

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK**

JACK FRAZIER, <i>et al.</i> ,	)	
	)	
PETITIONERS,	)	
	)	
v.	)	Civil Action No. _____
	)	
SECRETARY OF THE TREASURY	)	
PAUL H. O'NEILL, IN HIS OFFICIAL	)	
CAPACITY, J.P. MORGAN CHASE & CO.,	)	
AND BANK OF NEW YORK CO., INC.	)	
	)	
RESPONDENTS.	)	
	)	

**Memorandum Of Points And Authorities In Further Support  
Of Petition And Motion To Compel Turnover Of Funds**

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Petitioners file this memorandum in reply to the response of J.P. Morgan Chase Bank (“JPM Chase”) and in further support of their motion for issuance of a writ of execution compelling respondent JPM Chase to turn over funds in accounts belonging to the Government of Iraq (“Iraq”) sufficient to satisfy the final judgments that have been entered in their favor against Iraq.

### **SUMMARY OF DEVELOPMENTS SINCE THE FILING OF THE PETITION**

Following the filing of the Petition on September 23, 2002, petitioners filed on November 24, 2002, their First Amended Petition, which added as petitioners in this action 163 additional persons in whose favor final judgments have been entered in *Hill v. Republic of Iraq*. Two days later, on November 26, 2002, the President signed into law the Terrorism Risk Insurance Act (“TRIA”), P.L. 107-297, Title II, § 201(a), Nov. 26, 2002, 116 Stat. 2322. Title II of that Act is specifically intended to govern proceedings such as this in which a person seeks to enforce a judgment that has been entered in his favor in an action against a foreign state in which jurisdiction was predicated upon the state-sponsored terrorism exception of the Foreign Sovereign Immunities Act (“FSIA”), 28 U.S.C. § 1605(a)(7). In particular, § 201(a) provides that:

***Notwithstanding any other provision of law***, and except as provided in subsection (b), in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, or for which a terrorist party is not immune under section 1605(a)(7) of title 28, United States Code, ***the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment in aid of execution*** in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable.

P.L. 107-297, Title II, § 201(a) (emphasis added).

On December 30, 2002, the U.S. Attorney sent a letter to this Court in which it took the position that, as a consequence of the enactment of the TRIA, the Secretary of the Treasury is no longer a proper party to this action. (Letter of James B. Comey, U.S. Attorney, to Hon. John E. Sprizzo, dated Dec. 30, 2002.) In that submission, the U.S. Attorney informed this Court that:

It is the Government's position that, as a result of the passage of TRIA Section 201, certain blocked assets are eligible for attachment and execution notwithstanding 31 C.F.R. § 575.202(e). The petitioners . . . must, however, still prove that [they] have met the requirements of TRIA Section 201 by establishing, for example, that the assets [they seek to execute against] are blocked assets of the terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) against whom judgment was entered, within the meaning of TRIA Section 201.

*Id.* at 4. In view of the position taken by the U.S. Government, petitioners and the Secretary of Treasury have agreed to enter into a stipulation dismissing the Secretary as a party to this action.

### **ARGUMENT**

In its response to the Petition, JPM Chase does not oppose petitioners' motion seeking to compel it to turn over funds sufficient to satisfy the judgments at issue. Rather, JPM Chase takes the position that certain issues must be resolved by this Court before it can issue an order granting petitioners' motion.

As the U.S. Government has itself acknowledged, this proceeding is now governed by § 201 of the TRIA, which, by its express terms, supersedes "any other provision of law." JPM Chase's expression of concern notwithstanding, there is no doubt that each of the requirements for obtaining execution or attachment in aid of execution under § 201 has been satisfied in this case. Accordingly, petitioners are entitled to an order compelling JPM Chase to turn over assets it holds in accounts of Iraq (including assets held in accounts of any agencies or instrumentalities of Iraq) sufficient to satisfy each and every one of the judgments at issue.

## **I. Petitioners Have Satisfied Each Of The Requirements For An Order Of Execution Under § 201 Of The TRIA.**

Title II of the TRIA was enacted by Congress to provide a means through which American victims of terrorism, including the petitioners in this case, could enforce judgments entered in their favor based on acts of state-sponsored terrorism. To accomplish this result, Congress used language that could hardly be clearer and that bears repeating:

***Notwithstanding any other provision of law . . . in every case in which a person has obtained a judgment against a terrorist party on a claim . . . for which a terrorist party is not immune under section 1605(a)(7) of title 28, United States Code, the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment in aid of execution*** in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable.

P.L. 107-297, Title II, § 201(a) (emphasis added).

As set forth below, there can be no question that each of the requirements for obtaining execution or attachment in aid of execution under § 201(a) of the TRIA are met: (a) each of the petitioners has “obtained a judgment against a terrorist party” – *i.e.*, Iraq – on a claim for which that terrorist party “is not immune under section 1605(a)(7)” of the FSIA<sup>1</sup>; (b) the judgment obtained by each petitioner upon which execution is sought is a judgment for compensatory damages; and (c) the assets upon which petitioners seek execution are blocked assets of a

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<sup>1</sup> No question has been – or, indeed, could be – raised as to Iraq’s status as “a terrorist party.” Adopting precisely the language it had employed in circumscribing the class of states against which a claim could be brought under the FSIA’s state-sponsored terrorism exception, 28 U.S.C. § 1605(a)(7)(A), Congress defined the term “terrorist party” in § 201(d)(4) of the TRIA to mean, among other things, “a foreign state designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371).” On September 12, 1990, the Acting Secretary of State caused to be published in the Federal Register, Fed. Reg. 37, 793 (1990), the Department of State’s determination that Iraq was a state sponsor of terrorism under 50 U.S.C. App. § 2405(j) and, relying upon that determination, the district court in *Hill* found that “Iraq has been officially declared to be a state sponsor of terrorism as of September 1, 1990.” 175 F. Supp. 2d at 46, n.6; *see also Daliberti v. Republic of Iraq*, 97 F. Supp. 2d 38, 44 (D.D.C. 2000).

terrorist party within the meaning of § 201(a) – that is, they are blocked assets or Iraq or blocked assets of an agency or instrumentality of Iraq.

