> My Administration has worked tirelessly to reform or remove the provisions described above in order to facilitate the enactment of this vital legislation, but certain provisions remain concerning. My Administration will aggressively seek to mitigate those concerns through the design of implementation procedures and other authorities available to me as Chief Executive and Commander in Chief, will oppose any attempt to extend or expand them in the future, and will seek the repeal of any provisions that undermine the policies and values that have guided my Administration throughout my time in office.[7]

D.C. Circuit Finds Congress Did Not Abrogate Algiers Accords Commitments

Some of the U.S. personnel taken hostage in Iran in November 1979 and held for 444 days before being released in January 1980 pursuant to the Algiers Accords[1] have sought to sue Iran for damages.[2] In July 2011, the U.S. Court of Appeals for the D.C. Circuit ruled that the 2008 amendments to the Foreign Sovereign Immunities Act (FSIA) creating a federal cause of action for suits against state sponsors of terrorism did not trump U.S. commitments in the Accords to bar suits against Iran by the hostages.[3] Excerpts from the court's opinion by Senior Circuit Judge Arthur Randolph follow:

> Plaintiffs are Americans taken hostage in Iran in November 1979, and their families. The Iranians held the hostages for nearly 15 months. They were freed only when the United States and the Islamic Republic of Iran entered into the Algiers Accords. *See generally* Iran–United States: Settlement of the Hostage Crisis, 20 I.L.M. 223 (1981). In the Accords, the United States made promises to Iran in order to secure the hostages' release. One of these was a promise to bar the prosecution against Iran of any legal action by a U.S. national arising out of the hostage taking.
>
> For the sake of clarity we will refer to plaintiffs collectively as "Roeder." In Roeder's last action against Iran for damages, we held that the Foreign Sovereign Immunities Act (FSIA), Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended in scattered sections of 28 U.S.C.), and in particular, the 2002 amendments to the Act, did not abrogate the promise made by the United States in the Algiers Accords to bar actions such as Roeder's. *See Roeder v. Islamic Republic of Iran*, 333 F.3d 228 (D.C. Cir. 2003) (*Roeder I*).
>
> Five years after we affirmed the dismissal of his suit, Roeder brought a new complaint in the district court, this time relying on Congress's 2008 amendments to the FSIA. As in the past case, Iran did not respond, the United States intervened and filed a motion to dismiss, and the district court granted the motion. The question in this appeal is whether the 2008 amendments to the FSIA reneged on the promise of the United States in the Accords to bar Roeder's suit.[4]

In a footnote, the court quoted its opinion in the plaintiffs' earlier litigation explaining the principle that acts of Congress should not be construed to abrogate treaties or executive agreements without a clear expression of congressional intent to do so.

[7] White House Press Release, Statement by the President on H.R. 1540 (Dec. 31, 2011), *at* http://www.whitehouse.gov/the-press-office/2011/12/31/statement-president-hr-1540.

[1] 20 ILM 223 (1981).

[2] Clyde Haberman, *For Ex-Hostage, Lawsuit Against Iran Is Unfinished Business*, N.Y. TIMES, Feb. 11, 2011, at A22.

[3] Roeder v. Islamic Republic of Iran, 646 F.3d 56 (D.C. Cir. 2011).

[4] *Id.* at 58.

https://doi.org/10.5305/amerjintelaw.106.2.0364 Published online by Cambridge University Press

> [N]either a treaty nor an executive agreement will be considered "'abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed.'" *Trans World Airlines v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) (quoting *Cook v. United States*, 288 U.S. 102, 120 (1933)); *see Weinberger v. Rossi*, 456 U.S. 25, 32 (1982); *Comm. of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 936–37 (D.C. Cir. 1988). The way Congress expresses itself is through legislation.
>
> Executive agreements are essentially contracts between nations, and like contracts between individuals, executive agreements are expected to be honored by the parties. Congress (or the President acting alone) may abrogate an executive agreement, but legislation must be clear to ensure that Congress—and the President—have considered the consequences. The "requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991). *Roeder I*, 333 F.3d at 237–38.[5]

The court then examined whether the 2008 amendments to the FSIA satisfied this standard, concluding that they did not.

> Roeder argues that the 2008 FSIA amendments, by creating a federal cause of action against state sponsors of terrorism, rendered our country's commitment to bar claims like Roeder's a nullity. As the district court pointed out, during the five years between *Roeder I* and the 2008 amendments, in the 107th, 108th, 109th, and 110th sessions of Congress, legislators tried—and failed—"to enact legislation that would explicitly abrogate the provision of the Algiers Accords barring the hostages' suit." *Roeder v. Islamic Republic of Iran,* 742 F.Supp.2d 1, 5 (D.D.C. 2010) . . . . Just as in *Roeder I*, the amendments that finally passed "do not, on their face, say anything about the Accords."[6]

Based on a detailed analysis of the interaction of the complex statutory texts, the court concluded that the 2008 amendments to the FSIA did not sufficiently demonstrate congressional intent to abrogate the Algiers Accord.

> We do not deny the force of Roeder's argument. In the end it may well represent the best reading of §1083(c)(3). But our focus is not on the best reading. Legislation abrogating international agreements "must be clear to ensure that Congress—and the President—have considered the consequences." *Roeder I*, 333 F.3d at 238. An ambiguous statute cannot supercede an international agreement if an alternative reading is fairly possible. *Fund for Animals, Inc. v. Kempthorne*, 472 F.3d 872, 879 (D.C. Cir. 2006). This clear statement requirement—common in other areas of federal law, see *Roeder I*, 333 F.3d at 238—"assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991).[7]

Tenth Circuit Upholds Injunction Barring Oklahoma Anti-Sharia, Anti-international Law Constitutional Amendment

In January 2012, the U.S. Court of Appeals for the Tenth Circuit unanimously upheld a district court injunction[1] barring Oklahoma's State Election Board from certifying an amendment to Oklahoma's constitution, designated by the state legislature as the "Save Our State"

[5] *Id.* at 58 n.2 (parallel citations omitted).

[6] *Id.* at 59–60.

[7] *Id.* at 61 (parallel citations omitted).

[1] Awad v. Ziriax, 754 F.Supp.2d 1298, 1308 (W.D. Okla. 2010).

https://doi.org/10.5305/amerjintelaw.106.2.0364 Published online by Cambridge University Press