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# DOES AN INDIVIDUAL FOREIGN OFFICIAL QUALIFY AS A FOREIGN STATE FOR PURPOSES OF THE FOREIGN SOVEREIGN IMMUNITIES ACT?

*Erin Nelson*<sup>†</sup>

In 2005, Hafsat Abiola, Anthony Enahoro, and Arthur Nwankwo<sup>1</sup> brought suit in the United States District Court for the Northern District of Illinois under the Alien Tort Claims Act,<sup>2</sup> alleging violations of international and Nigerian law, assault and battery, intentional infliction of emotional distress, and wrongful death, among other claims.<sup>3</sup> Abiola brought suit to vindicate wrongs committed against her parents, who had been pro-democracy activists in Nigeria.<sup>4</sup> In her complaint, Abiola alleged that her father was imprisoned, beaten, and denied medical care, and that he died after drinking tea prepared for him in the office of General Abdusalami Abubakar, a ranking member of the Provisional

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1. *Abiola v. Abubakar*, 267 F. Supp. 2d 907, 908-09 (N.D. Ill. 2003), *aff'd sub nom. Enahoro v. Abubakar*, 408 F.3d 877 (7th Cir. 2005).

2. *Id.* at 910. The Alien Tort Claims Act (ATCA) provides that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” Alien Tort Claims Act, 28 U.S.C. § 1350 (2000). An expansive reading of the ATCA has been criticized. Adam Liptak, *Class-Action Firms Extend Reach to Global Rights Cases*, N.Y. TIMES, June 3, 2007, at A33 (“Business groups and the State Department have urged the courts to interpret the law narrowly, saying that allowing such suits is a form of judicial imperialism that can interfere with American foreign policy.”); *see also Sosa v. Alvarez-Machain*, 542 U.S. 692, 713 (2004) (rejecting plaintiff’s argument that the ATCA should be read broadly because it “was intended not simply as a jurisdictional grant, but as authority for the creation of a new cause of action for torts in violation of international law”). *But see* Andrew B. Mohraz, Note, *The Impact of the U.S. Supreme Court’s Decision in Sosa v. Alvarez-Machain (2004) on the Alien Tort Statute*, 12 LAW & BUS. REV. AM. 363, 363 (2006) (noting that the Court affirmed the validity of the ATCA in *Sosa*, despite the Court’s holding that the statute did not permit the plaintiff to recover under the circumstances).

3. *Abiola*, 267 F. Supp. 2d at 908. The complaint included seven claims: “torture; arbitrary detention; cruel, inhuman and degrading treatment; false imprisonment; assault and battery; intentional infliction of emotional distress; and wrongful death.” *Enahoro*, 408 F.3d at 880.

4. *Abiola*, 267 F. Supp. 2d at 908-09.

Ruling Council (PRC).<sup>5</sup> She also claimed that her mother had been “gunned down in her car” by the PRC.<sup>6</sup> Enahoro and Nwankwo brought claims for imprisonment and violence committed against them as a result of their status as pro-democracy activists in Nigeria.<sup>7</sup> Each plaintiff’s claim was directed against Abubakar, who had assumed the position of the head of state of Nigeria in 1998.<sup>8</sup> Abubakar claimed immunity from suit and argued that each plaintiff’s causes of action must be dismissed pursuant to the Foreign Sovereign Immunities Act (FSIA).<sup>9</sup> Abubakar asserted the FSIA immunity defense on behalf of himself, acting as an individual foreign official and head of state during the time in question.<sup>10</sup>

The Court of Appeals for the Seventh Circuit shattered prior precedent when it held that the FSIA was not the source of immunity for individual foreign officials such as General Abubakar.<sup>11</sup> Prior to the Seventh Circuit’s decision, the Fourth, Sixth, Ninth, and District of Columbia Circuit’s each had held that the FSIA governed individual

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5. *Id.* at 909. Abiola’s father ran for election in Nigeria; she alleged that he won the election prior to the military regime’s invalidation of the results. *Id.* After he declared himself President of Nigeria, Abiola’s father was accused of committing treason, arrested, and imprisoned until his death on July 9, 1998. *Id.*

6. *Id.* Several members of the PRC and others were being tried for Abiola’s mother’s death at the time the complaint was filed. *Id.*