*a. Each of the judgments at issue was obtained against a terrorist party on a claim for which it is not immune under the state-sponsored terrorism exception.* Each judgment upon which petitioners seek to execute is a judgment on “a claim for which a terrorist party is not immune under section 1605(a)(7) of title 28.” Indeed, the district court in *Hill v. Republic of Iraq*, 175 F. Supp. 2d 36 (D.D.C. 2001), expressly held that its “[s]ubject matter jurisdiction derive[d] from 28 U.S.C. §§ 1330(b) and 1605(a)(7),” *id.* at 38, and found it “beyond dispute that the American citizens denied permission to leave Kuwait and Iraq from August through mid-December, 1990,” including each of the petitioners, were ‘hostages’ within the meaning of” §1605(a)(7) and, hence, were “entitled to maintain an action against Iraq” under that section. *Id.* at 46.

*b. Each of the judgments is for compensatory damages.* Each of the judgments upon which execution is sought states on its face that it is “a judgment for compensatory damages.” Petitioners are not seeking in this proceeding to enforce a separate judgment that that they have obtained against defendant “for punitive damages in the amount of \$300 million.” *Hill*, 175 F. Supp. 2d at 49. Accordingly, the Petition plainly meets §201(a)’s requirement that execution be limited “to the extent of any compensatory damages” for which Iraq “has been adjudged liable.”

*c. The assets upon which petitioners seek execution are blocked assets of Iraq or of its agencies or instrumentalities.* In its response to the Petition, JPM Chase has acknowledged (at 3) that it holds assets in the name of the Central Bank of Iraq (“CBI”) and/or Bank Rafidain (“Rafidain”) that are more than sufficient to satisfy the claims of each of the petitioners in this proceeding as well as the claims of each of the petitioners in *Daliberti v. J.P. Morgan Chase*,

No. 02 CV 9773 (S.D.N.Y.).<sup>2</sup> In view of that representation and for purposes of narrowing and simplifying the issues in this proceeding, petitioners are hereby currently limiting their turnover demand to funds held in accounts in the name of CBI and/or Rafidain.<sup>3</sup>

CBI is an entity, which for purposes of U.S. law, is indistinguishable from and equivalent to the Government of Iraq itself. Indeed, the Treasury Department regulations governing the treatment of blocked Iraqi assets expressly define the term “Government of Iraq” to include, *inter alia*, “the Central Bank of Iraq.” 31 CFR § 575.306(a). By way of contrast, in defining the term “Government of Iran,” the Treasury regulations governing blocked Iranian assets do not mention the Central Bank of Iran. *See* 31 C.F.R. § 560.304.

The Treasury regulations, of course, have the force of law. However, even if they were not controlling and CBI could be regarded as legally separate from the Government of Iraq for purposes of U.S. law governing blocked assets, CBI is, of course, an organ of Iraq. Hence, as CBI has itself acknowledged, it is, at a minimum, an “agency or instrumentality” of Iraq within the meaning of § 1603(b) of the FSIA. *First City, N.A. v. Rafidain Bank*, 150 F.3d 172, 174 (2d Cir. 1998) (“It is undisputed that CBI is an agency of Iraq.”); *Commercial Bank of Kuwait v.*

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<sup>2</sup> Without proffering any explanation, JPM has asked (at 14) this Court to determine that none of the property against which execution is ordered is property against which JPM Chase has set off rights. Given JPM Chase’s representation that the assets it holds are more than sufficient to satisfy the judgments, this Court need not concern itself with any of JPM Chase’s purported set off rights. At any rate, JPM Chase cannot have and cannot now assert a “set-off” against any blocked assets of Iraq or otherwise frozen under Treasury regulations. This is made so by operation of the express and unqualified provisions of 31 C.F.R. § 575.415, which states that “[a] setoff against blocked account, whether by a U.S. bank or other U.S. person, is a prohibited transfer under § 575.201 if effected after the effective date.”

<sup>3</sup> JPM Chase has represented (at 2) that it does not hold any deposits in the name of the Republic of Iraq. To the extent, however, that JPM Chase may later determine that it does, in fact, hold assets belonging to the Republic of Iraq (as opposed to accounts belonging to one of Iraq’s agencies or instrumentalities), petitioners reserve the right to seek the turnover of any funds in those accounts to the extent their judgments have not already been satisfied in full.

*Rafidain Bank*, 15 F.3d 238, 239 (2d Cir. 1994) (holding that CBI is an agency or instrumentality of Iraq). JPM Chase does not suggest otherwise.

