of Columbia." Roeder I, 195 F. Supp. 2d at 152, 153. Thus, Section 626(c) amended the FSIA to remove sovereign immunity and create jurisdiction not only for acts that occur when the state is already designated a state-sponsor of terrorism or for acts that result in such a designation, but also specifically for any acts related to Roeder I. 195 F. Supp. 2d at 163; see also Roeder I, 333 F.3d at 235.[5]

4. Section 1083

The legislation now at issue, Section 1083(a), reformulated the terrorism exception to

[5] Whether Section 626(c) was constitutional, and therefore, whether it in fact conferred jurisdiction, was not resolved. See supra note 4.

sovereign immunity by incorporating into one new provision, to be codified at 28 U.S.C. § 1605A, both the terrorism exception to the jurisdictional immunity of a foreign state contained in the Anti-Terrorism Act (to be codified at 28 U.S.C. § 1605A(a)(1) and (a)(2)(A)(i)(I)), and the specific exception to sovereign immunity for Roeder I that was contained in section 626(c) (to be codified at 28 U.S.C. § 1605A(a)(2)(B)). The private cause of action against state officials created by the Flatow Act remains codified at 28 U.S.C. § 1605 note and is not part of the FSIA.

In addition to incorporating the Anti-Terrorism Act and section 626(c), Section 1083(a) creates a new private right of action against a foreign state (and against foreign officials for whose acts the state is vicariously liable), providing in relevant part as follows:

> A foreign state that is or was a state sponsor of terrorism as described in subsection (a)(2)(A)(i) [of section 1605A] . . . shall be liable to . . . a national of the United States . . . for personal injury or death caused by acts described in subsection (a)(1) [of section 1605A] of that foreign state . . . for which the courts of the United States may maintain jurisdiction under this section for money damages.

Section 1083(a)(1) (to be codified at 28 U.S.C. § 1605A(c)). By its very terms, therefore, whether this provision now allows for a private right of action against the foreign state of Iran in the present case hinges on whether Iran is or was a state sponsor of terrorism as described in 28 U.S.C. § 1605A(a)(2)(A)(i). Section 1605A(a)(2)(A)(i), in turn, has two subsections which purport to describe a state sponsor of terrorism, 28 U.S.C. § 1605A(a)(2)(A)(i)(I) and (II).

a. "State sponsor of terrorism" as described in 28 U.S.C. § 1605A(a)(2)(A)(i)(I)

Subsection I describes a state sponsor of terrorism as a foreign state that "was designated as a state sponsor of terrorism at the time the act [of hostage taking] occurred, or was so designated as a result of such act . . . ." 28 U.S.C. § 1605A(a)(2)(A)(i)(I). By its terms, this

provision, which incorporates the terminology of the Anti-Terrorism Act, creates no cause of action under § 1605A(c) for this case. Iran was designated as a state sponsor of terrorism in 1984, three years after the hostages were released, and it already has been determined that Iran "was not designated as a state sponsor of terrorism as a result of the hostage-taking at issue here." Roeder I, 195 F. Supp. 2d at 160-61; see also Roeder I, 333 F.3d at 235.

b. "State sponsor of terrorism" as described in 28 U.S.C. § 1605A(a)(2)(A)(i)(II)

Subsection II describes a state sponsor of terrorism, "in the case of an action that . . . is filed under this section [28 U.S.C. § 1605A] by reason of section 1083(c)(3) of [the National Defense Authorization Act for Fiscal Year 2008]," as a foreign state that "was designated as a state sponsor of terrorism when . . . the related action under section 1605(a)(7) (as in effect before the enactment of this section) . . . was filed . . . ." 28 U.S.C. § 1605A(a)(2)(A)(i)(II). Whether this description of a state sponsor of terrorism applies so as to create a private right of action against Iran in these circumstances by virtue of § 1605A(c) therefore depends on whether the present case was filed under 28 U.S.C. § 1605A by reason of section 1083(c)(3), and whether Iran was designated as a state sponsor of terrorism when the related action was filed.