7. *Id.* Anthony Enahoro, the second plaintiff, was a political activist imprisoned for his criticisms of the military regime in Nigeria. *Id.* During his imprisonment, Enahoro, a diabetic, was denied access to medical care. *Id.* As an internationally recognized pro-democracy activist, he was ultimately granted asylum in the United States. *Id.* The third plaintiff was political activist Arthur Nwankwo. *Id.* He was arrested, “stripped naked, flogged with a cane, and carried away in a car trunk.” *Id.* Nwankwo was freed from prison on August 24, 1998. *Id.*

8. *Id.* at 908. The complaint accused Abubakar of committing the alleged acts during a politically unstable era in Nigeria that spanned from 1983 to 1999. *Id.*

9. *Id.* at 910; *see also* Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1604 (2000) (“[A] foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.”). Abubakar also argued that the court did not have proper jurisdiction over the matter because an “exhaustion-of-remedies requirement” must be met before bringing a cause of action under the Torture Victim Protection Act (TVPA). *Abiola*, 267 F. Supp. 2d at 910; *see also* Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 note (2000). The court dismissed this argument because the plaintiffs had not asserted a TVPA claim. *Abiola*, 267 F. Supp. 2d at 910.

10. *Abiola*, 267 F. Supp. 2d at 909-10 (“[T]he Act makes no mention of any immunity afforded to individuals. Abubakar maintains that it is well established that the FSIA applies to foreign officials and thus to heads of state . . .”).

11. *Enahoro v. Abubakar*, 408 F.3d 877, 882 (7th Cir. 2005). Abubakar filed an interlocutory appeal of the district court’s immunity determination with the Seventh Circuit. *Id.* at 880. The district court had limited Abubakar’s immunity claim to only those actions he took while head of state of Nigeria. *Abiola*, 267 F. Supp. 2d at 916-17.

foreign official immunity.<sup>12</sup> The Seventh Circuit ultimately granted Abubakar immunity as to acts he committed while he was acting as the head of state of Nigeria, but denied immunity as to those acts committed while Abubakar was acting as an individual foreign official in the capacity of a general and member of the PRC.<sup>13</sup>

The Foreign Sovereign Immunities Act was enacted by Congress in 1976<sup>14</sup> to codify the body of common law which had governed foreign sovereign immunity.<sup>15</sup> The FSIA is the exclusive means by which a federal court can obtain jurisdiction over a foreign state.<sup>16</sup> The FSIA provides that a foreign state will be immune from suit in both federal and state courts unless the conduct of the foreign state at issue is covered by one of the exceptions provided for in the statute.<sup>17</sup> Therefore, a finding that the FSIA applies and the alleged conduct falls into one of the stated exceptions is critical. Without such a finding, the court does not have jurisdiction to hear the case, resulting in its immediate dismissal.<sup>18</sup>

As a preliminary matter, a court considering the applicability of the FSIA must assess whether the party claiming immunity is a “foreign state” as defined in § 1603 of the statute.<sup>19</sup> Only foreign states can claim immunity from suit under the statute.<sup>20</sup> Prior to 2005, the Fourth, Sixth, Ninth, and District of Columbia Circuits agreed that individual foreign

12. *Velasco v. Gov’t of Indon.*, 370 F.3d 392, 398-99 (4th Cir. 2004); *Keller v. Cent. Bank of Nig.*, 277 F.3d 811, 815-16 (6th Cir. 2002); *El-Fadl v. Cent. Bank of Jordan*, 75 F.3d 668, 671 (D.C. Cir. 1996); *Chuidian v. Philippine Nat’l Bank*, 912 F.2d 1095, 1103 (9th Cir. 1990).

13. *See Enahoro*, 408 F.3d at 882. The Seventh Circuit failed to suggest any alternative method for analyzing individual foreign official immunity. *See id.* Instead, the court noted the Supreme Court’s finding of congressional intent “that the FSIA be the sole basis for obtaining jurisdiction over a foreign state in our courts.” *Id.* at 882-83 (quoting *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989)).

14. Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891, 2892-98 (codified as amended at 28 U.S.C.A. §§ 1602-1611 (West 2006 & Supp. 2007)).