Rafidain, which is “a commercial bank wholly-owned by the Republic of Iraq,” *First City*, 150 F.3d at 174, likewise qualifies as an “agency or instrumentality” of Iraq under both the TRIA and the FSIA. Indeed, Rafidain has repeatedly asserted that it is an “agency or instrumentality” of Iraq in federal court and the Second Circuit has itself held that Rafidain is an “agency or instrumentality” of Iraq within the meaning of § 1603(b) of the FSIA. *Id.* (noting that Rafidain’s status as an “agency of instrumentality of a foreign state” under the FSIA was “undisputed” by the parties, including Rafidain, and so finding); *Int’l Housing Ltd. v. Rafidain Bank Iraq*, 893 F.2d 8, 10 (2d Cir. 1989) (“The parties do not dispute that Rafidain is an ‘agency or instrumentality of the foreign state’ as defined in 28 U.S.C. § 1603.”); *Goodman Holdings v. Rafidain Bank*, 26 F.3d 1143, 1145 (D.C. Cir. 1994) (same). Again, JPM Chase does not suggest otherwise.

## **II. Section 201 Of The TRIA Overrides Any Other Provision Of Law That Might Otherwise Impose An Obstacle To The Execution Of The Judgments.**

Though all of the requirements for execution under § 201(a) are met, JPM Chase maintains that several other questions must be answered before this Court can issue an order compelling JPM Chase to turn over any of the funds it holds in which the Government of Iraq has an interest. Notwithstanding the statutory language and unmistakable intention of Congress to supersede any other provision of law and to treat terrorist states and their “agencies and instrumentalities” as one and the same for purposes of execution and attachment, JPM Chase posits the following concerns:

- that § 201(a) of the TRIA might not override the immunity from execution that § 1611(b) of the FSIA otherwise affords to the assets of a central bank such as CBI;
- that § 201(a) of the TRIA might not have the effect of making the assets of CBI and Rafidain available to satisfy judgments against Iraq; and
- that CBI and Rafidain might have a right to be notified of these proceedings – independent of the notice that was given to Iraq when they were initiated more than three months ago.

As set forth below, none of these concerns presents any obstacle to the issuance of an immediate order compelling JPM Chase to turn over funds it holds in accounts in the name of CBI and/or Rafidain in an amount sufficient to satisfy each and every one of the judgments at issue.

*a. The TRIA overrides any immunity from execution that might otherwise be afforded property of the CBI under § 1611(b) of the FSIA.* JPM Chase asserts (at 10) that “[w]hether the immunity afforded to central bank assets pursuant to § 1611(b) remains in effect following the passage of TRIA is unclear.” In truth, the congressional intent to strip blocked assets of a terrorist state (including the blocked assets of the central bank of that terrorist state) of the immunity those assets would otherwise enjoy under the provisions of the FSIA (including § 1611(b) of the FSIA) could not be more clear.

The source of JPM Chase’s uncertainty about the effect of § 201(a) lies in the absence from that section of any specific reference to any of the provisions of the FSIA governing the immunity of a foreign state’s property from execution, including, in particular, § 1611(b) of the FSIA, which governs the immunity of property belonging to a foreign state’s central bank. That

observation, however, overlooks the unambiguous language of § 201(a). In that section, Congress expressly provided that, “[n]otwithstanding any other provision of law,” the blocked assets of a terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) *shall be* subject to execution or attachment in aid of execution.” Any ruling that § 201(a) does not subject the assets of the CBI to execution or attachment would require this Court either: (a) to rewrite the “notwithstanding any other provision of law” of § 201(a) to read “notwithstanding any other provision of law *except section 1611( b) of Title 28*”; or (b) to rewrite the final clause of § 201(a) to read that blocked assets “shall be subject to execution or attachment in aid of execution *unless they are otherwise immune from such execution or attachment under sections 1610 or 1611 of Title 28.*”<sup>4</sup>

Needless to say such an attempt to narrow and qualify the sweeping and unqualified language of § 201(a) would be a flagrant departure from the plain meaning rule. Applying that rule, the courts have “frequently held that the phrase ‘notwithstanding any other provision of law,’ or a variation thereof, means exactly that; it is unambiguous and effectively supersedes all previous laws.” *Energy Transp. Group, Inc. v. Skinner*, 752 F. Supp. 1, 10 (D.D.C. 1990).<sup>5</sup>

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<sup>4</sup> JPM Chase seems to suggest (at 12) the possibility that the § 201(a) of the TRIA does nothing more than remove the requirement that a judgment creditor who seeks to execute upon the blocked assets of a terrorist state obtain a license from the Secretary of the Treasury. Such a construction would, however, require this Court to substitute the “notwithstanding any other provision of law” clause of § 201(a) with a clause that read something like this: “notwithstanding any provision of the International Economic Emergency Powers Act (50 U.S.C. §§ 1701-02), or any proclamation, order, regulation, or license issued thereto.” That construction would also render § 201(b) of the TRIA – pertaining to the President’s authority to waive the requirements of § 201(a) for any diplomatic assets subject to the Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, that are not used for commercial activities – entirely superfluous, since no provision of the FSIA or the Vienna Convention exempts such assets from immunity in any circumstance.

<sup>5</sup> *Accord United States v. Dahl*, 2002 U.S. App. LEXIS 21585, at \*3 (9th Cir. Oct. 11, 2002) (“we read the language . . . ‘notwithstanding any other provision of law’ to mean just what it says – that the fee collection guidelines that follow are not subject to the constraints of other laws”); *Mapoy v. Carroll*, 185 F.3d 224 (4th Cir. 1999) (“we interpret ‘any’ to mean ‘all,’ and, thus, ‘notwithstanding any other provision of law’” in the Immigration Reform and Immigrant Responsibility Act of 1996 “to mean that all

Likewise, the phrase “notwithstanding any provision of law” in § 201(a) means what it says and, hence, has the unmistakable effect of making the blocked assets of a terrorist state “subject to execution” – § 1611(b) of the FSIA and all other provisions of law “notwithstanding.”