Assuming, arguendo, that the present case was filed by reason of section 1083(c)(3), as plaintiffs allege,[6] the question remains whether Iran was designated as a state sponsor of

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[6] See Plaintiffs' Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Class Certification and for Publication of Class Notice ("Pl. Class Cert. Memo.") at 14.

The statute provides no basis on which to judge whether plaintiffs in fact filed "by reason of" Section 1083(c)(3) because the statute does not define the term "by reason of." It appears that the present case was filed pursuant to section 1083(c)(3), but the statute does not indicate whether that is synonymous with filing "by reason of" section 1083(c)(3). Indeed, as discussed infra, there is reason to question whether plaintiffs filed "by reason of" Section 1083(c)(3) because Roeder I does not in fact qualify as a "related" case under the terms of Section

terrorism "when the related action was filed." 28 U.S.C. § 1605A(a)(2)(A)(i)(II) (emphasis added). Because it was not so designated, subsection II is not applicable for purposes of providing a cause of action under § 1605A. To qualify as "related" to the present case, the action (i.e., potentially, Roeder I) must have been pending at the time Section 1083 was enacted. This is clear from the fact that section 1083(c), is entitled "Application to Pending Cases," and thereby indicates that the terrorism immunity exception applies only to pending cases. In particular, the terrorism immunity exception applies to "Related Actions" that have been timely commenced. Section 1083(c)(3). Regarding pending "Related Actions," section 1083(c)(3) states as follows:

> 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 . . . 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 . . . 60 days after . . . the date of the enactment of this Act.

Section 1083(c)(3).

ARGUMENT

CONGRESS HAS NOT CREATED A CAUSE OF ACTION APPLICABLE TO PLAINTIFFS' CLAIMS

There can be no question that the plaintiff hostages endured unspeakable suffering. The United States is immeasurably grateful for their dedication and public service. But to proceed in this Court, plaintiffs must have a valid cause of action. They lack one here. In Roeder I, the Court explained that jurisdiction and the existence of a cause of action are separate and distinct inquiries. Roeder I, 195 F. Supp. 2d at 163, 171, 173. Therefore, even with jurisdictional impediments removed, "[t]he Court still has an obligation to satisfy itself that plaintiffs have

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1083(c)(3).

established a right to relief." Roeder I, 333 F.3d at 232; see also id. at 237 (explaining that lack of jurisdiction and absence of a cause of action due to Algiers Accords are two separate grounds for dismissal). Roeder I was dismissed because the plaintiffs failed to demonstrate that Congress had created a cause of action under which they could seek relief. See Roeder I, 195 F. Supp. 2d at 178 (explaining that the removal of sovereign immunity impacted subject-matter jurisdiction but did not create a cause of action for the victims of terrorism). That conclusion holds true now, and is not altered by the passage of Section 1083.

The Algiers Accords are "'substantive governing law' that extinguishes claims arising out of the 1979 Revolution and hostage taking on the merits." Roeder I, 195 F. Supp. 2d at 163 (quoting Dames & Moore v. Regan, 453 U.S. 654, 685 (1981)). Specifically, as part of the Accords, the United States agreed to "'bar and preclude the prosecution against Iran of any . . . claim of . . . a United States national arising out of the events . . . related to (A) the seizure of the 52 United States nationals on November 4, 1979, [and] (B) their subsequent detention.'" Roeder I, 333 F.3d at 232 (quoting Declaration of the Government of the Democratic and Popular Republic of Algeria, General Principles, ¶ 11, 20 I.L.M. 223, 227 (1981)); see also Suspension of Litigation Against Iran, Exec. Order No. 12,294, ¶ 8, 46 Fed. Reg. 14,111 (Feb. 24, 1981); Non-Prosecution of Claims of Hostages and for Actions at the United States Embassy and Elsewhere, Exec. Order No. 12,283, 46 Fed. Reg. 7927 (Jan. 19, 1981).