15. H.R. REP. NO. 94-1487, at 7 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6605; *see also* *Permanent Mission of India v. City of New York*, 127 S. Ct. 2352, 2357 (2007) (“In enacting the FSIA, Congress intended to codify the restrictive theory’s limitation of immunity to sovereign acts.” (citations omitted)).

16. *Permanent Mission of India*, 127 S. Ct. at 2355 (quoting *Amerada Hess Shipping Corp.*, 488 U.S. at 439); *see also* 48 C.J.S. *International Law* § 40 (2004) (“The Act gives the United States District Courts original jurisdiction, without regard to the amount in controversy, of any nonjury civil action against a foreign state as to any claim for relief in personam . . . . Personal jurisdiction over a foreign sovereign also exists only when one of the exceptions to foreign sovereign immunity applies.” (footnotes omitted)).

17. 28 U.S.C. § 1604 (2000); *see also* 28 U.S.C.A. §§ 1605-07 (West 2006 & Supp. 2007).

18. *See Permanent Mission of India*, 127 S. Ct. at 2355.

19. *See* 28 U.S.C. § 1603(a) (2000) (“A ‘foreign state’ . . . includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state . . .”).

20. *Id.* § 1604.

officials were included in the definition of a foreign state under the FSIA.<sup>21</sup> The Seventh Circuit created a circuit split when it held that an individual foreign official is not permitted to claim immunity under the FSIA because such an official does not fall within the statute's definition of a foreign state.<sup>22</sup> Congress sought to create uniformity and predictability in foreign sovereign immunity when it enacted the FSIA.<sup>23</sup> With respect to individual foreign officials, however, the FSIA's silence has only complicated the legal standard.<sup>24</sup> Another motivation for the enactment of the FSIA was to "transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations."<sup>25</sup> The ability of plaintiffs to forum shop and circumvent the FSIA due to its varying interpretations may lead to similar negative consequences for United States officials who are subject to suit abroad.<sup>26</sup>

The Seventh Circuit's holding that the FSIA does not govern the immunity of individual foreign officials has been cited favorably by the Department of Justice.<sup>27</sup> The language of the FSIA does not textually

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21. *Velasco v. Government of Indonesia*, 370 F.3d 392, 398-99 (4th Cir. 2004); *Keller v. Cent. Bank of Nig.*, 277 F.3d 811, 815-16 (6th Cir. 2002); *El-Fadl v. Cent. Bank of Jordan*, 75 F.3d 668, 671 (D.C. Cir. 1996); *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1103 (9th Cir. 1990).

22. *Enahoro v. Abubakar*, 408 F.3d 877, 881 (7th Cir. 2005).

23. H.R. REP. NO. 94-1487, at 6 (1976), as reprinted in 1976 U.S.C.C.A.N. 6604, 6604 (stating that the purpose of the FSIA is "to provide when and how parties can maintain a lawsuit against a foreign state or its entities in the courts of the United States and to provide when a foreign state is entitled to sovereign immunity").

24. See, e.g., *Kensington Int'l Ltd. v. Itoua*, 505 F.3d 147, 160 (2d Cir. 2007) ("[I]t is an open question in this circuit whether individual officials enjoy sovereign immunity under the FSIA."); *Bolkiah v. Superior Court*, 88 Cal. Rptr. 2d 540, 547 (Cal. Ct. App. 1999) (noting that "[t]here was some initial disagreement whether a natural person could ever be considered an 'agent or instrumentality of a foreign state' within the meaning of the FSIA given its statutory definition and legislative history," but citing to *Chuidian* for the proposition that the FSIA may apply to an individual foreign official acting in his official capacity). See generally Working Group of the American Bar Association, *Reforming the Foreign Sovereign Immunities Act*, 40 COLUM. J. TRANSNAT'L L. 489, 493 (2002) (providing analysis on the current state of the FSIA and provisions of the statute that have been clarified, or further complicated, by judicial interpretation).

25. H.R. REP. NO. 94-1487, at 7, as reprinted in 1976 U.S.C.C.A.N. 6604, 6606.

26. See, e.g., *Boos v. Barry*, 485 U.S. 312, 323-24 (1988) (emphasizing the importance of protecting American diplomats abroad); Statement of Interest of the United States of America at 22, *Matar v. Dichter*, 500 F. Supp. 2d 284 (S.D.N.Y. 2007) (No. 05 Civ. 10270) [hereinafter *Matar* Statement of Interest] ("It is . . . of critical importance that American courts recognize the same immunity defense for foreign officials, as any refusal to do so could easily lead foreign jurisdictions to refuse such protection for American officials in turn.").