Even if the language of § 201(a) of the TRIA left room for interpretation – and it does not – the legislative history of that section makes the congressional intention to supersede the immunity provisions of the FSIA unmistakably clear. For instance, the conference report accompanying the bill states that it was the intent of § 201(a) to make “all . . . judgments” against terrorist states for terrorist acts . . . enforceable against *any* assets or property” blocked under the International Economic Emergency Powers Act , 50 U.S.C. §§ 1701-02, or the Trading with the Enemy Act (50 U.S.C. App. § 5(b)). 148 Cong. Rec. H8728 (Nov. 13, 2002) (emphasis added). Similarly, in a speech on the floor of the Senate, Senator Tom Harkin – one of the two original sponsors of the provision in the Senate – declared, in no uncertain terms, that: “Title II operates *to strip a terrorist state of its immunity* from execution or attachment in aid of execution.” 148 Cong. Rec. S11525 (Nov. 19, 2002) (emphasis added). The explanation of § 201 proffered by Senator Harkin was not a matter of controversy and, indeed, not a single Senator rose to challenge it. That is not at all surprising since any construction of § 201 that would leave the immunity that the FSIA affords to a foreign state’s assets still intact would subvert § 201’s purpose of “enabling” victims of terrorism “to satisfy” judgments rendered in their favor

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other jurisdiction-granting statutes . . . shall be of no effect”); *Richardson v. Reno*, 162 F.3d 1338, 1357 n.92 (11th Cir. 1998) (“[n]otwithstanding any other provision of law’ means precisely ‘notwithstanding any other provision of law’”), *vacated on other grounds*, 526 U.S. 1142 (1999); *United States v. Fernandez*, 887 F.2d 465, 468 (4th Cir. 1989) (interpreting “notwithstanding any other provision of law” language in Ethics in Government Act to “naturally mean[] that the conferral of prosecutorial powers [on the independent counsel] should not be limited by other statutes”); *Crowley Caribbean Transport, Inc. v. United States*, 865 F.2d 1281, 1283 (D.C. Cir. 1989) (“[a] clearer statement [than ‘notwithstanding any other provision of law’] is difficult to imagine”); *New Jersey Air Nat’l Guard v. Federal Labor Relations Auth’y*, 677 F.2d 276, 282 (3d Cir. 1982) (same).

“through the attachment of blocked assets of terrorist parties.” 148 Cong. Rec. H8728 (conference report).<sup>6</sup>

*b. The TRIA does not permit any distinction to be made between the assets of Iraq and the assets of its agencies or instrumentalities.* JPM Chase also raises the possibility that the parenthetical language in § 201(a) of the TRIA making blocked assets of agencies and instrumentalities subject to execution does not mean what it says. In particular, JPM Chase states (at 13) that this Court must determine whether under § 201(a) “the property of an agency or instrumentality of the Republic of Iraq . . . can be attached or executed against to satisfy a judgment against the Republic of Iraq.” That is not a difficult determination to make. As is readily apparent from both the plain language of the TRIA and its legislative history, § 201(a) unquestionably gives petitioners the right to execute against the property of any of Iraq’s agencies or instrumentalities in order to satisfy their judgments against the Government of Iraq itself.

The TRIA specifically identifies what types of assets of a terrorist state “shall be subject to execution or attachment in aid of execution” in order to satisfy a judgment upon a claim for which it is not immune under the state-sponsored terrorism exception, namely “blocked assets of

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<sup>6</sup> The statements of the each of the original Senate and House sponsors of the provision also confirms that the purpose of § 201 was to provide justice to terrorist victims and deter future terrorism by making all blocked assets of terrorist states available for the satisfaction of judgments. *See* 148 Cong. Rec. S11527 (Nov. 19, 2002) (Senator Harkin) (“paying American victims of terrorism from the blocked and frozen assets. . . will provide a new, powerful disincentive for any foreign government to continue sponsoring terrorist attacks on Americans” and will enable “American victims of state-sponsored terrorism . . . to secure some measure of justice and compensation”); 148 Cong.Rec. S5510 (June 13, 2002) (Senate Allen) (stating that purpose of amendment was to provide justice for victims and deter future acts of terrorism); 148 Cong. Rec. H6134 (Sept. 10, 2002) (Congressman Fosella) (noting that under existing law agencies and instrumentalities “ironically . . . can claim foreign sovereign immunity against victims in U.S. courts because of their relationship with the terrorist-sponsoring states” and stating that “[b]y exposing these agencies and instrumentalities to liability,” § 201 “increases the cost of sponsoring terrorism”); *Id.* (Congressman Cannon) (“By imposing a direct and immediate cost, this language represents one effective financial tool against terrorists and also helps their victims.”).

that terrorist [state] (*including the blocked assets of any agency or instrumentality of that terrorist [state]*). P.L. 107-297, § 201(a) (emphasis added). That language can have only one interpretation: a judgment against a terrorist state may be enforced by executing against both blocked assets held in its own name and blocked assets held in the name of its agencies and instrumentalities.