An international executive agreement like the Algiers Accords can only be abrogated through legislation that contains "a clear expression of intent to abrogate that agreement." Roeder I, 195 F. Supp. 2d at 175; see also Roeder I, 333 F.3d at 238 (citing Gregory v. Ashcroft, 501 U.S. 452, 461 (1991)). Thus, proceeding with this case requires a clear repeal of the

prosecution bar contained in the Accords. Roeder I, 195 F. Supp. at 182; see also Roeder I, 333 F.3d at 237 (stating that "neither a treaty nor an executive agreement will be considered abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed") (internal quotation marks omitted). Congress could have, but did not – through Section 1083 or otherwise – abrogate the Algiers Accords in either of two possible ways; i.e., by explicitly abrogating the Accords, or by creating a specific, unambiguous cause of action for plaintiffs against Iran. See Roeder I, 195 F. Supp. 2d at 184.

I. Section 1083 Does Not Expressly Abrogate the Accords

Section 1083 does not explicitly abrogate the Algiers Accords. Indeed, it says nothing at all about them, by name or by description. The courts have made clear that Congress must act with clarity and specificity if it intends to supersede United States' treaty obligations. See, e.g., U.S. v. Palestine Liberation Org., 695 F. Supp. 1456, 1469 (S.D.N.Y. 1988) (noting that where potential conflict between treaty and subsequent statute was foreseeable, it was "especially important . . . for Congress to give clear, indeed unequivocal guidance" as to any intention to supersede treaty obligations). "When Congress decides purposefully to enact legislation restricting or regulating presidential action, it must make its intent clear." Armstrong v. Bush, 924 F.2d 282, 289 (D.C. Cir. 1991); see also Franklin v. Mass., 505 U.S. 788, 800-01 (1992) ("Out of respect for the separation of powers and the unique constitutional position of the President, we find that textual silence is not enough to subject the President to the provisions of the [statute]."). The requirement of a clear statement by Congress "'assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.'" Roeder I, 333 F.3d at 238 (quoting Gregory v. Ashcroft, 501 U.S. 452, 461 (1991)).

Congress was well aware of this requirement generally, therefore, before it enacted Section 1083, and this Court's confirmation of this requirement as regards these very plaintiffs and these very claims in Roeder I left no doubt that anything short of a clear expression of intent to revoke the Algiers Accords would have that effect. See Roeder I, 195 F. Supp. 2d at 175-84. No such clarity of purpose to revoke the Algiers Accords can be derived from the provisions of Section 1083, which is completely silent about the Accords. Roeder I, 195 F. Supp. 2d at 175 ("'[L]egislative silence is not sufficient to abrogate a treaty,' Trans World Airlines v. Franklin Mint Corp., 466 U.S. 243, 252 . . . (1984), or a bi-lateral executive international agreement.' See Weinberger v. Rossi, 456 U.S. 25, 32 . . . (1982).").

Although the requisite clear statement must be found, if at all, in the statutory text, there is no support for the plaintiffs' position even in the legislative history of Section 1083, which fails to mention the Algiers Accords. The legislative history consists merely of a Joint Explanatory Statement of the Committee of Conference concerning the House amendment (H.R. 1585) that was agreed to in conference and ultimately enacted, with minor changes of no relevance here, as the National Defense Authorization Act for Fiscal Year 2008. See H.R. Conf. Rep. No. 110-477, at 666 (2007), 2007 WL 4403679. This Statement broadly explains that the House amendment "would establish a private cause of action under the state sponsor of terrorism exception to the FSIA." Id. at 840. It further explains that "the amendments under this section shall apply to any claim filed or refiled under the new section 1605A of the FSIA." Id. at 841. The Statement applies to terrorist states generally and does not single out Iran, except to allude to the jurisdictional provision formerly contained in Section 626(c). Thus, nowhere does the legislative history specifically refer to the Algiers Accords, much less express an intention to

create a cause of action against Iran for the hostage taking.