27. See Statement of Interest of the United States of America as Amicus Curiae at 3, *Kensington Int'l Ltd. v. Itoua*, 505 F.3d 147 (2d Cir. 2007) (Nos. 06-1763, -2216)

commit the immunity of individual foreign officials to the FSIA, and Congress did not intend for the statute to apply in these circumstances.<sup>28</sup> Further, international opinion also indicates that determinations of individual foreign official immunity may be considered a separate inquiry from the immunity of a foreign state.<sup>29</sup> When the court is presented with the issue of whether an “individual foreign official” should be granted foreign sovereign immunity, the court should analyze the issue using common law that was developed prior to the enactment of the FSIA.<sup>30</sup>

This Comment argues that the split in authority among the federal circuit courts as to whether the FSIA should apply to individual foreign officials must be resolved in favor of the Seventh Circuit approach. In Part I, this Comment first explores the well-established precedent of granting individual foreign officials immunity from suit in the United States. It examines an early form of sovereign immunity, “absolute immunity,” as well as the shift to the “restrictive” theory of sovereign immunity in 1952. This Comment then explores the Foreign Sovereign Immunity Act itself, with particular attention to the statutory language that created the circuit split on the issue of individual immunity. This Comment also considers the post-FSIA case law and the differing approaches to individual foreign official immunity, specifically focusing on the approaches taken by the Seventh and Ninth Circuits. Part II of this Comment addresses why the FSIA was not intended to apply to the sovereign immunity of individual foreign officials and why the Ninth Circuit, as well as the Fourth, Sixth, and District of Columbia Circuits, incorrectly applied the FSIA in this manner. The Comment considers the statutory language and legislative history of the FSIA, international approaches to individual foreign official immunity, and the possible negative repercussions of granting individual foreign officials immunity under the statute. This Comment ultimately suggests in Part III that the Seventh Circuit’s approach to the FSIA is correct. The FSIA, as enacted, should not be applied to determine the immunity of individual foreign officials. Instead, courts must look to the federal common law developed prior to the enactment of the FSIA to determine whether an individual foreign official should be granted immunity. Finally, this Comment recommends that Congress amend the FSIA to clarify the source of individual foreign official immunity.

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[hereinafter *Kensington Int’l Statement of Interest*] (“[T]he immunity of individual foreign officials is not governed by the FSIA.”).

28. *Id.* at 3, 6-7.

29. *Matar Statement of Interest, supra* note 26, at 20-21.

30. *See Kensington Int’l Statement of Interest, supra* note 27, at 3. A common-law determination of immunity may involve the court looking to the executive branch for a “suggestion of immunity.” *See id.* at 3-4.

## I. ABSOLUTE SOVEREIGN IMMUNITY IS RECOGNIZED BY THE COURTS AND APPLIED TO INDIVIDUAL FOREIGN OFFICIALS

### A. Early Sovereign Immunity Jurisprudence

The Foreign Sovereign Immunities Act was not the first articulation of sovereign immunity in American legal thought.<sup>31</sup> In 1812, Chief Justice Marshall articulated an early form of sovereign immunity in *The Schooner Exchange v. McFaddon*.<sup>32</sup> The Chief Justice began by noting that while “[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute,” jurisdiction is not without some qualification.<sup>33</sup> Common interests fostered interaction amongst sovereign

31. See *Nat'l City Bank of N.Y. v. Republic of China*, 348 U.S. 356, 358 (1955) (“The freedom of a foreign sovereign from being haled into court as a defendant has impressive title-deeds.”). The birthplace of the theory of sovereign immunity is found in the historical assumption that the king “could do no wrong.” Manuel R. García-Mora, *The Doctrine of Sovereign Immunity of Foreign States and its Recent Modifications*, 42 VA. L. REV. 335, 336 (1956). The immunity a king would be granted in his own kingdom was thereafter recognized when the king happened to be in the country of another:

“If . . . [the] prince be come to negotiate, or to treat about some public affair, he is doubtless entitled in a more eminent degree to enjoy all the rights of ambassadors. If he be come as a traveller [sic], his dignity alone, and the regard due to the nation which he represents and governs, shelters him from all insult, gives him a claim to respect and attention of every kind, and exempts him from all jurisdiction.”

