

Recognition of the Taliban: Challenges and Opportunities for Victims of Terrorism to Receive Compensation

INTRODUCTION

On August 30, 2021, the United States withdrew its last remaining troops from Afghanistan, marking the end of the longest armed conflict in American history.¹ The withdrawal of American forces was preceded by a February 2020 agreement between the Trump administration and the Taliban which provided for the withdrawal of American forces from Afghanistan in the following fourteen months known as the Doha Agreement.² Following his election in 2020, President Biden extended the deadline for withdrawal of American troops, stating that all U.S. forces would be withdrawn from Afghanistan by September 11, 2021.³

¹ Melissa Mahtani et al., *August 30 Afghanistan- Taliban News*, CNN (Aug. 31, 2021, 6:00 AM), <https://www.cnn.com/world/live-news/afghanistan-kabul-taliban-us-news-08-30-21/index.html>.

² Mujib Mashal, *Taliban and U.S. Strike Deal to Withdraw American Troops from Afghanistan*, N.Y. TIMES (Aug. 23, 2021), <https://www.nytimes.com/2020/02/29/world/asia/us-taliban-deal.html>. The Doha Agreement had several key provisions. First, the Doha Agreement provided a schedule for the withdrawal of American and other coalition forces over the course of fourteen months. Second, the Doha Agreement provided for the release of up to 5,000 Taliban prisoners and the release of 1,000 Afghan government security force prisoners held by the Taliban. The Doha Agreement also provided for diplomatic engagement with the aim of achieving the removal of the Taliban and Taliban members from sanctions lists, a promise from the United States to refrain from interfering in the internal affairs of Afghanistan, and assurances from the Taliban that they would not harbor Al Qaida members. *See* Agreement for Bringing Peace to Afghanistan Between the Islamic Emirate of Afghanistan Which Is Not Recognized by the United States as a State and Is Known as the Taliban and the United States of America, Taliban-U.S., Feb. 29, 2020, <https://www.state.gov/wp-content/uploads/2020/02/Agreement-For-Bringing-Peace-to-Afghanistan-02.29.20.pdf> [hereinafter Taliban-U.S. Agreement].

³ *See* President Joseph Biden, *Remarks by President Biden on the Way Forward in Afghanistan*, WHITE HOUSE (Apr. 14, 2021, 2:29 PM), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/04/14/remarks-by-president-biden-on-the-way-forward-in-afghanistan/>. In the wake of the chaotic withdrawal of American forces from Afghanistan in 2021, there has been significant political debate over responsibility for the swift Taliban takeover in Afghanistan with some Biden officials casting blame on the structure of the Trump-negotiated Doha Agreement while Republicans cast blame on the Biden administration's handling of the withdrawal from Afghanistan. *See* *Top US General Says Afghan Collapse Can be Traced to Trump-Taliban Deal*, GUARDIAN (Sept. 29, 2021), <https://www.theguardian.com/us-news/2021/sep/29/frank-mckenzie-doha-agreement-trump-taliban>. Regardless of ex-post analysis of the strategic failures of the American withdrawal from Afghanistan, an American withdrawal of forces under a Biden administration was likely, even without the Doha Agreement. In July 2019, prior to the signing of the Doha Agreement by the Trump administration, President Biden told the Council on Foreign Relations that he would commit to removing all American troops from Afghanistan by the end of his first term. *The Presidential Candidates on the War in Afghanistan*, COUNCIL ON FOREIGN RELS. (July 30, 2019, 11:51 AM), <https://www.cfr.org/article/presidential-candidates-war-afghanistan>. In addition, President Biden had a track record of being dovish on Afghanistan. In his tenure as Vice President, Biden opposed the commitment of more troops to Afghanistan. Diaa Hadid & Khwaga Ghani, *What Joe Biden's Presidency May Mean for Afghanistan*, NPR (Nov. 18, 2020), <https://www.npr.org/2020/11/18/935351710/what-joe-bidens-presidency-may-mean-for-afghanistan>

The Taliban subsequently seized wide swathes of Afghan territory in the summer of 2021,⁴ culminating with the capture of the capital of Afghanistan, Kabul, on August 15, 2021.⁵ Upon the fall of the existing Afghan government and the Taliban's seizure of power, the Biden administration notified U.S. financial institutions that it did not recognize the Taliban as having control over Afghan national bank assets.⁶ The Taliban now has effective control over Afghanistan despite not being currently recognized by the United States as the official government of Afghanistan.⁷

In the aftermath of the Taliban assumption of power in Afghanistan, the Biden administration froze \$7 billion of assets held by Afghanistan's national bank, Da Afghanistan Bank ("DAB"), that were held in the United States.⁸ The seized funds were later separated into two pools, one that would go to a third-party humanitarian trust to help the Afghan people and another that would remain in the United States, subject to attempts at attachment by plaintiffs with judgments against the Taliban.⁹ Victims of the September 11th terrorist attacks and other attacks assisted

-a-joe-biden-presidency-may-mean-for-afghanistan. Therefore, President Biden would have likely withdrawn American forces from Afghanistan even without the Doha Agreement signed by President Trump, albeit potentially in a different manner.

⁴ The rapidity of the Taliban offensive over the summer of 2021 was blamed, in part, by some on the end of American airstrikes against the Taliban following the Doha Agreement. Yaroslav Trofimov, *How the Taliban Overran the Afghan Army, Built by the U.S. Over 20 Years*, WALL ST. J. (Aug. 14, 2021, 12:32 PM), <https://www.wsj.com/articles/afghanistan-army-collapse-taliban-11628958253>.

⁵ *Id.* Mohammad Yunus Yawar & Charlotte Greenfield, *Afghan Taliban Celebrate Return to Power Two Years On Amid Erosion of Women's Rights*, REUTERS (Aug. 15, 2023, 12:35 PM), <https://www.reuters.com/world/asia-pacific/taliban-mark-two-years-since-return-power-afghanistan-2023-08-15/>.

⁶ Scott R. Anderson, *What's Happening with Afghanistan's Assets?*, LAWFARE (Feb. 18, 2022, 11:28 AM), <https://www.lawfaremedia.org/article/whats-happening-afghanistans-assets>.

⁷ Amanda Macias, *Secretary of State Blinken Calls Taliban 'the De Facto Government of Afghanistan'*, CNBC (Sept. 13 2021, 10:30 PM), <https://www.cnbc.com/2021/09/13/secretary-of-state-blinken-calls-taliban-the-de-facto-government-of-afghanistan.html>. Although several foreign governments have received Taliban envoys, the Taliban has struggled to achieve international recognition from foreign governments and the United Nations. Some worry about the message that will be sent if governments extend official recognition to terrorist groups and the precedent that will be set for other armed groups that overthrow democratic governments. Alim M. Latifi, *Taliban Still Struggling for International Recognition*, AL JAZEERA (Oct. 7, 2021), <https://www.aljazeera.com/news/2021/10/7/taliban-afghanistan-international-recognition>.

⁸ *See* Anderson, *supra* note 7. DAB assets were in the United States because the assets were being held by the Federal Reserve Bank of New York.

⁹ *Id.* The \$3.5 billion being held for humanitarian purposes is being held in a fund known as the Fund for the Afghan People. *See* Emma Farge & Charlotte Greenfield, *Swiss-Based Trust Fund for Frozen Afghan Assets Meets in Geneva*, REUTERS (Nov. 21, 2022, 7:01 AM), <https://www.reuters.com/world/swiss-based-trust-fund-frozen-afghan-assets-meets-geneva-2022-11-21/>. The transfer of funds has been condemned by the Taliban. The fund's stated purpose is "to receive, protect, preserve and disburse assets for the benefit of the Afghan people." The fund is to be dispersed by a four-member board and is constituted in Switzerland. The fund's trustees are a mix of American, Swiss, and Afghan officials consisting of Swiss foreign ministry official Alexandra Baumann; U.S. Ambassador to Switzerland Scott Miller; Anwar Ahady, a former Afghan central bank chief and former finance minister; and Shah Mehrabi, a U.S. academic who remains on the DAB Supreme Council. *Id.*

or perpetrated by the Taliban have already secured default judgments against the Taliban for amounts up to \$6 billion.¹⁰

This note will examine the effects of the Taliban takeover of Afghanistan on the efforts of plaintiffs who have secured judgments against the Taliban to attach assets belonging to the DAB in satisfaction of awards against the Taliban.¹¹ Specifically, this note examines the legal mechanisms that President Biden used to seize the DAB's assets held in the United States following the Taliban takeover of Afghanistan. The note also examines the process and challenges plaintiffs face in suits against the Taliban in attempting to attach DAB assets.

Part I of the note focuses on the background of American withdrawal from Afghanistan and the ensuing humanitarian crisis, current suits against the Taliban, Biden administration policy concerns regarding Afghanistan, and the Biden administration's seizure and subsequent division of DAB assets held within the United States. Part II of the note analyzes both the avenues and challenges plaintiffs in suits against the Taliban face in attaching DAB assets to satisfy judgments against the Taliban.¹² Part III of the note examines the current state of litigation that is attempting to attach DAB assets, and what, if anything, President Biden could do to effectuate his policy goals stated in part II while helping plaintiffs satisfy their judgments.

10 See Anderson, *supra* note 7.

11 Many of the current plaintiffs trying to execute a judgment against DAB assets are victims of the September 11th terrorist attacks but some are also victims of acts of terror committed against American contractors in Afghanistan. See Anderson, *supra* note 7. The plaintiffs have sued the Taliban along with a number of other nations and terror groups such as the Iranian Revolutionary Guard, Al Qaida, and the Haqqani Network; however, plaintiffs have seized the opportunity to execute their judgments via DAB assets. This is likely a reflection of the sovereign immunity afforded to foreign governments and the lack of assets terrorist groups have in the United States that can be subject to attachment. The unique status of DAB assets relative to the Taliban represents a novel issue in the sphere of litigation following terrorist attacks.

12 It is important to distinguish the plaintiffs' legal challenges. Plaintiffs have already achieved judgments against the Taliban. Therefore, this note will not focus on plaintiffs finding an exception within the Foreign Sovereign Immunities Act in order to sue the Taliban as a foreign government, but instead with what, if any, means plaintiffs have of executing their judgments against the Taliban or otherwise attaining compensation for the damages resulting from Taliban terrorist attacks and what, if any, role the Biden administration should have in satisfying those judgments. Much of the current jurisprudence regarding post-terror incident litigation concerns plaintiffs' attempts to overcome the default immunity afforded to sovereigns under the Foreign Sovereign Immunities Act.