In urging the Senate to pass the National Defense Authorization Act for Fiscal Year 2008, Senator Levin asserted that Section 1083 "clarifies the law that permits U.S. nationals and members of the U.S. armed forces who are victims of terrorist acts to sue State sponsors of terrorism for damages resulting from terrorist acts in the U.S. courts." 154 Cong. Rec. 53 (Jan. 22, 2008). To the extent this individual statement is of any value in determining Congress' intent, cf. Roeder I, 333 F.3d at 237 (stating that explanatory remarks in a conference report "do not have the force of law"), it too lacks any expression of intent to abrogate the Algiers Accords. Thus, the scant legislative history on Section 1083 fails to acknowledge the Accords or express Congress' collective will to terminate them. See Roeder I, 195 F. Supp. 2d at 182.

Because the legislative history is sparse, the Court must be "even more vigilant in its refusal to draw inferences . . . that would fill in the gaps in congressional logic." Roeder I, 195 F. Supp. 2d at 183. Refusing to infer an intent to abrogate the Algiers Accords in Roeder I, the Court noted that the legislation at issue there was not drafted until after the bill had gone to conference, was never discussed in committee, was never subject to floor debate, and that the Conference Report made only opaque references without ever explaining what the statute purported to do. Id. at 183. Similarly here, Congress appears not to have deliberated at all over Section 1083, which was included without any floor debate among hundreds of other defense provisions, and whose legislative history consists of an ambiguous joint explanatory statement that does not mention or refer to the Algiers Accords.

In light of the lack of a clear Congressional intent to abrogate the Algiers Accords, Section 1083 should not be interpreted to create a cause of action for plaintiffs against Iran. See

Roeder I, 195 F. Supp. 2d at 175 (citing Trans World Airlines v. Franklin Mint Corp., 466 U.S. at 252 ("When a later statute conflicts with an earlier agreement, and Congress has neither mentioned the agreement in the text of the statute nor in the legislative history of the statute, the Supreme Court has conclusively held that it can not find the requisite Congressional intent to abrogate.")). As the Court concluded in Roeder I, "[u]nless and until Congress expresses its clear intent to overturn the provisions of a binding agreement between two nations that has been in effect for over twenty years, this Court can not interpret these statutes to abrogate that agreement." Roeder I, 195 F. Supp. 2d at 177.

II. Section 1083 Creates No Clear Cause of Action for Plaintiffs Against Iran for the Hostage Taking

Section 1083 also cannot be said to unambiguously create a cause of action for plaintiffs against Iran. While it purports to create a cause of action against foreign states, it does not indisputably create a private right of action against Iran for claims arising from the 1979 hostage taking. The statute is anything but a model of clarity. Section 1083(a)(1) incorporates a new section to be codified at 28 U.S.C. § 1605A. The only source of any potential cause of action for this case is within that new section. Specifically, whether a cause of action exists depends on whether the foreign state is "a state sponsor of terrorism as described in [28 U.S.C. § 1605A(a)(2)(A)(i)]." 28 U.S.C. § 1605A(c). Thus, in the present case, plaintiffs have a cause of action only if Iran is "a state sponsor of terrorism as described in [28 U.S.C. § 1605A(a)(2)(A)(i)(II)]."[7]

[7] As explained above in section 4(a) of the Statutory Background, 28 U.S.C. § 1605A(a)(2)(A)(i)(I) does not create a cause of action for purposes of this case because Iran was not designated as a state sponsor of terrorism at the time the act of hostage taking occurred or as a result of that act. Therefore, the question is whether 28 U.S.C. § 1605A(a)(2)(A)(i)(II)