*Id.* at 337 (quoting EMMERICH DE VATTEL, *LES DROIT DES GENS* BK. IV.C.VII § 108 (Joseph Chitty trans., 1867) (1758)). In effect, a “mutually protective arrangement” of foreign sovereign immunity was established. *Id.* at 336-37.

32. 11 U.S. (7 Cranch) 116, 147 (1812); see also H.R. REP. NO. 94-1487, at 8 (1976), as reprinted in 1976 U.S.C.C.A.N. 6604, 6606. The case involved a dispute over the ownership of a vessel. *The Schooner Exch.*, 11 U.S. (7 Cranch) at 117. The plaintiff filed suit alleging that he owned the vessel and it was taken from him by parties in the service of Napoleon, the Emperor of France. *Id.* Plaintiff argued that because the ship was at port in Philadelphia, it was subject to the jurisdiction of the court and should be returned to its lawful owner. *Id.* Chief Justice Marshall ultimately concluded that the ship was not subject to the jurisdiction of the Court because it had been

in the service of a foreign sovereign, with whom the government of the United States is at peace, and having entered an American port open for her reception, on the terms on which ships of war are generally permitted to enter the ports of a friendly power, must be considered as having come into the American territory, under an implied promise, that while necessarily within it, . . . she should be exempt from the jurisdiction of the country.

*Id.* at 147. There was no body of common law on which Chief Justice Marshall could draw to provide legal support for his opinion. ERNEST K. BANKAS, *THE STATE IMMUNITY CONTROVERSY IN INTERNATIONAL LAW* 15 (2005). His articulation of sovereign immunity was the first in United States courts. As a result, Chief Justice Marshall looked to the philosophical writings of Vattel, Hobbes, and Rousseau, among others. *Id.*

33. *The Schooner Exchange*, 11 U.S. (7 Cranch) at 136 (reasoning that this qualification derived from the consent of the nation for the benefit of interchange with other sovereigns).

states and required the waiver of a state's right to absolute jurisdiction when dealing with another sovereign state in certain circumstances.<sup>34</sup> The Chief Justice reasoned that this was because

[o]ne sovereign being in no respect amenable to another, and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.<sup>35</sup>

Thus, a state would impliedly consent to a foreign state's immunity from suit in that state's jurisdiction in exchange for the benefits the state would gain from continuing to interact with the foreign state, particularly in the realm of commerce.<sup>36</sup>

Even in Chief Justice Marshall's early articulation of foreign sovereign immunity, the Supreme Court acknowledged that sovereign immunity extended beyond the foreign state itself to the individual head of state and his foreign ministers.<sup>37</sup> There was a general consensus, in the United States as well as in the international community, that the head of state and his foreign ministers are essentially the personal representation of the sovereign state itself and thus should be granted the same immunity.<sup>38</sup>

In 1897, the Supreme Court was directly presented with the question of whether to apply foreign sovereign immunity to an individual foreign official in the case of *Underhill v. Hernandez*.<sup>39</sup> The plaintiff, an American citizen, brought suit against General Hernandez for wrongs committed against him while working for the government of Venezuela in the midst of a civil war.<sup>40</sup> The issue the Court addressed was whether a

34. *Id.* The immunity granted to foreign states is unlike the immunity granted to the states through the Eleventh Amendment. *Nat'l City Bank of N.Y.*, 348 U.S. at 358-59. Foreign sovereign immunity is not a principle of constitutional law but a consideration of international foreign policy. *Id.* at 359.

35. *The Schooner Exchange*, 11 U.S. (7 Cranch) at 137.

36. *Id.*

37. *Id.* at 137-38. Regarding foreign ministers, the Court was concerned that if a minister was subject to the jurisdiction of another country the minister would sacrifice the loyalty due his sovereign because he "would owe temporary and local allegiance to a foreign prince, and would be less competent to the objects of his mission." *Id.* at 139.

38. *Id.* at 138.

39. 168 U.S. 250, 252 (1897).