Basic rules of statutory construction foreclose any argument that victims of terrorism who have obtained judgments against a terrorist state may not invoke § 201(a) to enforce those judgments against blocked assets of the agencies or instrumentalities of that state. There is no plausible explanation of the meaning of the parenthetical language in § 201(a) other than to make the blocked assets of agencies or instrumentalities available to satisfy judgments against terrorist states. Any contrary construction of that section must read the parenthetical out of the statute in violation of the cardinal rule that statutes must be construed, if at all possible, to give all of their provisions meaning and “operative effect.” *United States v. Nordic Village*, 503 U.S. 30, 36 (1992); *see also Duncan v. Walker*, 533 U.S. 167, 174 (2001) (“It is our duty ‘to give effect, if possible, to every clause and word of a statute.’”); *Connecticut Nat’l Bank v. Germain*, 503 U.S. 249, 253 (“courts should disfavor interpretations of statutes that render language superfluous”).

That section 201(a) means exactly what it says is confirmed by the legislative history of the TRIA. The Conference Report accompanying the bill proclaims that “[t]he purpose of section 201 is to deal with the problem of enforcement of judgments rendered on behalf of victims of terrorism in any court of competent jurisdiction by enabling them to satisfy such judgments through the attachment of blocked assets of terrorist parties.” 148 Cong. Rec. H8728. As Senator Harkin stated on the Senate floor, one of the ways in which § 201 fulfilled that

purpose was through giving victims of terrorism access to the blocked assets of the sponsoring state's agencies and instrumentalities:

[T]here has been a dispute over the availability of “agency and instrumentality” assets to satisfy judgments against a terrorist state itself. Let there be no doubt on this point. Title II operates to strip a terrorist state of its immunity from execution or attachment in aid of execution by making the blocked assets of that terrorist state, ***including the blocked assets of any of its agencies or instrumentalities***, available for attachment and/or execution of a judgment issued against that terrorist state. ***Thus, for purposes of enforcing a judgment against a terrorist state, title II does not recognize any juridical distinction between a terrorist state and its agencies or instrumentalities.***

148 Cong. Rec. S11525 (emphasis added); *see also* 148 Cong. Rec. H6134 (Congressman Fosella) (stating that “[b]y exposing these agencies and instrumentalities to liability,” § 201 “increases the cost of sponsoring terrorism”).

As the legislative history makes clear, in providing that the assets of a terrorist state's agencies and instrumentalities shall be available to satisfy judgments against the terrorist state itself, Congress made a deliberate policy choice to remove the presumption that otherwise requires “government instrumentalities established as juridical entities distinct and independent from their sovereign” to “be treated as such.” *First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba* (“*Bancec*”), 462 U.S. 611, 626-27 (1983). That presumption of separateness has its underpinnings in “principles of comity” – principles that are themselves based upon the mutual respect that one sovereign owes to another. *Id.* at 626. In enacting § 201(a), Congress made a reasoned judgment that, by virtue of their flagrant disregard for universally accepted principles of international law and civilized conduct, terrorist states that sponsor the torture and hostage-taking of American citizens forfeit any entitlement they might otherwise have under our

laws to be extended such comity and respect.<sup>7</sup> As the Supreme Court noted in its decision in *Bancec*, the courts are not at liberty “to give effect to the corporate form” where to do so would be to disregard the plain language of a congressional statute and “to defeat [the] legislative policies” underlying it. 462 U.S. at 630.

***c. Neither CBI nor Rafidain Are Entitled To Independent Notice Of This Proceeding.***

JPM Chase does not dispute that petitioners properly initiated this proceeding pursuant to Fed. R. Civ. P. 69, properly served JPM Chase, and properly gave Iraq notice in a manner consistent with N.Y. C.P.L.R. § 5225(b).<sup>8</sup> Nor can JPM Chase dispute that petitioners had no obligation under either § 201(a) or C.P.L.R. § 5225(b) to separately notify CBI or Rafidain of this proceeding.<sup>9</sup> Accordingly, petitioners are entitled to have this Court determine in this proceeding whether they have met all of the requirements for a writ of execution that are set forth in § 201(a) of the TRIA. JPM Chase does not argue to the contrary. Instead, JPM Chase speculates that should this Court find that petitioners have, in fact, met the requirements for a writ of execution under § 201(a), which they clearly have, CBI and/or Rafidain may attempt to

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<sup>7</sup> In making this determination, Congress was exercising its express constitutional authority under article I, § 8 of the Constitution “to define and punish . . . offenses against the law of nations” and “to regulate commerce with the foreign nations.” “Nothing in the Constitution limits congressional authority . . . to remove the sovereign immunity that foreign states otherwise enjoy” or, *a fortiori*, “to modify” that immunity by treating a terrorist state and its instrumentalities as one and the same for the purpose of attaching or executing against its blocked assets. *Price v. Socialist People’s Libyan Arab Jamahiriya*, 294 F.3d 82, 99 (D.C. Cir. 2002); *see also Rein v. Socialist People’s Libyan Arab Jamahiriya*, 995 F. Supp. 325, 330 (E.D.N.Y. 1998) (“the issue of whether a foreign state receives immunity in the courts of the United States [is] a matter of grace and comity accorded to a foreign state by Congress and the Executive in their exclusive and discretionary exercise of their foreign affairs powers under the Constitution”), *aff’d*, 162 F.3d 748 (2d Cir. 1998).