The description of a state sponsor of terrorism in 28 U.S.C. § 1605A(a)(2)(A)(i)(II) involves a two-pronged inquiry. Section 1605A(a)(2)(A)(i)(II) refers to a foreign state that, [1] "in the case of an action that . . . is filed under this section by reason of section 1083(c)(3) of [the National Defense Authorization Act for Fiscal Year 2008]," [2] "was designated as a state sponsor of terrorism when . . . the related action under section 1605(a)(7) . . . was filed . . . ." 28 U.S.C. § 1605A(a)(2)(A)(i)(II). The first inquiry under this standard is whether this case was filed "by reason of" Section 1083(c)(3). The term "by reason of" is not defined. However, Section 1083(c)(3) authorizes the filing of an action (such as this case) which arises out of the "same act or incident" that is the basis for another ("related") action which has been timely commenced under 28 U.S.C. § 1605(a)(7).[8] Because Roeder I was timely filed under 28 U.S.C. § 1605(a)(7), and both Roeder I and this case arise out of the 1979 Iranian hostage taking, it can be assumed, at least for the sake of argument, that this case was, strictly in a procedural sense, filed "by reason of" Section 1083(c)(3), as plaintiffs allege, Pl. Class Cert. Memo. at 14.[9]

The second inquiry is whether Iran was "a state sponsor of terrorism when . . . the related action under section 1605(a)(7) . . . was filed . . . ." 28 U.S.C. § 1605A(a)(2)(A)(i)(II). To meet

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creates a cause of action for plaintiffs.

[8] Section 1083(c)(3) ("Related Action") states in relevant part as follows:

> 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 . . . 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 entry of judgment in the original action; or (B) the date of the enactment of this Act.

[9] As previously noted, however, see infra note 6, and as discussed more fully below, Roeder I is not in fact "related" to this case under the specific terms of Section 1083(c)(3).

this criterion (in other words, for Iran to have been "a state sponsor of terrorism when . . . the related action under section 1605(a)(7) . . . was filed . . . ."), this case and Roeder I must necessarily be "related." The structure and text of Section 1083 indicate that, in order for this case and Roeder I to be considered "related," Roeder I must have been "pending" when Section 1083 was enacted. It was not.

The phrase "related action" refers back to its usage in Section 1083(c)(3), which is entitled "Related Cases" and is cited earlier in the same sentence (i.e., a state sponsor of terrorism as described in 28 U.S.C. § 1605A(a)(2)(A)(i) is a foreign state that, "in the case of an action that . . . is filed under this section by reason of section 1083(c)(3) of [the National Defense Authorization Act for Fiscal Year 2008]," "was designated as a state sponsor of terrorism when . . . the related action under section 1605(a)(7) . . . was filed . . . ." 28 U.S.C. § 1605A(a)(2)(A)(i)(II) (emphasis added)). Section 1083(c)(3) is a subsection of Section 1083(c), which is entitled "Application to Pending Cases" (emphasis added). These both fall under Section 1083, which bears the general heading "Terrorism Exception to Immunity." This structure of the statute therefore indicates that the terrorism sovereign immunity exception for foreign states created by Section 1083 applies to a subset of "pending cases," namely the "related cases" described in Section 1083(c)(3). Thus, to be considered "related" to this case (which "arises out of" it, as described in section 1083(c)(3)), Roeder I must have been pending at the time of enactment of Section 1083. Roeder I, however, was dismissed in 2003, and therefore it was not pending in January 2008 when Section 1083 was passed.[10]

[10] Section 1083 was relevant to numerous other cases still pending against Iran, Cuba, and Libya as of January 2008, when it was passed. There is thus no reason to believe that Congress intended sub silentio to create a cause of action for plaintiffs in this case.