40. *Id.* at 251. George F. Underhill had contracted with the government of Venezuela to build a waterworks system. He also owned a machinery repair business in Venezuela. *Id.* Underhill alleged that Hernandez refused him his right to a passport to



country's military general should be immune from suit in American courts, similar to the immunity he would be granted if he had been the head of state of Venezuela.<sup>41</sup> The Court ultimately held that Hernandez's acts were the acts of the government of Venezuela and therefore he was immune from suit.<sup>42</sup> Hernandez acted on behalf of the government when he forced Underhill to stay in Venezuela against his will, and so Hernandez was "representing the authority of the revolutionary party as a government."<sup>43</sup> Thus Hernandez, as an individual foreign official of Venezuela, was eligible for the same immunity from suit that would be granted to Venezuela's head of state.<sup>44</sup>

### *1. The Executive Branch Controlled Sovereign Immunity by Issuing Suggestions of Immunity*

The procedural mechanism for granting immunity from suit to a foreign state, prior to the enactment of the FSIA in 1976, was the executive branch's suggestion of immunity.<sup>45</sup> These suggestions of immunity were traditionally issued by the Department of State. The Department of State submitted the suggestions of immunity to the court where the litigation was pending.<sup>46</sup> Beginning with Chief Justice Marshall's opinion in *The Schooner Exchange*<sup>47</sup> and continuing "[f]or the

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return to the United States, which caused him delay, and that Hernandez's soldiers also committed "certain alleged assaults and affronts." *Id.*

41. *Id.* at 253-54.

42. *Id.* at 254. Before the Court could determine whether General Hernandez should be immune from suit, it had to resolve whether he was an individual foreign official of the government of Venezuela. *Id.* at 252-53. At the time, Venezuela was in the midst of a civil war. Two parties in opposition to one another claimed control of the government. *Id.* The Court set forth the conditions under which the acts of a revolutionary government would be recognized as the acts of the independent state and liability could be imposed. *Id.* at 253. Were the revolutionary party to succeed in its revolt and the independence of the government to be recognized, liability could be imposed for "the acts of such government from the commencement of its existence." *Id.* However, in the event a revolutionary party fails, "acts of legitimate warfare cannot be made the basis of individual liability." *Id.* The Court found that in this case, "[t]he acts complained of were the acts of a military commander representing the authority of the revolutionary party as a government, which afterwards succeeded and was recognized by the United States." *Id.* at 254. Thus, individual liability would be permitted. *Id.* The Supreme Court affirmed the circuit court's decision that "'the acts of the defendant were the acts of the government of Venezuela.'" *Id.* (quoting *Underhill v. Hernandez*, 65 F. 577, 583 (2d Cir. 1895)).

43. *Id.*

44. *See id.*

45. *See* H.R. REP. NO. 94-1487, at 7-8 (1976), as reprinted in 1976 U.S.C.C.A.N. 6604, 6606.

46. *See id.* at 8, as reprinted in 1976 U.S.C.C.A.N. 6604, 6606-07.

47. 11 U.S. (7 Cranch) 116, 135. In *The Schooner Exchange*, the Attorney General for the District of Pennsylvania filed a suggestion at the request of the executive branch that the suit be dismissed with costs. *Id.* at 116, 118-19.

next 165 years,” courts looked to suggestions of immunity made by the Department of State to guide them in their decision for grants of immunity from suit.<sup>48</sup> When a foreign state requested a suggestion of immunity from the executive branch, the Department of State generally complied with the request as long as the foreign state was considered a “friendly foreign sovereign[.]”<sup>49</sup>

When the executive branch failed to make a suggestion of immunity the court would purport to read into the executive branch’s silence on the matter.<sup>50</sup> The Supreme Court case of *Republic of Mexico v. Hoffman* illustrates this procedure.<sup>51</sup> In *Hoffman*, the Department of State did not make a suggestion of immunity on behalf of the Republic of Mexico.<sup>52</sup> Nonetheless, the Court looked to the executive branch for guidance on the immunity determination, stating that it would “inquire whether the ground of immunity is one which it is the established policy of the department to recognize.”<sup>53</sup> Thus, even in silence, the executive branch influenced the Court’s decisions on grants of immunity to foreign states.<sup>54</sup>

In *Hoffman*, the rationale underpinning the policy of adhering to executive branch suggestions of immunity was the need to avoid

48. *Enahoro v. Abubakar*, 408 F.3d 877, 880 (7th Cir. 2005) (noting that the usual procedure for sovereign immunity determinations involved dismissal of suits after the executive branch, through the Department of State, suggested immunity).