<sup>8</sup> Section 5225(b) provides that notice of the proceeding need be served only on the judgment debtors “in the same manner as a summons or by registered or certified mail.” N.Y. C.P.L.R. § 5225(b). Petitioners have complied with this provision by sending copies of their Petition and their restraining notices to Iraq by certified and regular mail. (*See* Declaration of James W. Perkins, dated Jan. 7, 2002 (“Perkins Decl.”), at ¶¶ 3-7.)

<sup>9</sup> Neither the N.Y. C.P.L.R. nor the Federal Rules of Civil Procedure require petitioners to send notice to other parties who might claim an interest in property “in which the judgment debtor has an interest.” *See* N.Y. C.P.L.R. § 5225(b).

make a *collateral attack* on that finding in a subsequent action against JPM Chase in which they would seek to hold JPM Chase liable for not giving them prior notice of this proceeding.

At the outset and as set forth in greater detail below, this Court need not concern itself with any possible exposure that JPM Chase speculates it might have stemming from the failure to independently notify CBI and Rafidain of this proceeding because JPM Chase has already provided them with such notice. More fundamentally, however, the failure to provide CBI or Rafidain with independent notice and an opportunity to be heard cannot possibly expose JPM Chase to any liability, because § 201(a) of the TRIA overrides any rights that they might otherwise have to receive such notice.

JPM Chase's concern that it could be exposed to liability is based on the assumption that with respect to any claim that might be made to the blocked assets of Iraq, CBI and Rafidain are entitled to be treated as if they are third persons that are separate and distinct from the Government of Iraq itself. That assumption is wrong. As set forth in Point II.b. above, § 201(a) of the TRIA ordains that for purposes of execution of a judgment issued against a terrorist state, a terrorist state and its agencies or instrumentalities are to be treated as one and the same. *See, e.g.*, 148 Cong. Rec. S11525 (statement of Senator Harkin) ("for purposes of enforcing a judgment against a terrorist state, title II does not recognize any juridical distinction between a terrorist state and its agencies or instrumentalities").

By its terms, the TRIA sets forth the exclusive requirements for obtaining execution of a judgment from the blocked assets of a terrorist state. In adopting that Act, Congress omitted any provision that would require victims of terrorism to notify the terrorist state against whom they have obtained a judgment prior to executing against the assets of that state and, instead, mandated that blocked assets of terrorist states be made available for execution without regard to

“any other provision of law.” The congressional decision to exclude any such notice requirement is perfectly sensible. By virtue of the executive orders blocking their assets, terrorist states are already on notice that their assets have been “attached” and are well aware of the fact that those assets are subject to divestiture and liquidation by the federal government at any time. In declining to impose any additional notice requirement as a condition to execution under § 201(a) of the TRIA, Congress properly concluded that terrorist states that are adjudged liable for perpetrating terrorist acts against American citizens are not deserving of such further notice.<sup>10</sup>

At any rate, even if § 201(a) did not supersede the notice requirements of existing law, which it does, petitioners met those requirements by furnishing notice of this proceeding to Iraq in a manner consistent with N.Y. C.P.L.R. § 5225(b). And, inasmuch as Iraq and CBI are one and the same by virtue of controlling Treasury regulations and inasmuch as Iraq and both CBI and Rafidain must be treated as one and the same for purposes of executing upon Iraq’s blocked assets, notice to Iraq is notice to CBI and Rafidain. *See, e.g., King v. Galluzo Equipment & Excavating, Inc.*, 2001 U.S. Dist. LEXIS 18344 (E.D.N.Y. Nov. 8, 2001) (“the law

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<sup>10</sup> By way of contrast, § 1610(c) of the FSIA expressly requires that service of a default judgment be made on a foreign state in a manner prescribed by § 1608(e) and that a “reasonable period of time” elapse following such service as a precondition to any “attachment or execution *referred to in subsections (a) and (b) of th[at] section.*” 28 U.S.C. § 1610(c) (emphasis added). In an apparent reference to the requirements of § 1610(c) of the FSIA, JPM Chase suggests (at 13) that no execution may be obtained under § 201(a) of the TRIA until “a reasonable period of time has elapsed” following service of the default judgment upon Iraq in this case. That suggestion disregards the language of § 1610(c), which expressly limits its requirements to attachment or execution referred to in §§ 1610(a) and (b), as well as the “notwithstanding any other provision of law” clause of § 201(a) of the TRIA. Petitioners are, however, not seeking an order of execution pursuant to § 1610(a) or (b) of the FSIA and, hence, the notice requirement of § 1610(c), by the very terms of that section, can have no applicability to this proceeding. At any rate, even if the notice requirements of § 1610(c) of the FSIA were somehow applicable to executions under § 201(a) of the TRIA, in the case of the judgments of the eleven original petitioners, Iraq received such notice ten months ago on March 13, 2002. (Perkins Decl. ¶ 8 & Ex.G.)

is clear that service on the alter ego of a corporation constitutes effective service on the corporation”).

JPM Chase does not argue that § 201(a) of the TRIA or any other provision of law requires that agencies or instrumentalities of a terrorist state be furnished separate notice before the blocked assets of those agencies or instrumentalities may be executed against to enforce a judgment issued in favor of a terrorist victim. JPM Chase does, however, suggest that agencies or instrumentalities or a terrorist state are “persons” within the meaning of the Due Process Clause and, hence, have a constitutional right to such notice. That suggestion is incorrect.