The use of the present perfect tense in section 1083(c)(3), to the effect that "[i]f an action arising out of an act or incident has been timely commenced," also indicates that a new action cannot be deemed "related" unless the original action (Roeder I) was pending at the time of enactment of Section 1083. (Emphasis added). This meaning is reinforced by the more recent decision in Simon v. Republic of Iraq, 529 F.3d 1187 (D.C. Cir. 2008), in which the Court construed Section 1083, 28 U.S.C. § 1605A(a)(2)(A)(i)(II), as signifying that a new action could be considered "'filed . . . by reason of section 1083(c)(3)' if a pending 'related action' had been timely commenced." Simon, 529 F.3d at 1193 (emphasis added); see also id. at 1191 ("Plaintiffs with 'pending cases' may invoke new § 1605A in certain circumstances."). Because Roeder I was dismissed in 2003 and was not pending when Section 1083 was enacted in January 2008, the present case is not "related" to Roeder I within the meaning of 28 U.S.C. § 1605A(2)(a)(i)(II).[11] Given that no "related action" exists as defined in the statute, it is impossible for Iran to have been designated as a state sponsor of terrorism when "the related action" was filed. Therefore, Iran is not a "state sponsor of terrorism as described in [28 U.S.C. § 1605A(a)(2)(A)(i)]," 28 U.S.C. § 1605A(c), and plaintiffs have no private right of action against Iran.

If Congress had intended to create a cause of action explicitly for victims of the 1979 Iranian hostage taking, it could have done so with the same directness it used to confer jurisdiction through section 626(c) while Roeder I was pending.[12] As the Court pointed out in

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[11] Plaintiffs ignore the language and structure of the statute, simply assuming that the instant case and Roeder I are related, without taking into account the requirement that it be related to a "pending" case as set forth herein. See Plaintiffs' Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Entry of Default Judgment on Liability at 19, 20.

[12] While the Court in Roeder I found the Flatow Act insufficient to create a private right of action as to a foreign state, it nevertheless concluded that section 626(c) was sufficiently direct

Roeder I, "straightforward legislation would be simple enough to draft." Id. at 184. Indeed, prior to the disposition of Roeder I, Senator Harkin introduced a bill which stated: "Notwithstanding the Algiers Accords . . . a former Iranian hostage or immediate relative shall have a cause of action for money damages against the Government of Iran for the hostage taking . . . ." Roeder I, 195 F. Supp. 2d at 154. However, this bill was tabled, id., perhaps "by virtue of its clarity of purpose," id. at 184; see Roeder I, 333 F.3d at 237 (noting that the term "notwithstanding any other authority" is the type of language that might abrogate an executive agreement, but that no such statement had been enacted).[13] That Congress has instead made Byzantine cross-references and included vague terms in Section 1083 cannot be regarded as sufficient to create a cause of action for plaintiffs in the face of the Algiers Accords. Given controlling precedent and its previous analysis, the Court should reject any assertion that Section 1083 contains the type of "express statutory mandate sufficient to abrogate an international executive agreement." Roeder I, 195 F. Supp. 2d at 177.[14] For all these reasons, Section 1083 does not create a cause of action

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for purposes of establishing jurisdiction in the case.

[13] Other unsuccessful efforts were made in the 107th, 108th, and 109th Congresses to enact legislation that would have explicitly abrogated the provision of the Algiers Accords barring the hostages' suit. See generally Congressional Research Service Report for Congress, Order Code RL31258 (updated July 31, 2008), at CRS-31-32. The Congressional Research Service concluded that nothing in the latest legislation expressly abrogates the Accords. Id. at CRS-32.

[14] In Roeder I, the Court determined that the Flatow Act was "ambiguous" as to whether Congress intended to create a cause of action against Iran, despite statutory language that distinctly spoke only of a cause of action against individuals and not foreign states. Roeder I, 195 F. Supp. 2d at 166, 173-76. To an even greater extent here, the language of Section 1083 is fraught with ambiguities. Congress' equivocation here leads inexorably to the conclusion that there is no manifest intent to rescind the Accords.

against Iran for the 1979 hostage taking and torture alleged in plaintiffs' complaint.[15] Consequently, plaintiffs have failed to state a claim upon which relief can be granted.

CONCLUSION

For the foregoing reasons, this suit for compensatory and punitive damages pursuant to 28 U.S.C. § 1605A should be dismissed for failure to state a claim upon which relief can be granted.

Respectfully submitted,

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Dated: April 21, 2009

[15] Section 1083 does, of course, create a cause of action against other foreign states, and even against the state of Iran, under circumstances which meet the statutory requirements.