I. BACKGROUND

a. American Withdrawal from Afghanistan and Its Effects

The withdrawal of American troops from Afghanistan was concluded on August 30, 2021.¹³ The withdrawal was conducted by the Biden administration according to the Doha Agreement, a peace agreement between the Trump administration and the Taliban.¹⁴ The Doha Agreement was signed in February 2020 and included among other provisions, agreements by the United States to release Taliban prisoners and refrain from future intervention in domestic Afghan affairs.¹⁵ The Doha Agreement also provided a schedule by which the United States would withdraw its forces from Afghanistan.¹⁶ The Taliban seized upon the withdrawal of American and other international forces from Afghanistan as well as the diminished assistance from American air support making significant advances throughout the Summer of 2021 culminating in the capture of Kabul, Afghanistan's capital, on August 15, 2021.¹⁷ That day

13 Oren Liebermann, *Defense Secretary Lloyd Austin Says He's "Proud of the Part" the US Played in the War in Afghanistan*, CNN (Aug. 30, 2021), <https://www.cnn.com/world/live-news/afghanistan-kabul-taliban-us-news-08-30-21/index.html>. This marked the end of direct military involvement in Afghanistan by the United States that was started nearly two decades prior by the Bush administration in the wake of the September 11th terrorist attacks. *Id.*

14 Sheerena Qazi, *Afghanistan's Taliban, US Sign Agreement Aimed at Ending War*, AL JAZEERA (Feb. 29, 2020), <https://www.aljazeera.com/news/2020/2/29/afghanistans-taliban-us-sign-agreement-aimed-at-ending-war>. The Doha Agreement and the process by which the agreement was negotiated have been criticized by those within Afghanistan on a number of grounds. First, some criticized the lack of monitoring mechanisms which can be used to hold the Taliban to their obligations under the Doha Agreement. Others criticized the agreement for failing to represent the interests of the majority of Afghans, and instead being largely concerned with the interests of the Taliban. In addition, several have criticized the agreement for failing to meaningfully curb violence against the Afghan people. Makhfi Azizi, *Afghans' Views on the Doha Peace Process and the Biden Administration's Review of the US-Taliban Peace Agreement*, ATL. COUNCIL (Feb. 25, 2021), <https://www.atlanticcouncil.org/blogs/southasiacenter/what-do-afghans-think-of-the-ongoing-doha-peace-process-as-well-as-the-us-taliban-peace-deal-and-what-do-they-expect-from-the-biden-administrations-review/>.

15 Taliban-U.S. Agreement, *supra* note 2.

16 The agreement provided that the United States would withdraw all forces within fourteen months of the treaty's signing with a deadline of withdrawal of May 2021. *Id.* In April 2021, President Biden confirmed his commitment to the withdrawal of all American forces from Afghanistan but stated that the withdrawal would not be complete until August 31, 2021. Zeke Miller & Aamer Madhani, *'Overdue': Biden Sets Aug. 31 for US Exit from Afghanistan*, ASSOCIATED PRESS (July 8, 2021, 4:52 PM), <https://apnews.com/article/joe-biden-afghanistan-government-and-politics-86f939c746c7bc56bb9f11f095a95366>.

17 Stephen Castle, *Afghanistan Live Updates 20-Year U.S. War Ending as It Began, with Taliban Ruling Afghanistan*, N.Y. TIMES (Aug. 29, 2021), <https://www.nytimes.com/live/2021/08/15/world/taliban-afghanistan-news>. The Taliban was able to wipe out the American-backed Afghan government's positions throughout Afghanistan in a matter of mere months despite assurances from the Biden administration that the Afghan government was better equipped and better trained than the Taliban. Though the Taliban largely refrained from attacking coalition forces in their offensive, they did not honor other commitments of the Doha Agreement. The Taliban offensive was relatively swift with much of the country falling to the Taliban between June and August. The United States asserted that the Afghan government had the resources it needed to defend itself after American forces withdrew, with Whitehouse spokesperson Jen Psaki stating that, "The Afghan National

the spokesman of the Taliban told Al Jazeera that the war in Afghanistan was over, and the Taliban had achieved its goals.¹⁸

In the wake of the Taliban takeover of Afghanistan, a humanitarian crisis has ensued. Four months after the Taliban assumed control of Afghanistan only two percent of the Afghan population had an adequate supply of food according to United Nations World Food Program.¹⁹ The United Nations Security Council was informed that six million Afghans were at risk of famine²⁰ and more than one million children were suffering from severe life-threatening malnutrition.²¹ Many have called for the United States to release the funds they have frozen to address the growing humanitarian crisis within Afghanistan.²²

b. Current Litigation Against the Taliban

There are several ongoing suits against the Taliban for their involvement in the September 11th terrorist attacks and other acts of terror. Many of these plaintiffs have attempted to attach frozen DAB assets to satisfy judgments against the Taliban. These plaintiffs have received multi-billion-dollar judgments against the Taliban and other defendants for both compensatory and punitive damages. The current parties trying

Security Defense Forces have what they need. What they need to determine is whether they have the political will to fight back, and if they have the ability to unite as leaders to fight back." Claire Brader, *Timeline of Taliban Offensive in Afghanistan*, HOUSE LORDS LIBR. (Aug. 17, 2021), <https://lordslibrary.parliament.uk/timeline-of-taliban-offensive-in-afghanistan/>. The United States and British embassies also accused the Taliban of war crimes in the course of their offensive which the Taliban denied. *Id.*

¹⁸ Nayera Abdallah et al., *Taliban Spokesman Says, "War is Over in Afghanistan" - Al Jazeera*, REUTERS (Aug. 15, 2021, 6:33 PM), <https://www.reuters.com/world/asia-pacific/taliban-spokesman-says-war-is-over-afghanistan-al-jazeera-2021-08-15/>.

¹⁹ Shelley Thakral et al., *15 Millions Afghans Receive WFP Food Assistance so Far in 2021; Massive Uplift Needed as Economy Disintegrates*, WORLD FOOD PROGRAMME (Dec. 14, 2021), <https://www.wfp.org/news/15-millions-afghans-receive-wfp-food-assistance-so-far-2021-massive-uplift-needed-economy>.

²⁰ *UN Says Six Million Afghans Are at Risk of Famine as Crises Grow*, AL JAZEERA (Aug. 30, 2022), <https://www.aljazeera.com/news/2022/8/30/un-warns-6-million-afghans-at-risk-of-famine-as-crises-grow>.

²¹ *Id.*

²² In a letter from more than seventy economists, President Biden and Treasury Secretary Yellen were urged to allow the DAB to access the \$7 billion in foreign reserves blocked by the Biden administration, arguing that the frozen assets were destroying the Afghan economy. The group of economists joined a host of others calling for the release of DAB funds including families of some victims of the September 11th attacks, the United Nations Secretary General, and human and civil rights activists. Dan Beeton, *Over 70 Economists Call for Biden Administration to Return Afghanistan's Central Bank Reserves*, CTR. FOR ECON. & POL'Y RSCH. (Aug. 10, 2022), <https://cepr.net/press-release/over-70-economists-call-for-biden-administration-to-return-afghanistans-central-bank-reserves/>. In addition, forty-six Democratic members of the House of Representatives called for the release of DAB funds to aid the Afghan people, and a bipartisan group of House members called for the release of these funds to a United Nations fund in order to provide aid to Afghan children and teachers. Joseph Choi, *House Democrats Call on Biden to Unfreeze Afghan Central Bank Reserves*, HILL (Dec. 20, 2021, 3:19 PM), <https://thehill.com/policy/international/middle-east-north-africa/586618-dozensof-democrats-call-on-biden/>.

to satisfy their judgments against the Taliban via DAB assets are the plaintiffs in *Smith ex rel. v. The Islamic Emirate of Afghanistan, et al.*²³; *Havlish, et al. v. Bin Laden*²⁴; *Fed. Ins. Co. et al. v. Al Qaida, et al.*²⁵ and *John Does 1 Through 7 v. The Taliban et al.*²⁶ (collectively, the “plaintiffs”).

c. Relevant Policy Considerations for the Biden Administration

The Biden administration does not currently recognize the Taliban as the legitimate governing group in Afghanistan,²⁷ nor has the Biden

23 Plaintiffs in *Smith ex rel. v. Islamic Emirate of Afg.* also filed suit against the Taliban for losses related to the September 11th terrorist attacks. They were awarded a judgment against the Taliban on May 7, 2003, for economic damages, solatium damages, and compensation for their decedents' pain and suffering. *Smith ex rel. v. Islamic Emirate of Afg.*, 262 F. Supp. 2d 217, 217, 232-33, (S.D.N.Y. 2003). The court awarded damages of tens of millions of dollars. *Id.* at 240.

24 On December 22, 2011, a magistrate judge in the Southern District entered a default judgment against the sovereign and non-sovereign defendants for their involvement in the September 11th terrorist attacks in *Havlish v. Bin Laden (In re Terrorist Attacks)*. The sovereign defendants included the Islamic Republic of Iran, Ayatollah Ali Hoseini Khamenei, Hezbollah, and other Iranian individuals and entities. *In re Terrorist Attacks* on Sept. 11, 2001, Nos. 03 Civ. 9848(GBD)(FM), 03 MDL 1570(GBD)(FM), 2011 WL 13244047, at *38 (S.D.N.Y. Dec. 22, 2011). The non-sovereign defendants included Osama bin Laden, Al Qaida, and the Taliban. *In re Terrorist Attacks* on Sept. 11, 2001, Nos. 03 Civ. 9848(GBD)(FM), 03 MDL 1570(GBD)(FM), 2012 WL 3090979, at *1 (S.D.N.Y. July 30, 2012). The court awarded fifty-nine plaintiffs damages totaling \$6,048,513,805. *In re Terrorist Attacks* on Sept. 11, 2001, No. 03 MDL 1570(GBD)(FM), 2012 WL 4711407, at *1 (S.D.N.Y. Oct. 3, 2012).