First, foreign states are simply “not persons protected by the Fifth Amendment.” *Price v. Socialist People’s Libyan Arab Jamahiriya*, 294 F.3d 82, 97 (D.C. Cir. 2002); *see also Altmann v. Republic of Austria*, 142 F. Supp. 2d 1187, 1208 (C.D. Cal. 2001) (same), *aff’d*, 2002 U.S. App. LEXIS 25517 (9th Cir. Dec. 12, 2002). As the D.C. Circuit recently explained in *Price*, it would “be highly incongruous to afford greater Fifth Amendment rights to foreign nations who are alien to our constitutional system, than are afforded to the states [of the Union], who help make up the very fabric of that system,” but who, “cannot, by any reasonable mode of interpretation,” be regarded as persons within the meaning of the Due Process Clause. *Id.* at 97 (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 323-24 (1966)).<sup>11</sup> The *Price* Court concluded that to confer on a terrorist state “the due process trump” to prevent the Congress from exercising its “prerogative . . . to authorize legal action against another sovereign . . . would

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<sup>11</sup> In its decision in *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992), the Supreme Court stated that it did not need to decide the issue whether “a foreign state is a ‘person’ for purposes of the Due Process Clause but, immediately after making that statement, the Court cited its decision in *Katzenbach*. *Id.* at 619. Noting the *Weltover* Court’s citation to *Katzenbach*, both the Second Circuit and this Court have since questioned whether foreign states can be regarded as “persons” under the Fifth Amendment, but, like the *Weltover* Court, they did not find it necessary to resolve the issue. *See Hamil Bank v. PT. Bank Negara Indonesia*, 148 F.3d 127, 134 (2d Cir. 1998); *Wasserstein Perella Emerging Markets Finance, L.P. v. Province of Formosa*, 2002 U.S. Dist. LEXIS 12012, at \*29-30 (S.D.N.Y. July 2, 2002).

distort the very notion of ‘liberty’ that underlies the Due Process Clause.” *Id.* at 99. Indeed, were the courts “to hold that foreign states may cloak themselves in the protections of the Due Process Clause,” the plenary powers of Congress and the President to respond to foreign policy crises could be compromised by terrorist states who could, for example, challenge an order “freez[ing] the[ir] assets” or “impos[ing] economic sanctions on them . . . as deprivations of property without due process of law.” *Id.*; see also *Paradissiotis v. United States*, 304 F.3d 1271, 1275 (Fed. Cir. 2002) (“Economic sanctions would hardly be sanctions if the foreign targets of the sanctions could simply stand in line to be compensated for the losses those sanctions caused them.”).

Even if the Fifth Amendment were applicable here, which it is not, any constitutional right to notice has been satisfied and, thus, the issue whether Rafidain and Central Bank are entitled to due process protection is one of purely academic interest. First, JPM Chase has furnished them constitutionally sufficient notice by serving them in a manner consistent with the requirements of C.P.L.R. § 5239 and by setting a return date for January 27, 2003 – the same date as has been set for the hearing on this Petition.<sup>12</sup> Even if that notice were somehow technically defective, that would not affect its constitutional sufficiency in the context of these supplementary proceedings. Such “*supplementary proceedings . . . to enforce judgments . . . are meant to be swift, cheap [and] informal.*” *Resolution Trust Corp. v. Ruggiero*, 994 F.2d 1221, 1226 (7th Cir. 1993) (emphasis in original). As the Seventh Circuit noted in *Ruggiero*, it is implausible that “the draftsmen of Rule 69 meant to put the judge into a procedural straightjacket, whether of state or federal origin.” *Id.* Thus, it is not essential for “every twist

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<sup>12</sup> The manner of service of the petition in a proceeding under N.Y. C. P.L.R. § 5239 need only be “in the same manner as a notice of motion,” that is, by regular mail. Accordingly, in sending copies of its Third Party Petition to CBI and Rafidain by mail, JPM Chase satisfied the notice requirements of § 5239.

and turn of [state] procedural law” to have been followed, so long as “the requirements of due process” are “satisfied.” *Id.* at 1226-27; *see also Posadas de Puerto Rico, Inc. v. Gruberman*, 226 A.D.2d 249, 254, 641 N.Y.S.2d 615, 619 (1st Dep’t 1996).

Any due process notice requirements were also satisfied when petitioners provided notice to Iraq in conformity with N.Y. C.P.L.R. § 5225(b), because, even if they are “persons” for Fifth Amendment purposes, CBI and Rafidain have no constitutional right to be treated as legally separate from Iraq. The right of foreign states and their instrumentalities to a presumption of separate legal status is, as set forth above, a creature of comity, which Congress recognized when it enacted the FSIA and which it unquestionably has the power to withdraw if it determines that it is in the national interest to do so. *See* note 6 *supra*. Moreover, foreign states are fully aware of the fact that another state’s willingness to extend comity may diminish or disappear if relations with that state break down. It, therefore, goes without saying that an organ of the Iraqi Government such as CBI had no “reasonable investment backed expectation,” *Paradissiotis*, 304 F.3d at 1276, that their assets would remain immunized from attachment and would not be made available to satisfy the claims against Iraq in the event that country were to engage in aggressive actions that jeopardize the security interests of the United States and that trample upon the rights of American citizens.<sup>13</sup> Inasmuch as Rafidain and CBI do not otherwise have any right to be treated as separate from Iraq for purposes of executing against their assets to satisfy the judgments at issue, they have no constitutional or statutory right to notice of these proceedings separate from that which has been given to Iraq.