The *Havlish* plaintiffs sought action against sovereign defendants pursuant to the exception set forth in § 1605A of the Foreign Sovereign Immunities Act, which abrogates immunity for foreign states that are sponsors of terrorism. Section 1605A allows for damages to be sought including “economic damages, solatium, pain and suffering, and punitive damages.” 28 U.S.C § 1605(a); *In re Terrorist Attacks* on Sept. 11, 2001, Nos. 03 Civ. 9848(GBD)(FM), 03 MDL 1570(GBD)(FM), 2012 WL 3090979, at *2. The court allotted \$394,277,884 for economic damages which encompassed: “the past and future lost wages and benefits of each decedent; the estate's loss of household services; its loss of advice, counsel, guidance, instruction, and training services; its loss of accompaniment services; and prejudgment interest.” *In re Terrorist Attacks* on Sept. 11, 2001, Nos. 03 Civ. 9848(GBD)(FM), 03 MDL 1570(GBD)(FM), 2012 WL 3090979, at *3 (S.D.N.Y. July 30, 2012). In addition, the court awarded the plaintiffs a total of \$94,000,000 for pain and suffering; \$874,000,000 for solatium; and \$4,686,235,921 in punitive damages. *In re Terrorist Attacks* on Sept. 11, 2001, No. 03 MDL 1570(GBD)(FM), 2012 WL 4711407, at *3 (S.D.N.Y. Oct. 3, 2012).

25 Plaintiffs in *Fed. Ins. Co. et al. v. Al Qaida, et al.* brought suit against Al Qaida, the Taliban, and Hezbollah for insurance losses as a result of the September 11th terrorist attacks. The plaintiffs won a \$9,351,247,965.99 judgment against Al Qaida, which was later extended to the Taliban. *In re Terrorist Attacks* on Sept. 11, 2001, 03-MD-01570-GBD-SN, at 7, 11 (S.D.N.Y. 2022) (Report & Recommendation).

26 The fourth group of plaintiffs filed suit against the Taliban in 2016 in *John Does 1 Through 7 v. Taliban et al.* The *Doe* plaintiffs were victims of a suicide bombing against a contractor compound in Afghanistan in 2016 by the Taliban and other terror groups. The *Doe* plaintiffs were awarded a default judgment against the Taliban in the Northern District of Texas for \$138,000,000. Charlie Savage, *More Sept. 11 Victims Who Sued the Taliban Want Frozen Afghan Funds*, N.Y. TIMES (Dec. 2, 2021), <https://www.nytimes.com/2021/12/02/us/politics/9-11-families-taliban-funds.html>.

27 *U.S. Relations with Afghanistan*, U.S. DEP'T STATE (Aug. 15, 2022), <https://www.state.gov/u-s-relations-with-afghanistan/>. As of August 15, 2022, exactly one year after the fall of Kabul, the State Department's official position is that it does not recognize the Taliban or any other any other entity as the official government in Afghanistan, but does note that the United States “engages with

administration added Afghanistan to the list of state sponsors of terror.²⁸ The Biden administration's actions towards DAB assets held in the United States have allowed plaintiffs to attempt to seize the assets of DAB to satisfy their claims against the Taliban.²⁹ The Biden administration's actions can be viewed through the prism of several pertinent policy concerns: concerns about granting the Taliban recognition, an organization that has been declared a terrorist group by some countries³⁰ and has been criticized for their treatment of women and minorities;³¹ concerns about the ongoing humanitarian crisis in Afghanistan; and concerns regarding

Taliban representatives to urge the establishment of a credible process to form an inclusive government." *Id.*

²⁸ *State Sponsors of Terrorism*, U.S. DEP'T STATE, <https://www.state.gov/state-sponsors-of-terrorism/> (last visited Apr. 5, 2024). The Secretary of State has the power to designate a country as a state sponsor of terror. This designation is typically preceded by large scale acts of terror such as Iran's sponsorship of the bombing of the U.S. Marine barracks in Beirut that killed 241 servicemen. However, countries such as Saudi Arabia that have allegedly sponsored acts of terror such as the September 11th attacks have not been designated. Glenn M. Spitler III, *Foreign State-Sponsored Terrorism: A History and Legislative Analysis*, 29 S.C. BAR J. 19, 22 (2017).

²⁹ *Havlish v. Bin-Laden*, No. 1:03-cv-09848-GBD-SN (S.D.N.Y. 2022) (Doc. 526-1).

³⁰ The Taliban has been declared a terrorist organization by several countries including Canada. *Currently Listed Entities*, PUB. SAFETY CAN., <https://www.publicsafety.gc.ca/cnt/ntnl-scr/cntr-trrrsm/lstd-ntts/crrnt-lstd-ntts-en.aspx#53> (last visited Apr. 8, 2024). The United States has not declared the Taliban a terrorist organization, but has declared its Pakistani affiliate, Tehriki-Taliban Pakistan, a terrorist group. *Foreign Terrorist Organizations*, U.S. DEP'T STATE, <https://www.state.gov/foreign-terrorist-organizations/> (last visited Apr. 8, 2024). Tehriki-Taliban Pakistan has been designated a terrorist organization by the State Department since September 1, 2010. The process by which a group is designated a terrorist organization by the United States is determined by the Bureau of Counterterrorism in the State Department, who monitors the global activities of potential terrorist groups and prepares an "administrative record" which demonstrates the organization has met the statutory criteria for being a designated terrorist group. Then, the Secretary of State in concert with the Attorney General and Secretary of the Treasury make a determination on the designation of the group as terrorist organization. Finally, Congress is notified of the determination and is given a seven-day period to object to the designation. In the absence of Congressional action, the designation will take effect. *Id.* There are three general criteria an organization must fulfill in order to be designated a Foreign Terrorist Organization. First, the organization must be a foreign organization. Second, the organization must engage in terrorist activity as defined in § 212(a)(3)(B) of the Immigration Nationality Act or as defined in § 140(d)(2) of the Foreign Relations Authorization Act, or the organization retains the capability and intent to engage in terrorist activity or terrorism. Third, the organization's terrorist activity must threaten American nationals or the national security of the United States. *Id.* There are several important ramifications for designating a group a Foreign Terrorist Organization. First, it is unlawful for a person in or subject to the United States' jurisdiction to provide material support to a Foreign Terrorist Organization. Second, representatives or agents of Foreign Terrorist Organizations, if aliens, are inadmissible to the United States and may be removable from the United States. Third, any American financial institution that is aware that it has possession of or control over funds in which a Foreign Terrorist Organization has interest must retain possession or control of the funds and report the funds to the Office of Foreign Assets Control of the Treasury Department. *Id.* There are three avenues through which a group's designation as a Foreign Terrorist Organization can be revoked. First, the Secretary of State may choose to revoke the designation at any time. Second, the Secretary of State must revoke the designation if the circumstances that warranted the designation no longer do. Third, the Secretary of State must revoke the designation if the national security of the United States warrants a revocation. *Id.*

³¹ Yogita Limaye, *Afghanistan: Taliban Ban Women from Universities Amid Condemnation*, BBC (Dec. 21, 2022), <https://www.bbc.com/news/world-asia-64045497>; Christine Goldbaum et al., *Taliban Bar Women from NGOs, Threatening to Worsen Crisis*, N.Y. TIMES (Dec. 24, 2022), <https://www.nytimes.com/2022/12/24/world/asia/taliban-women-ngos-afghanistan.html>.

pressure from victims of terrorist attacks to satisfy their claims against the Taliban.³²

The Biden administration has frequently expressed its concern for the ongoing humanitarian crisis and human rights violations³³ that have occurred since the Taliban takeover of the country on August 20, 2021. In the year following the American withdrawal from Afghanistan, the United States has provided over \$1.1 billion in humanitarian assistance to Afghanistan.³⁴ In the aftermath of an earthquake in Afghanistan that killed over 1,000 people in June of 2022, the Biden administration re-committed to providing humanitarian aid to the country.³⁵ In President Biden's executive order freezing DAB assets and separating half of DAB assets into a third-party trust for the benefit of the Afghan people, President Biden directly cited the ongoing economic crisis, famine, and COVID pandemic in Afghanistan as humanitarian issues the United States is working towards resolving.³⁶ President Biden stated the reason

32 It is important to note that President Biden will also be facing reelection in 2024. Americans are split on the Biden administration's handling of Afghanistan. A Pew Research Poll indicated that a majority of Americans approved of the decision to withdraw American troops from Afghanistan. However, most Americans disapproved of the manner in which the Biden administration conducted the withdrawal of forces. In addition, 46% of Americans indicated they considered Taliban control of Afghanistan to be a major threat to the security of the United States, while 44% of Americans indicated they consider Taliban control of Afghanistan to be a minor threat to the security of the United States. Katherine Schaeffer, *A Year Later, a Look Back at Public Opinion About the U.S. Military Exit from Afghanistan*, PEW RSCH. CTR. (Aug. 17, 2022), <https://www.pewresearch.org/fact-tank/2022/08/17/a-year-later-a-look-back-at-public-opinion-about-the-u-s-military-exit-from-afghanistan/>. It is unclear what effect the role of Afghanistan, the Taliban, and justice for victims of terrorism will have in the 2024 presidential contest; however, former President Trump, the presumptive Republican nominee for President in 2024, lambasted President Biden's handling of Afghanistan as "the greatest foreign policy humiliation in U.S. history" and criticized the conclusion of American forces in Afghanistan as "not a withdraw" but a "total surrender." Lawrence Hurley & David Morgan, *Trump Assails Biden for Afghanistan 'Humiliation'*, REUTERS (Aug. 22, 2021, 6:52 AM), <https://www.reuters.com/world/us/trump-assails-biden-afghanistan-humiliation-2021-08-22/>. Other republican leaders such as Ted Cruz, Ron Desantis, and Mike Pence similarly criticized the Biden administration's handling of Afghanistan on grounds that it made the United States look weak to adversaries such as Iran, North Korea, Russia, and China. Thomas Beaumont, *3 GOP Prospects for 2024 Criticize Biden at Political Event*, ASSOCIATED PRESS (Sept. 12, 2021, 4:53 PM), <https://apnews.com/article/joe-biden-afghanistan-ron-desantis-michael-pence-nebraska-0ebb98428b8f6fb66397d7163538c44>. Therefore, it seems likely that the issue of Afghanistan can and will be used as cudgel by Republicans in the 2024 presidential contest to attack President Biden's foreign policy record.