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<sup>13</sup> Indeed, the courts have made it clear that even private individuals and corporations may not claim a right to compensation under the Fifth Amendment when they suffer the loss of valuable contractual rights as a result of an executive order freezing the assets of a foreign state, including assets in which they might have an interest. *See, e.g., Paradissiotis*, 304 F.3d at 1275-76; *767 Third Ave. Assocs. v. United States*, 48 F.3d 1575, 1580-81 (Fed. Cir. 1995).

At any rate, as is apparent from the Supreme Court’s decision in *Dames & Moore v. Regan*, 453 U.S. 654 (1981), the directives of the political branches with respect to the disposition, including the permanent disposition, of blocked assets do not require scrutiny under the Fifth Amendment. *Id.* at 673-74 & n. 5 & 6. In that case, the Supreme Court confronted a Fifth Amendment challenge to President Carter’s orders to first restrict and then to terminate all attachments of blocked Iranian government assets (expressly defined to include all assets of Iranian government agencies and instrumentalities). Reasoning that “the President’s action in nullifying the attachments and ordering the transfer of the assets was taken pursuant to specific congressional authorization,” the Supreme Court declared that that action was “supported by the strongest presumptions and widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.” *Id.* at 674. Accordingly, the Court rejected the argument that the President’s exercise of his authority violated plaintiffs’ substantive due process rights under the Fifth Amendment and voiced no concern about any violation of procedural due process, even though the nullification of plaintiffs’ attachments and the transfer of the assets in which they had an interest was made without giving them prior notice or an opportunity to be heard. *Id.* at 674 & n.6.

**III. Petitioners Should Not Be Prejudiced By Any Further Delay In The Disposition Of These Proceedings.**

These ancillary proceedings – which will be more than four months old at the time of the January 27, 2002 hearing date – are intended to provide for swift and expeditious relief. Two of the petitioners – Jack Frazier and Charles Amos – are terminally ill and likely have just a few months left to live. (*See* Declaration of Daniel Wolf, filed Sept. 18, 2002.) JPM Chase has itself called for “a prompt resolution of this matter.” (Response at 1. n.1.) Accordingly, petitioners

respectfully request that this Court issue an order at the hearing on January 27 compelling JPM Chase to turn over blocked Iraqi assets in an amount sufficient to satisfy the judgments.

Petitioners' entitlement under § 201(a) to an order of execution on those assets is clear. It is equally clear that to the extent the turnover of the assets might otherwise expose JPM Chase to liability, which it would not, the issuance of such an order will fully protect JPM Chase from any such risk. Under no conceivable scenario, could JPM Chase be held liable to any third party in a subsequent action for complying with a court order compelling it to turn over blocked assets in accordance with the mandate of a federal statute. *See, e.g., Title Search Co. v. 1st Source Bank*, 765 N.E.2d 167, 173 (Ind. Ct. App. 2002) ("The Bank could not have breached any duty it owed to Title Search [by turning over funds in accounts allegedly containing money of its customers] by doing what it was obligated to do under law – comply with a valid garnishment order.").<sup>14</sup>

To the extent this Court concludes that (a) JPM Chase could somehow face potential exposure if it did not properly notify CBI and Rafidain of these proceedings, and (b) the notice JPM Chase has already provided them is not sufficient, the prejudice of further delay should fall upon JPM Chase – not petitioners. Petitioners initiated this proceeding seeking turnover of funds in which Iraq has an interest (including funds in accounts held by CBI and Rafidain) on September 23, 2002. If it felt that an order of execution could expose it to liability, JPM Chase could have filed its Third Party Petition and notified CBI and Rafidain of this Petition at that time. Instead, JPM Chase waited more than three months to file and serve its Third Party Petition.<sup>15</sup> Accordingly, petitioners (two of whom are chronically ill, short on funds and have

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<sup>14</sup> Petitioners have no objection to JPM Chase's request for entry of an order under N.Y. C.P.L.R. § 5209 discharging it from any obligation to petitioners once their judgments have been fully satisfied.

<sup>15</sup> At the hearing on September 26, 2002, JPM Chase's counsel represented that JPM Chase was, in essence, nothing more than a bystander in the dispute between petitioners and the Secretary of Treasury and, thus, said that it would need no more than five pages to inform the Court of any views it might have

little time left to live) should not be forced to bear the risks and burdens of delay (including the risk that other parties might execute upon these assets or that the Secretary of Treasury may license them to other parties) particularly in view of the uncertainties in the present international situation concerning Iraq.

### CONCLUSION

For the reasons set forth herein and in their initial memorandum, petitioners' application for issuance of a writ of execution should be granted. Petitioners respectfully request that the Court issue a writ of execution ordering respondent JPM Chase to turnover funds from accounts in the name of CBI and/or Rafidain in an amount sufficient to satisfy each petitioners' judgment and in the form annexed to the Petition as Exhibit A.

Dated: January 7, 2003

Respectfully submitted,

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on the Petition. While Petitioners have signed stipulations extending respondents' time for filing a response to their Petition, they did so initially only because the enactment of the TRIA seemed imminent and, following the enactment of that statute, agreed to a final extension only because the U.S. Attorney's office insisted that the Government needed additional time "to solidify its position" on the meaning of the TRIA. Had JPM Chase intimated to petitioners that it might be taking the position that it would oppose the granting of an order before CBI and Rafidain were notified, petitioners would have been able to prevent any unnecessary delay by furnishing such notice themselves, insisting that JPM Chase furnish such notice or refusing JPM Chase's requests for additional time to respond.