33 Ned Price, *Department Press Briefing – December 20, 2022*, U.S. DEP'T STATE (Dec. 20, 2022, 2:31 PM), <https://www.state.gov/briefings/department-press-briefing-december-20-2022/#post-406519AFGHANISTAN>.

34 Anthony J. Blinken, *United States Announces Humanitarian Assistance for Afghanistan*, U.S. DEP'T STATE (Sept. 23, 2022), <https://www.state.gov/united-states-announces-humanitarian-assistance-for-afghanistan/>.

35 See Jake Sullivan, *Statement by National Security Advisor Jake Sullivan on the Earthquake in Afghanistan*, WHITE HOUSE (June 22, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/22/statement-by-national-security-advisor-jake-sullivan-on-the-earthquake-in-afghanistan/>.

36 *Fact Sheet: Executive Order to Preserve Certain Afghanistan Central Bank Assets for the People of Afghanistan*, WHITE HOUSE (Feb. 11, 2022), <https://www.whitehouse.gov/briefing->

for preserving half of DAB assets was for “the benefit of the Afghan people and for Afghanistan’s future.”³⁷

Victims of the September 11th terrorist attacks have also attracted significant attention for their lobbying efforts. In the executive order freezing DAB assets President Biden also stated that “more than \$3.5 billion in DAB assets would remain in the United States and are subject to ongoing litigation by U.S. victims of terrorism. Plaintiffs will have a full opportunity to have their claims heard in court.”³⁸ Victims of the September 11th terrorist attacks have found frequent and significant support in Congress. In 2016 Congress handed President Obama his first executive veto override when they overrode President Obama’s veto³⁹ of the Justice Against Sponsors of Terrorist Act (“JASTA”).⁴⁰ JASTA provided a new avenue for victims of terrorism to sue sovereign states for acts of terrorism beyond the exception provided within the Foreign Sovereign Immunities Act (“FSIA”).⁴¹ JASTA had bipartisan support and senators specifically cited the ability for victims of the September 11th attacks to pursue justice in overriding President Obama’s veto.⁴² When briefing the court on the issue of whether the plaintiff’s writ of execution against

room/statements-releases/2022/02/11/fact-sheet-executive-order-to-preserve-certain-afghanistan-central-bank-assets-for-the-people-of-afghanistan/ [hereinafter Fact Sheet – Afghanistan].

37 *Id.* This statement and others from the Biden administration could be argued to be mere lip service to concerns for the humanitarian disaster in Afghanistan. However, in the 2022 fiscal year, the United States gave more official development aid than the European Union, United Kingdom, or World Bank. *See U.S. Foreign Assistance by Country*, FOREIGNASSISTANCE.GOV (Mar. 28, 2024), <https://foreignassistance.gov/cd/afghanistan/2022/disbursements/1>.

38 Fact Sheet – Afghanistan, *supra* note 37.

39 *See* Barack Obama, *Veto Message from the President—S.2040*, WHITE HOUSE (Sept. 23, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/09/23/veto-message-president-s2040>. President Obama cited several reasons for his veto of JASTA. First, he cited the departure that JASTA represented from the traditional process of designating state sponsors of terrorism that allowed for an avenue for litigation under the Foreign Sovereign Immunities Act. Second, President Obama cited that JASTA would represent a significant departure from international relations, upsetting longstanding standards on sovereign immunity that protect American Armed Forces from litigation. Third, JASTA would potentially endanger relationships with strategic allies by the United States. *Id.*

40 Seung Min Kim, *Congress Hands Obama First Veto Override*, POLITICO (Sept. 28, 2016, 1:45 PM), <https://www.politico.com/story/2016/09/senate-jasta-228841>. JASTA’s congressional findings stated that:

The United States has a vital interest in providing persons and entities injured as a result of terrorist attacks committed within the United States with full access to the court system in order to pursue civil claims against persons, entities or countries that have knowingly or recklessly provided material support or resources, directly or indirectly, to the persons or organizations responsible for their injuries.

Justice Against Sponsors of Terrorism Act, Pub. L. No. 114-222, § 2(7), 130 Stat. 852 (2016).

Almost immediately after the passage of JASTA, it was used in an action against the Saudi Arabian government by a group of insurers seeking to recoup losses stemming from property damage caused by the September 11th terrorist attacks. Jonathan Stempel, *Saudi Arabia Faces \$6 Billion U.S. Lawsuit by September 11 Insurers*, REUTERS (Mar. 24, 2017, 10:20 AM), <https://www.reuters.com/article/idUSKBN16V21Z/>.

41 28 U.S.C. § 1605(B).

42 *Id.*

DAB assets should be granted, the Department of Justice stated that there is “a compelling interest in permitting victims of terrorism to obtain compensation to the greatest degree permitted under the law.”⁴³ Victims of state-sponsored acts of terror have also garnered significant congressional support in the past. Individuals who had been taken hostage at the American embassy during the 1979 Iranian Revolution were able to lobby Congress to add a provision to the FSIA that essentially created an exception to Iran’s sovereign immunity for the taking of hostages in the Iranian Revolution.⁴⁴

With any action towards Afghanistan, the Biden administration must also weigh diplomatic and national security concerns. The United States originally invaded Afghanistan over twenty years ago due to the Taliban’s harboring of Al Qaida who had just perpetrated the September 11th attacks.⁴⁵ Today the Taliban has a much more antagonistic stance towards Sunni extremist terror groups such as the Islamic State.⁴⁶ However, the United States may be reluctant to provide the Taliban any sort of financial assistance or diplomatic recognition, given their past support of Islamic extremist groups.⁴⁷ Official recognition is a significant decision that

43 Havlisch v. Bin-Laden, No. 1:03-cv-09848-GBD-SN, at 11 (S.D.N.Y. 2022) (Doc. 5).

44 Sean D. Murphy, *Lawsuit by U.S. Hostages Against Iran*, 96 AM. J. INT’L L. 463, 465 (2002). Although Iran had been designated a state sponsor of terror, and thus plaintiffs had a valid exception to sovereign immunity under the Foreign Sovereign Immunities Act, the designation of Iran did not occur until 1984, and the designation was not for the actions of Iranian revolutionaries between 1979 and 1981, which was the source of the plaintiffs’ claims. *Id.* at 465. Plaintiffs, faced with the difficulty of getting an exception to the Foreign Sovereign Immunities Act, successfully lobbied Congress in 2002 to amend the Foreign Sovereign Immunities Act to provide an exception to sovereign immunity for their specific litigation and circumvent the Algiers Accord that removed all litigation against the Iranian government stemming from the 1979 Iranian Hostage Crisis to an international tribunal. *Id.* at 465–466. When President Bush signed the legislation, he recognized that it removed Iran’s sovereign immunity for tortious acts committed during the 1979 Iranian Hostage Crisis. Ultimately, the plaintiffs’ litigation would prove unsuccessful, and the District of Columbia Court of Appeals would dismiss the litigation, finding that the legislation passed by Congress did not express a clear intent to abrogate the Algiers Accords. *Roeder v. Islamic Republic of Iran*, 195 F. Supp. 2d 140, 184 (D.D.C. 2002), *aff’d*, 333 F.3d 228 (D.C. Cir. 2003). Therefore, although the plaintiffs were ultimately unsuccessful in their litigation against the Iranian government, their ability to lobby Congress to provide an exception to existing legislation on sovereign immunities shows the high degree of sensitivity that elected federal officials have towards victims of terrorism.

45 News Desk, *A Historical Timeline of Afghanistan*, PBS (Aug. 30, 2021, 5:27 PM), <https://www.pbs.org/newshour/politics/asia-jan-june11-timeline-afghanistan>. The invasion of Afghanistan started after the Taliban refused to give up Osama bin Laden, the leader of Al Qaida. The United States and coalition forces were able to relatively quickly overwhelm Taliban forces who were in power in Afghanistan, and within a matter of months, had toppled the Taliban government. *Id.* Although in May 2011, United States Special Forces killed bin Laden in a raid in Pakistan, United States armed forces remained in Afghanistan for another ten years. *Id.*

46 Nilofar Sakhi, *The Taliban Has Failed to Gain Legitimacy — What Can Be Done?*, HILL (July 6, 2022, 12:30 PM), <https://thehill.com/opinion/international/3544405-the-taliban-has-failed-to-gain-legitimacy-what-can-be-done/>. Eric Schmitt, *What We Know About ISIS-K, the Group that Has Been Linked to the Moscow Attack*, N.Y. TIMES (Mar. 22, 2024), <https://www.nytimes.com/2024/03/22/us/politics/isis-k-moscow-attack.html>.

47 In August 2022, the United States killed Ayman al-Zawahiri, an Al Qaida leader, via drone strike in Kabul, Afghanistan. Robert Plummer & Matt Murphy, *Ayman al-Zawahiri: Al-Qaeda Leader Killed in US Drone Strike*, BBC (Aug. 2, 2022), <https://www.bbc.com/news/world-asia-60841111>.

President Biden is unlikely to take lightly.⁴⁸ Furthermore, recognition of the Taliban represents a significant bargaining chip that the Biden administration could use in negotiating with the Taliban. For example, formal recognition of the Taliban could be used to gain certain human rights guarantees for women or other minorities in Afghanistan.

In short, the Biden administration has and must continue to be cognizant of the need to provide humanitarian assistance to the Afghan people, placate victims of terrorist attacks as they seek compensation in civil litigation, and balance the national security and diplomatic concerns that come with dealing with the Taliban. Any future policy regarding DAB assets must be carefully triangulated to balance all these policy objectives.

d. Biden Administration Executive Action Regarding DAB Assets

On February 11, 2022, President Biden issued Executive Order 14064 titled, “Protecting Certain Property of Da Afghanistan Bank for the Benefit of the People of Afghanistan” which blocked all assets of the DAB held by United States financial institutions in the United States and required that they be transferred to a single consolidated account in the Federal Reserve Bank of New York (“FRBNY”).⁴⁹ The order was issued pursuant to the President’s power under the National Emergencies Act and International Emergency Economic Powers Act.⁵⁰ The order explicitly recognized both the ongoing humanitarian crisis in Afghanistan and ongoing litigation in the United States which implicated DAB assets.⁵¹

62387167. Despite the Doha Agreement’s stipulations that the Taliban would not allow Afghanistan to become a safe harbor for terrorism, American officials accused the Taliban of being aware of al-Zawahri’s presence in Kabul in violation of the Doha Agreement. *Id.*

48 There are several consequences arising from official recognition of a foreign government by the United States. Recognition of a foreign government allows that government to sue in American courts. Recognition of the Taliban as the official government in Afghanistan would protect their actions under the Act of State Doctrine. The Act of State Doctrine prevents U.S. courts from examining the validity of acts of a foreign government conducted within their own borders. John R. Stevenson, *Effect of Recognition on the Application of Private International Law Norms*, 51 COLUM. L. REV. 710, 712 (1951). In addition, lack of recognition prevents the Taliban from accessing Afghan government assets abroad, using foreign diplomatic facilities, or being party to international organizations. Scott R. Anderson, *History and the Recognition of the Taliban*, LAWFARE (Aug. 26, 2021, 12:55 PM), <https://www.lawfareblog.com/history-and-recognition-taliban>.

49 See Exec. Order No. 14064, 87 Fed Reg. 8391 (Feb. 11, 2022).

50 See *Id.*

51 *Id.* The executive order stated:

I, JOSEPH R. BIDEN JR., President of the United States of America, find that the widespread humanitarian crisis in Afghanistan—including the urgent needs of the people of Afghanistan for food security, livelihoods support, water, sanitation, health, hygiene, shelter and settlement assistance, and COVID-19-related assistance, among other basic human needs—and the potential for a deepening economic collapse in Afghanistan constitute an unusual and extraordinary threat to the national security and foreign policy of the United States . . . In addition, I find that the preservation of certain property of Da Afghanistan Bank (DAB) held in the United

Executive Order 14064 was just part of the Biden administration's overall approach toward DAB assets. The other central element of the Biden administration's plan, the transfer of half of the U.S.-held DAB assets to a third-party trust, was not mentioned in Executive Order 14064. Instead, this action was achieved through a license that was issued through the Department of the Treasury's Office of Foreign Asset Control ("OFAC"). The license directed the FRBNY to take half of the U.S.-held DAB assets totaling \$3.5 billion and place them in a separate account in the DAB's name.⁵² The license then provided that the funds would be transferred to a yet-to-be-determined international financing mechanism or United Nations entity for the benefit of the people of Afghanistan.⁵³ However, such a transfer is contingent on instructions from the Secretary of State certifying that the recipient of such funds has the authority to act in the best interest of the Afghan people pursuant to § 25B of the Federal Reserve Act.⁵⁴ Section 25B gives the Secretary of State the power to determine who has authority over the assets of national banks.⁵⁵

II. APPROACHES TO SEIZURE OF DAB ASSETS

a. *Terrorism Risk Insurance Act*

The current means by which plaintiffs are trying to execute their judgments against the Taliban is the Terrorism Risk Insurance Act

States by United States financial institutions is of the utmost importance to addressing this national emergency and the welfare of the people of Afghanistan. I also understand that various parties, including representatives of victims of terrorism, have asserted legal claims against certain property of DAB or indicated in public court filings an intent to make such claims. This property is blocked under this order.

Id.

⁵² *OFAC License No. DABRESERVES-EO-2022-886895-1*, DEP'T OF TREASURY, (Feb. 11, 2022), <https://s3.documentcloud.org/documents/21226931/ex-b-ofac-license.pdf>.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ 12 U.S.C. § 632 states,

Whenever (1) any Federal Reserve bank has received any property from or for the account of a foreign state which is recognized by the Government of the United States, or from or for the account of a central bank of any such foreign state, and holds such property in the name of such foreign state or such central bank; (2) a representative of such foreign state who is recognized by the Secretary of State as being the accredited representative of such foreign state to the Government of the United States has certified to the Secretary of State the name of a person as having authority to receive, control, or dispose of such property; and (3) the authority of such person to act with respect to such property is accepted and recognized by the Secretary of State, and so certified by the Secretary of State to the Federal Reserve bank, the payment, transfer, delivery, or other disposal of such property by such Federal Reserve bank to or upon the order of such person shall be conclusively presumed to be lawful and shall constitute a complete discharge and release of any liability of the Federal Reserve bank for or with respect to such property.

Id.

("TRIA"). The TRIA was passed by Congress in 2002 in the wake of the September 11th terrorist attacks. Congress passed the TRIA in order "to protect consumers by addressing disruptions and ensure the continued widespread availability and affordability of property and casualty insurance for terrorism risk."⁵⁶ In addition, TRIA was passed in order "to deal comprehensively 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."⁵⁷ Section 201(a) of TRIA permits plaintiffs who have obtained judgments against terrorist parties for acts of terrorism to obtain compensatory damages from blocked assets of the terrorist group.⁵⁸

Courts have had the opportunity to visit several key issues of TRIA § 201 such as what constitutes a terrorist party, whether the President may determine what constitutes a terrorist party, and what assets are subject to execution or attachment.

Not all state sponsors of terrorism will have their assets subject to execution or attachment in TRIA. TRIA § 201(b)(1) states that on a case-by-case basis, if it is in the United States' national security interest, the President may block the opportunity for attachment granted in TRIA § 201(a).⁵⁹ In *Smith v. Federal Reserve Bank of N.Y.*, the court found that

56 Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, § 101(b)(1), 116 Stat. 2323 (2002).

57 148 CONG. REC. H8728 at 23122 (2002).

58 Acts of terrorism are defined in § 102(1)(A) of the TRIA as:

Any act that is certified by the Secretary, in concurrence with the Secretary of State, and the Attorney General of the United States—
 (i) to be an act of terrorism;
 (ii) to be a violent act or an act that is dangerous to—
 (I) human life;
 (II) property; or
 (III) infrastructure;
 (iii) to have resulted in damage within the United States, or outside of the United States in the case of—
 (I) an air carrier or vessel described in paragraph (5)(B); or
 (II) the premises of a United States mission; and
 (iv) to have been committed by an individual or individuals acting on behalf of any foreign person or foreign interest, as part of an effort to coerce the civilian population of the United States or to influence the policy or affect the conduct of the United States Government by coercion.

Terrorism Risk Insurance Act of 2002 § 102(1)(A).

59 TRIA § 201(b)(1) states:

In general.—Subject to paragraph (2), upon determining on an asset-by-asset basis that a waiver is necessary in the national security interest, the President may waive the requirements of subsection (a) in connection with (and prior to the enforcement of) any judicial order directing attachment in aid of execution or execution against any property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations.

Terrorism Risk Insurance Act of 2002 § 201(b)(1).

However, § 201(b)(2)(A)-(B) provide an exception to § 201(b)(1) stating that:

the President could prevent *Smith* plaintiffs from attaching certain assets of an Iraqi bank pursuant to § 201(a) via the exception power granted to him in § 201(b)(1).⁶⁰ In upholding the President's power to block the attachment of Iraqi assets the court held that § 201(b)(1) was not an improper delegation of power by Congress to the President.⁶¹ Furthermore, in *Acree v. Snow*, the court held that Iraq remaining a designated state sponsor of terrorism was insufficient to refute President Bush's determination that § 201(a) was no longer valid with respect to Iraq.⁶²

Notwithstanding state sponsors of terrorism, TRIA also designates terrorist parties to be individuals or organizations deemed to be terrorists defined by § 212(a)(3)(B)(vi) of the Immigration and Nationality Act ("INA") (8 U.S.C. 1182(a)(3)(B)(vi)).⁶³ INA specifies that a terrorist organization can be designated in the following ways: directly in § 1189 of INA, via designation by the Secretary of State upon a finding that they have committed the acts described in § 1188(a)(3)(B)(iv)(I)-(VI),⁶⁴ or a

Exception.—A waiver under this subsection shall not apply to—

- (A) property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations that has been used by the United States for any nondiplomatic purpose (including use as rental property), or the proceeds of such use; or
- (B) the proceeds of any sale or transfer for value to a third party of any asset subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations.

Terrorism Risk Insurance Act of 2002 § 201(b)(2)(A)-(B).

The court in *Bennett v. Islamic Republic of Iran* addressed what property was protected from execution under TRIA. In *Bennett*, plaintiffs, whose decedent was the victim of Iranian state sponsored terrorism in Israel, attempted to satisfy a default judgment against Iran for \$12 million. *Bennett v. Islamic Republic of Iran*, 618 F.3d 19, 21 (D.C. Cir. 2010). Plaintiffs attempted to satisfy the judgment by executing writs against certain diplomatic property, such as Iran's former embassy and the residence of ambassador. *Id.* at 21. The Court of Appeals for the District of Columbia rejected the plaintiffs' claims on grounds that these properties did not constitute "blocked assets" as defined by the TRIA and thus were not subject to execution to satisfy the plaintiffs' claims because they were protected by the Vienna Convention. *Id.* at 24.

⁶⁰ *Smith v. Fed. Rsr. Bank of N.Y.*, 280 F. Supp. 2d 314 (S.D.N.Y. 2003). The court held that TRIA did not provide an "appropriation" by Congress for plaintiffs to execute their claims. *Id.* at 320. The court went on to acknowledge that TRIA explicitly recognized the President's discretion to block assets of terrorists from execution, and that Congress implicitly recognized that not all assets belonging to terrorist groups would be available for execution. *Id.* at 318. Furthermore, the President acted within his authority conferred by International Emergency Economic Powers Act ("IEEPA") § 1702(a)(1)(C) by ordering the confiscation of blocked Iraqi assets, which prevented plaintiffs from using TRIA to satisfy their judgment against Iraq. *Id.*

⁶¹ 280 F. Supp. 2d at 318.

⁶² *Acree v. Snow*, 276 F. Supp. 2d 31, 33 (D.D.C. 2003). The court additionally noted that plaintiffs may have a valid argument as to the President's determination that § 201(a) of TRIA did not apply retroactively, however, this was not at issue in *Acree*. *Id.* at 33.

⁶³ Terrorism Risk Insurance Act of 2002 § 201(d).

⁶⁴ These acts include:

- (I) to commit or to incite to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity;
- (II) to prepare or plan a terrorist activity;
- (III) to gather information on potential targets for terrorist activity;
- (IV) to solicit funds or other things of value for—
 - (aa) a terrorist activity;

designation based on a finding that a group of two or more individuals committed any of the acts described in § 1188(a)(3)(B)(iv)(I)-(VI).

Another crucial aspect of the application of TRIA is the determination of what assets are subject to attachment or execution. As a threshold matter, for an asset to qualify as “blocked” for the purposes of attachment or execution under TRIA, the assets must be seized by the executive branch pursuant to either the Trading with the Enemy Act (“TWEA”) or the International Emergency Economic Powers Act (“IEEPA”).⁶⁵ In *Weinstein v. Islamic Republic of Iran* the court held that bank accounts that had formerly been used by the Iranian Consulate were blocked assets under TRIA and were subject to attachment by the estate of a plaintiff who had died in a Hamas suicide bombing, a terrorist group that Iran supported.⁶⁶

In *Kirschenbaum v. Assa Corp.*, the Court held that corporations could accurately be described as a terrorist party for the purposes of TRIA if they are owned by a terrorist party.⁶⁷ The court first explained that Iran was a terrorist party under TRIA since it had been designated a state

- (bb) a terrorist organization described in clause (vi)(I) or (vi)(II); or
- (cc) a terrorist organization described in clause (vi)(III), unless the solicitor can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization;
- (V) to solicit any individual—
 - (aa) to engage in conduct otherwise described in this subsection;
 - (bb) for membership in a terrorist organization described in clause (vi)(I) or (vi)(II); or
 - (cc) for membership in a terrorist organization described in clause (vi)(III) unless the solicitor can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization; or
- (VI) to commit an act that the actor knows, or reasonably should know, affords material support, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training—
 - (aa) or the commission of a terrorist activity;
 - (bb) to any individual who the actor knows, or reasonably should know, has committed or plans to commit a terrorist activity;
 - (cc) to a terrorist organization described in subclause (I) or (II) of clause (vi) or to any member of such an organization; or
 - (dd) to a terrorist organization described in clause (vi)(III), or to any member of such an organization, unless the actor can demonstrate by clear and convincing evidence that the actor did not know, and should not reasonably have known, that the organization was a terrorist organization.

⁶⁵ 8 U.S.C. § 1182.

⁶⁶ 28 U.S.C. §§ 1605A(a)(1), 1610.

⁶⁷ The court rejected the United States’ argument that they were compelled to protect the funds from attachment under the Vienna Conventions on Diplomatic and Consular Relations, holding instead they were only obliged to protect assets currently being used for a diplomatic or consular purposes. *Weinstein v. Islamic Republic of Iran*, 274 F. Supp. 2d 53, 60-63 (D.D.C. 2003).

⁶⁷ *Kirschenbaum v. Assa Corp.*, 934 F.3d 191 (2d Cir. 2019).

sponsor of terrorism.⁶⁸ The court then explained that the corporation in question, Assa Corporation, could be thought of as an alter ego of Iran and thus a terrorist party.⁶⁹ In addition, Assa was an agency or instrumentality under the three-pronged test the court provided.⁷⁰ However, courts have been unwilling to consider assets blocked and thus not subject to TRIA if by the time plaintiffs obtained final judgment the assets were controlled by the Department of the Treasury.⁷¹

In summary, TRIA provides victims of terrorism the opportunity to attach or execute certain assets in satisfaction of suits if (1) the party is a terrorist party meaning they have been designated a stated sponsor of terror, they have been designated a terror group under § 212(a)(3)(B)(vi) of the INA, or have committed acts described in § 1188(a)(3)(B)(iv)(I)-(VI) of the Immigration and Nationality Act; (2) the assets have been blocked by the executive branch by either TWEA or IEEPA; (3) the assets are not under the control of the Department of the Treasury; and (4) if the assets are owned by an entity other than the terrorist party, that entity is either an “alter ego” or instrumentality of the terrorist party against which attachment or execution is sought.

b. Application of TRIA to Victims of Taliban Terror Attacks

Several groups of plaintiffs who have achieved judgments against the Taliban have already attempted to utilize the TRIA to satisfy claims judgments against the Taliban.⁷² These plaintiffs in their emergency motion for writ of execution on DAB assets claimed that the Taliban is in control of the DAB assets following the Taliban takeover in Afghanistan.⁷³ The *John Doe* plaintiffs go on to claim that the Taliban clearly meets the “terrorist party” requirement of TRIA. The Taliban is a Specially Designated Global Terrorist, meeting the definition of a terrorist party provided in § 212(a)(3)(B)(vi) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)(B)(vi)).⁷⁴ In the alternative, plaintiffs suggest that the Taliban is a terrorist party for purposes of TRIA because it engages in terrorist

⁶⁸ *Id.* at 198.

⁶⁹ *Id.* at 199.

⁷⁰ Under the agency or instrumentality test, the court looked at whether the corporation “(1) was a means through which a material function of the terrorist party is accomplished, (2) provided material services to, on behalf of, or in support of the terrorist party, or (3) was owned, controlled, or directed by the terrorist party.” *Id.* at 199.

⁷¹ *See* Smith v. Fed. Rsr. Bank of N.Y., 280 F. Supp. 2d 314, 318 (S.D.N.Y. 2003).

⁷² John Does 1 Through 7 v. Taliban, No. 1:20-mc-00740-KPF (S.D.N.Y. 2021) (Doc. 15, Pl.’s emergency mot. for writ of execution).

⁷³ *Id.* at 8.

⁷⁴ *Id.* at 3.

activity prescribed in 8 U.S.C. § 1182(a)(3)(B)(vi)(III) as evidenced by the actions for which they have had a judgment entered against them.⁷⁵

Havlish plaintiffs brought a similar action for a writ of execution against DAB assets to satisfy a judgment of over \$7 billion.⁷⁶ In their writ of execution, the *Havlish* plaintiffs alleged that the Taliban claimed control of the government of Afghanistan and claimed to be in control of the DAB as well.⁷⁷ Because the Taliban claim ownership over DAB assets, a judgment against the Taliban can be “enforced against any and all assets belonging to the government of Afghanistan, including any assets held at the Federal Reserve Bank in the name, for the benefit, or on the account of Da Afghanistan Bank, the central bank of Afghanistan.”⁷⁸

In August 2022, federal magistrate judge Sarah Netburn in the Southern District of New York recommended the *Havlish* plaintiffs’ writ of execution be denied.⁷⁹ The court’s reasoning was threefold.⁸⁰ First, the court reasoned that the DAB was immune from its jurisdiction due to the FSIA.⁸¹ Second, the Taliban had not yet been recognized as the sovereign government in Afghanistan and the court was unwilling to make such a recognition by implication since it is the sole power of the executive branch.⁸² Third, TRIA requires some sort of “agency relationship” for assets to be executed upon and the Taliban has not created such a relationship by their takeover of Afghanistan.⁸³ The court also held that the Taliban meets the definition of a terrorist party as a non-state actor because of the definition specified in 8 U.S.C. § 1182(a)(3)(B)(vi).⁸⁴

The court first examined FSIA’s applicability to the writ of execution against the DAB. The court noted that there are two types of foreign sovereign immunity, “immunity from jurisdiction and immunity from attachment and execution of the sovereign’s property.”⁸⁵ The court further observed that central banks enjoy additional protections to their immunity from execution.⁸⁶ Thus, the court reasoned that TRIA only provides a waiver of immunity to execution of sovereign assets if there is already a valid judgment against a sovereign.⁸⁷ Because the underlying

⁷⁵ *Id.*

⁷⁶ *Havlish v. Bin-Laden*, No. 1:03-cv-09848-GBD-SN (S.D.N.Y. 2022) (Doc. 526-1).

⁷⁷ *Id.* at 12.

⁷⁸ *Id.* at 13.

⁷⁹ *In re Terrorist Attacks on Sept. 11, 2001*, 03-MD-01570-GBD-SN, at 11 (S.D.N.Y. 2022) (Report & Recommendation).

⁸⁰ *Id.* at 2.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 29.

⁸⁵ *Id.* at 14.

⁸⁶ *Id.* at 15.

⁸⁷ *Id.* at 17.

suits were not against Afghanistan, they failed to abrogate the jurisdictional immunity of Afghanistan and its instrumentalities.⁸⁸ The court rejected the plaintiffs' argument that the DAB was an instrumentality of the Taliban, a non-state actor.⁸⁹

The court went on to examine constitutional restraints that prevented them from issuing a writ of execution, notwithstanding jurisdictional immunity. The court noted that the plaintiffs meet all but one of the following requirements of execution in TRIA § 201(a):

(1) they have obtained a judgment against a terrorist party, (2) on a claim based on an act of terrorism or an act for which a terrorist party is not immune under 28 U.S.C. § 1605A or 28 U.S.C. § 1605(a)(7), which they seek to satisfy with the (3) blocked assets, (4) of that terrorist, terrorist party, or their agency or instrumentality, (5) to the extent of only their compensatory damages.⁹⁰

The court found that the plaintiffs met all but the fourth criterion. Under the *Kirschenbaum* test, an agency or instrumentality is that of a terrorist party if it "(1) was a means through which a material function of the terrorist party is accomplished, (2) provided material services to, on behalf of, or in support of the terrorist party, or (3) was owned, controlled, or directed by the terrorist party."⁹¹ The court rejected the plaintiffs' claim that because the Taliban was the de facto government of Afghanistan the DAB was an instrumentality of the Taliban. The court conceded that although the Taliban can currently exert influence over the DAB and has even appointed Taliban members to key positions in the DAB, they cannot recognize the DAB as an instrumentality of the Taliban.⁹² It reasoned that doing so would be an implicit recognition of the Taliban as Afghanistan's government. The court elaborated that the power of recognition is a power exclusively held by the executive branch under *Zivotofsky*.⁹³ Therefore, the court is constitutionally restrained

⁸⁸ *Id.* at 19.

⁸⁹ *Id.* at 30.

⁹⁰ *Id.* at 29.

⁹¹ *Id.* at 30.

⁹² *Id.* at 33-34.

⁹³ *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1 (2015). The Court in *Zivotofsky* examined the issue of whether the President or Congress has the power to recognize Jerusalem as part of Israel. The issue was implicated because the plaintiff, an American citizen, was born in Jerusalem. Under the Foreign Relations Authorization Act, passed and signed into law by President Bush in 2003, American citizens born in Jerusalem could request to have Israel listed as their place of birth on their passports. *Id.* at 7. President Bush issued a signing statement indicating that, if the provision regarding Jerusalem was viewed as mandatory rather than advisory, it would unconstitutionally interfere with the President's power to recognize foreign governments. *Id.* at 7. The Court concluded that their past jurisprudence indicated that the President had the sole power to "recognize or decline to recognize a foreign state and its territorial bounds." *Id.* at 28. Although *Zivotofsky* concerned the President's power of recognition over a foreign state's territorial boundaries, the magistrate judge held in their judgment regarding DAB assets that the President's power of recognition also applied to the power to recognize a foreign government. *In re Terrorist Attacks on Sept. 11, 2001, 03-MD-01570-GBD-SN at 27-28 (S.D.N.Y. 2022) (Report & Recommendation).*

from recognizing the DAB as an instrumentality of the Taliban, as that would be an implicit act of recognition.⁹⁴

Lastly, the court reasoned that aside from the jurisdictional and constitutional concerns, they were constrained from granting a writ of execution on DAB assets on the grounds that the Taliban's nonconsensual control over the DAB prevents it from being an instrumentality or agency of the Taliban. Because the Taliban has "violently occupied" DAB, the court reasoned that there is no requisite consent for an agency relationship with the Taliban. The court's ruling analogized the Taliban's control over the DAB to that of a bank robber and unwilling bank. The court's reasoning, in part, hinged on the lack of executive recognition of the Taliban as well. Because the Taliban's takeover of the DAB and appointment of DAB officials is illegitimate there can be no agency relationship between the DAB and the Taliban.⁹⁵

In February 2023, a federal district judge adopted much of Magistrate Judge Netburn's opinion.⁹⁶ Specifically, the opinion adopted the finding that the court lacked subject matter jurisdiction over the DAB because of immunity provided by FSIA.⁹⁷ The court found that the DAB was an instrumentality of the Afghan government.⁹⁸ Furthermore, the court held that TRIA could not be used to nullify the DAB's immunity and give the court jurisdiction over it.⁹⁹ Lastly, the court held that the judgments against the Taliban were not sufficient to reach the DAB's assets under TRIA's framework.¹⁰⁰ The court elaborated that TRIA only gives a path to attachment of otherwise exempt assets if the creditors seek attachment where "a valid judgment has been entered against the sovereign."¹⁰¹ The court explained that Afghanistan has not been deemed a state sponsor of terrorism, nor is it a "terrorist party" as defined by TRIA. Therefore, TRIA is not a possible avenue for the seizure of DAB assets because Afghanistan is not a state sponsor of terrorism and the plaintiffs have judgments against the Taliban, who are currently not recognized as a sovereign.¹⁰² Furthermore, the court explained that it lacked the power under the Constitution to confer the DAB status as an instrumentality of the Taliban, because doing so would confer the Taliban status as sovereign

⁹⁴ *In re Terrorist Attacks on Sept. 11, 2001, 03-MD-01570-GBD-SN* at 30-31 (S.D.N.Y. 2022) (Report & Recommendation).

⁹⁵ *See Id.* at 37, 40-41.

⁹⁶ *In re Terrorist Attacks on Sept. 11, 2001*, 657 F. Supp. 3d 311, 320 (S.D.N.Y. 2023).

⁹⁷ *Id.* at 325.

⁹⁸ *Id.* at 326.

⁹⁹ *Id.* at 328-30.

¹⁰⁰ *Id.* at 330-32.

¹⁰¹ *Id.* at 330.

¹⁰² *Id.* at 331-32.

in Afghanistan, a power reserved for the executive branch.¹⁰³ Though the court acknowledged the plaintiff's arguments that the Taliban had exerted control over the DAB by appointing Taliban leaders to positions within the DAB and otherwise control the DAB,¹⁰⁴ the court could not formally recognize the DAB as a Taliban instrumentality because doing so would be an act of recognition reserved for the executive branch.¹⁰⁵

III. BIDEN ADMINISTRATION OPTIONS

Legal scholars have pointed out the current difficulties that plaintiffs will have in getting a writ of execution granted against DAB assets.¹⁰⁶ However, the court's decision to deny the writ of execution in *In re Terrorist Attacks on Sept. 11, 2001*, does suggest that a change in the Biden administration's policy of recognition of the Taliban as the legitimate government in Afghanistan could have a significant effect on the ability to attach DAB assets.

The Biden administration has several options. First, the administration can continue to simply not recognize the Taliban as the legitimate ruling government in Afghanistan. The State Department's official stance towards the Taliban remains one of "pragmatic engagement" without official recognition as the legitimate government in Afghanistan.¹⁰⁷ Despite the lack of official recognition from the United States or the international community, Secretary of State Anthony Blinken recognized the Taliban as the *de facto* government of Afghanistan as early

103 *Id.* at 333-36.

104 *Id.* at 334.

105 *Id.* at 334-35.

106 See Anderson, *supra* note 7.

107 See *U.S. Relations with Afghanistan*, *supra* note 28, at 1. The State Department does maintain that the Doha Agreement provides the pathway for Taliban participation in the new Afghan government, however the State Department premises its participation on the inclusion of women and minorities in a new government. The Taliban has largely failed to protect women's rights in Afghanistan, let alone include them in the government. A United Nations report recently called Afghanistan the "most repressive country in the world for women and girls." The report cited repressive rules for women regarding their inclusion in work, education, and other aspects of public life. Some advocates of woman's rights have gone so far as to accuse the Taliban of creating a "gender apartheid." Rahim Faiez, *UN: Afghanistan Is World's Most Repressive Country for Women*, ASSOCIATED PRESS (Mar. 8, 2023, 10:39 PM), <https://apnews.com/article/taliban-afghanistan-women-rights-united-nations-591c39436d53f83e5a0c423c5e06891c>. The State Department, along with representatives from Australia, Canada, the European Union, France, Germany, Italy, Norway, Switzerland, and the United Kingdom, has condemned the Taliban's treatment of women and minorities in Afghanistan. U.S. DEP'T STATE, *Joint Statement on Afghanistan*, (Mar. 7, 2023), <https://www.state.gov/joint-statement-on-afghanistan-2/>. Therefore, it seems unlikely that the Taliban will fulfill the State Department's recommendation for participation in the Afghan government. The United States has also suspended embassy operations in Afghanistan. See *U.S. Relations with Afghanistan*, *supra* note 28, at 3. In addition, none of the major international organizations that Afghanistan is party to, such as the United Nations, International Monetary Fund, or World Bank, recognize the legitimacy of the Taliban to represent Afghanistan. *Id.*

as September 2021.¹⁰⁸ The Taliban have assumed the rough outline of a government in Afghanistan, albeit with the use of heavy force and repression.¹⁰⁹ By maintaining the current status quo, the Biden administration would likely be foreclosing the possibility of plaintiffs with claims against the Taliban to satisfy these claims via DAB assets.

Second, the Biden administration could choose to recognize the Taliban as the sovereign government in Afghanistan. Such recognition of the Taliban would lend credibility to a group that the United States fought for over a decade¹¹⁰ and has faced credible allegations of human rights abuses.¹¹¹ However, recognition could also be a moderating force for the Taliban by providing a valuable “carrot” in exchange for human rights guarantees. The Biden administration also retains the option to recognize the Taliban as the government of Afghanistan while designating Afghanistan a state sponsor of terror providing the proverbial stick as well as carrot. Either decision would benefit the plaintiff’s seeking execution on DAB assets.

The Biden administration could also premise recognition of the Taliban on an agreement to settle claims against them in some sort of international tribunal. Such a decision would be in line with past executive action towards Iran following the 1979 revolution and subsequent Algiers Accords that negotiated the release of American hostages taken by Iranian revolutionaries.¹¹² The creation of such a tribunal could have the benefit of giving victims of September 11th some sort of compensation while protecting DAB assets that can be used for the benefit of the

108 Macias, *supra* note 8. This statement was made by Secretary of State Blinken in the context of a Congressional hearing. Secretary Blinken admitted that the Taliban had assumed power as a result of “getting the upper hand in a civil war.” *Id.* When asked if the United States would recognize the Taliban as the official government of Afghanistan, Secretary of Defense Lloyd Austin deflected, saying that “It’s hard to predict where this will go in the future with respect to the Taliban.” *Id.*

109 William Byrd, *Let’s Not Kid Ourselves: Afghanistan’s Taliban Regime Will Not Become More Inclusive*, LAWFARE (Oct. 24, 2022, 8:31 AM), <https://www.lawfaremedia.org/article/lets-not-kid-ourselves-afghanistans-taliban-regime-will-not-become-more-inclusive>.

Some argued that the Taliban essentially remains an authoritarian organization, as they were when they held power in the 1990s in Afghanistan. The Taliban has cracked down on opposition groups in Afghanistan and resisted pressures to create a meaningfully inclusive government. *Id.* Andrew Watkins, *One Year Later: Taliban Reprise Repressive Rule, but Struggle to Build a State*, U.S. INST. PEACE (Aug. 17, 2022), <https://www.usip.org/publications/2022/08/one-year-later-taliban-reprise-repressive-rule-struggle-build-state>. The Taliban has repressed free speech and political organizations within Afghanistan through arrests, coercion, and other acts of violence. In particular, the Taliban has cracked down on organized demonstrations of women in Afghanistan. *Id.*

110 *The U.S. War in Afghanistan*, COUNCIL ON FOREIGN RELS., <https://www.cfr.org/time-line/us-war-afghanistan> (last visited Apr. 11, 2024).

111 See *Afghanistan: Report Highlights Multiple Human Rights Violations and Abuses Under Taliban*, *infra* note 121.

112 *Iran-U.S. Claims Tribunal*, U.S. DEP’T STATE, <https://www.state.gov/iran-u-s-claims-tribunal/> (last visited Apr. 11, 2024). The agreement between Iran and the United States, known as the Algiers Accords, was signed in 1981. The agreement created a tribunal in the Hague, in part to settle disputes American nationals and companies had against Iran. Over \$2.5 billion in awards have been given by the tribunal. *Id.*

Afghan people in the face of tremendous poverty and famine. Although U.S.-Iranian relations can hardly be said to be the ideal picture of diplomacy, the Algiers Accords were a significant step in both satisfying the legitimate claims of plaintiffs with valid claims against a foreign government and allowing the United States to bring an end to the hostage crisis in Iran.¹¹³

In 1981, the United States entered the Algiers Accords with Iran. The agreement provided that American hostages who had been held in Tehran for 444 days would be released, Iranian assets attached by U.S. courts would be repatriated, and litigation between U.S. nationals and Iran would be terminated and directed to an international court of arbitration.¹¹⁴ The agreement was entered into by executive agreement and without Congressional approval.¹¹⁵ The agreement faced scrutiny from parties with a financial interest in the \$8 billion in repatriated Iranian assets.¹¹⁶ The Supreme Court decided in the watershed case *Dames & Moore v. Regan* that the President has the unilateral power to terminate claims in U.S. courts and refer them to an international arbitral body pursuant to a valid executive agreement.¹¹⁷

Although the authority of the President to terminate claims against Iran pursuant to the terms of the Algiers Accords has been called into question by some scholars in the wake of the Court's decision in *Dames & Moore v. Regan*,¹¹⁸ the decision remains good law. Therefore, President Biden could try to facilitate some sort of agreement with the Taliban akin to the agreement the Algiers Accords made with the revolutionary government in Iran. Such an agreement could serve several ends for both parties. The Biden administration could try to get a number of counter-terrorism and human rights guarantees from the Taliban government.

The Taliban still has close ties with the terrorist group Al Qaida, and a 2022 UN Report stated the Taliban "remains close" with Al Qaida and

¹¹³ Omar Ahmed, *Remembering the Algiers Accords*, MIDDLE E. MONITOR (Jan. 19, 2022, 9:43 AM), <https://www.middleeastmonitor.com/20220119-remembering-the-algiers-accords/>.

¹¹⁴ Rebecca A. D'Arcy, *The Legacy of Dames & (and) Moore v. Regan: The Twilight Zone of Concurrent Authority Between the Executive and Congress and a Proposal for a Judicially Manageable Nondelegation Doctrine*, 79 NOTRE DAME L. REV. 291, 292 (2003).

¹¹⁵ *Id.* at 292-293.

¹¹⁶ *Id.* at 292-293.

¹¹⁷ *Dames & Moore v. Regan*, 453 U.S. 654 (1981). The Court in *Dames & Moore* largely justified their decision on grounds that it was merely an application of Justice Jackson's landmark concurrence in *Youngstown Steel*. However, the Court stated that their own opinion in *Dames & Moore* was also born out of political expedience because striking down the executive agreement would have imperiled the release of the 444 American hostages that remained in captivity in Iran. D'Arcy, *supra* note 115, at 293. Scholars have subsequently posited that the Court's decision in *Dames & Moore* has vastly expanded the executive's power in foreign affairs in times of alleged national emergency because the Court grounded the President's power to terminate litigation against Iran and refer it to an arbitral body in largely unrelated Congressional legislation. *Id.* at 294-95.

¹¹⁸ 453 U.S. 654.

that the Taliban has created a “safe haven” for Al Qaida.¹¹⁹ These concerns are highlighted by the killing of Al Qaida leader Ayman al-Zawahiri in Kabul, who was reportedly living in the home of a Taliban aide.¹²⁰ The Taliban has also been accused of a number of human rights violations. Specifically, the Taliban has curtailed the rights of women in Afghanistan, depriving them of their rights to education, participation in the workplace, and participation in public life.¹²¹ In addition, the Taliban has also been accused of extrajudicial killings, arbitrary arrests and detention, and torture.¹²²

The Biden administration could hold the “carrot” of official recognition of the Taliban in exchange for certain human rights and security guarantees from the Taliban. Recognition could be given within the framework of a diplomatic agreement similar to the Algiers Accord. Such an agreement could also deal with claims against the Taliban that would divert them to some sort of international arbitral tribunal while unfreezing some or all assets of the Afghan government held in the United States. The State Department has already discussed premising recognition of the Taliban on respect for human rights and its treatment of terrorist groups within Afghanistan.¹²³ Therefore, official recognition of the Taliban as the legitimate governing faction in Afghanistan; security and human rights guarantees from the Taliban; the unfreezing of Afghan government assets in the United States;¹²⁴ and the diversion of claims against the Taliban in the United States to an international arbitral body could represent the nexus of several key policy goals of the Biden administration. Of course, such a plan would only be the result of likely months of heated negotiation between the United States and the Taliban. Furthermore, such a structured settlement would have to overcome the inertia of inaction with regard to a particularly thorny foreign policy issue and the stigma associated with legitimizing a group such as the Taliban. Regardless, the Biden administration could consider negotiating with the Taliban as a means of seeking justice for victims of terrorism and helping deliver humanitarian aid to those within Afghanistan.

¹¹⁹ Lindsay Maizland, *The Taliban in Afghanistan*, COUNCIL ON FOREIGN RELS. (Jan. 19, 2023, 10:45 AM), <https://www.cfr.org/backgrounder/taliban-afghanistan>.

¹²⁰ *Id.*

¹²¹ *Afghanistan: Report Highlights Multiple Human Rights Violations and Abuses Under Taliban*, UN NEWS (July 20, 2022), <https://news.un.org/en/story/2022/07/1122892>.

¹²² *Id.*

¹²³ *Department Press Briefing – August 16, 2021*, U.S. DEP’T STATE (Aug. 16, 2021, 4:38 PM), <https://www.state.gov/briefings/department-press-briefing-august-16-2021/>.

¹²⁴ Unfreezing Afghan government assets could have the added benefit of ameliorating a deteriorating humanitarian situation in Afghanistan if the Biden administration can further bargain for the frozen assets to be used strictly for humanitarian aid to the Afghan populace.

The contours of an agreement with the Taliban could largely match the provisions and structure of the Algiers Accords. The Algiers Accords provided that the United States would unfreeze certain Iranian assets frozen by President Carter and nullify attachments of Iranian assets awarded in American courts. In exchange, Iran would release the hostages taken at the American embassy.¹²⁵ The tribunal also provided that there would be an account furnished with Iranian assets that would be kept at a minimum level to satisfy plaintiffs' judgments at the tribunal.¹²⁶

However, there would be some critical differences between the Algiers Accords and a potential agreement between the United States and the Taliban. First, it is important to consider the vast economic differences between Iran and Afghanistan and what amounts of assets Afghanistan should and could provide to satisfy claims in an international tribunal. At the time the Algiers Accords were signed in 1981, Iran's GDP was roughly \$100.5 billion with a GDP per capita of \$2,483.¹²⁷ In contrast, Afghanistan's GDP in 2021 is \$14.58 billion with a GDP per capita of \$364.¹²⁸ Although GDP and GDP per capita are a rough indicator of overall financial welfare, it is a fair assessment that relative to Iran, Afghanistan is much more economically enfeebled. Therefore, if a tribunal with Afghanistan was to be created, the Biden administration would have to recognize that Afghanistan may not be able to provide as much guaranteed money as the Iranian government was able to settle in arbitral disputes.

Another key difference between the Algiers Accords and a potential agreement between the Taliban and the United States is the type of

125 Arturo Carrillo & Jason Palmer, *Transnational Mass Claim Processes (TMCPs) in International Law and Practice*, 28 BERKELEY J. INT'L L. 343 (2010). Plaintiffs' nullified claims were directed to an international tribunal which was "established for the purpose of deciding claims of nationals of the United States against Iran and claims of nationals of Iran against the United States . . . [which arose] out of debts, contracts, . . . expropriations or other measures affecting property rights" *Id.* at 353 (quoting Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, Art. I, Jan. 19, 1981. The tribunal could also adjudicate "any counterclaim which [arose] out of the same contract, transaction or occurrence that constitute[d] the subject matter of that national's claim . . . , and claims arising out of contractual disputes between the two governments. *Id.* at 353.

126 *Id.* at 353. American banks were to transfer \$1 billion in Iranian assets to a secured account and Iran would replenish the account to a level of at least \$500 million anytime it fell below that level until all arbitral claims were satisfied. *Id.* at 353. The Iranian government ended up reneging on their obligation to provide a minimum balance of at least \$500 million in 1992, resulting in the United States bringing a case against Iran in the international tribunal. The tribunal issued a judgment against Iran and forced Iran to replenish the account. *Id.* at 353.

127 *Iran GDP 1960-2024*, MACROTRENDS, <https://www.macrotrends.net/countries/IRN/iran/gdp-gross-domestic-product> (last visited Apr. 11, 2024).

128 *Afghanistan GDP 1960-2024*, MACROTRENDS, <https://www.macrotrends.net/countries/AFG/afghanistan/gdp-gross-domestic-product> (last visited Apr. 11, 2024). Afghanistan's GDP and GDP per capita suffered a 20% decline in 2021 after nearly two decades of growth from 2003 to 2020. *Id.*

claims that would be subject to adjudication in an international tribunal. The settlement between Iran and the United States foreclosed any claims resulting from American hostages' illegal captivity, allowing only for arbitration related to contract disputes between Americans and the Iranian revolutionary government.¹²⁹ Obviously, this would contrast with any potential agreement between the United States and Afghanistan, which would provide for an arbitral body to settle litigation for tortious conduct regarding acts of terrorism and not contract disputes born out of the Iranian revolutionary regime's alleged violation of contracts with Americans.

CONCLUSION

The Taliban takeover of Afghanistan represents a unique policy challenge for the Biden administration. The Biden administration must balance the competing goals of providing humanitarian relief for the impoverished people of Afghanistan, providing an avenue for victims of terrorism to seek financial compensation, curb human and civil rights abuses committed by the Taliban, and address any lingering national security concerns. Though it may be politically challenging, the Biden administration has the opportunity to address all these goals simultaneously in a structured agreement with the Taliban. Such an agreement could be modeled after the Algiers Accords with Iran that helped end the Iranian hostage crisis, stabilize relations with Iran, and provide plaintiffs with claims against the Iranian government an avenue to seek compensation. Although there would be necessary differences between the Algiers Accords and an agreement with the Taliban, such an agreement could be a useful path forward in achieving an array of policy goals the Biden administration has in Afghanistan.

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¹²⁹ Carillo & Palmer, *supra* note 126, at 353-54. This decision was subsequently ratified by Executive Order. *See* Exec. Order No. 12,294, 3 C.F.R. 139 (1981). The Executive Order was subsequently upheld by the judiciary throughout the course of litigation. *See, e.g.*, Persinger v. Islamic Republic of Iran, 729 F.2d 835 (D.C. Cir. 1984); Ledgerwood v. State of Iran, 617 F. Supp. 311 (D.D.C. 1985).

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