49. *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 486 (1983). *But see* H.R. REP. NO. 94-1487, at 7, *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6605-06 (criticizing the Department of State policy of granting immunity to friendly foreign sovereigns because of the impact that outside diplomatic influence may have on a decision to grant immunity when that decision is not determined by looking to established guidelines and standards).

50. *See* *Republic of Mexico v. Hoffman*, 324 U.S. 30, 34-35 (1945).

51. *Id.*

52. *Id.* at 31-32, 36.

53. *Id.* at 36. In *Hoffman*, the Court did not accept the claim of sovereign immunity Mexico made on behalf of the steamship *Baja California*. *Id.* at 31, 38. The steamship was owned by Mexico but operated under a lease by a private party for commercial purposes. *Id.* at 32-33. The Department of State did not present an opinion to the Court as to whether immunity should be granted under these circumstances. *Id.* at 31-32. Instead, the Department simply provided citations to a case where a ship was not found to be in the “possession and public service of [a] foreign government” and to another case where the contrary was found. *Id.*

54. *See id.* at 34-35. The Court held that the Department’s silence on a matter to which it had the opportunity to present an opinion would be considered controlling. *Id.* at 38. The Court reasoned that “recognition by the courts of an immunity upon principles which the political department of government has not sanctioned may be equally embarrassing to it in securing the protection of our national interests and their recognition by other nations.” *Id.* at 36. The Court further relied upon the fact that the Department had refrained from granting immunity on the grounds of state ownership of a vessel, without actual possession of the vessel by the State in the past. *See id.* at 36-37.

interference with the executive in conducting foreign affairs.<sup>55</sup> Foreign affairs are within the province of the Executive Branch and therefore it was appropriate for the Court to look to the Executive Branch's opinion on the matter.<sup>56</sup> The Court did not abdicate its role as the interpreter of the law by cooperating with the Executive Branch because, unlike the immunity of the states,<sup>57</sup> foreign sovereign immunity is not found in the text of the Constitution.<sup>58</sup> Thus, as the Court reaffirmed in a case in 1983, granting immunity to foreign states is not a constitutional requirement that must be interpreted by the judicial branch, but the subject of international policy on which the court defers to the executive branch's suggestions of immunity.<sup>59</sup>

These early articulations of foreign sovereign immunity served as a precursor to the development of sovereign immunity in the twentieth century. Chief Justice Marshall's articulation of immunity in *The Schooner Exchange* would become known as absolute immunity,<sup>60</sup> as compared to restrictive immunity, which began with the Department of State's issuance of the Tate Letter in 1952.<sup>61</sup>

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55. *Id.* at 35 ("It is a guiding principle in determining whether a court should exercise or surrender its jurisdiction in such cases, that the courts should not so act as to embarrass the executive arm in its conduct of foreign affairs. 'In such cases the judicial department of this government follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction.'" (quoting *United States v Lee*, 106 U.S. 196, 209 (1882))).

56. *See generally* U.S. CONST. art. II, § 2, cl. 2 (setting out provisions of executive power, including the power to make treaties, appoint ambassadors and consuls, and receive foreign ambassadors and consuls).

57. *See* U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

58. *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 486 (1983).

59. *Id.* ("As *The Schooner Exchange* made clear, . . . foreign sovereign immunity is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution. Accordingly, this Court consistently has deferred to the decisions of the political branches—in particular, those of the Executive Branch—on whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities.").

60. *See The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812) ("The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. . . . All exceptions, therefore, . . . must be traced up to the consent of the nation itself."). The theory of absolute immunity extended immunity from suit to foreign sovereigns in all instances where they were haled into a U.S. court. Robert B. von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 COLUM. J. TRANSNAT'L L. 33, 34 (1978).

61. *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 698 (1976).

## 2. *The Tate Letter and the Adoption of the Restrictive Theory of Sovereign Immunity*

In 1952, the Department of State issued the Tate Letter and articulated a shift in the policy of sovereign immunity.<sup>62</sup> Prior to 1952, the Department would make a suggestion of immunity whenever the party involved was found to be a friendly sovereign.<sup>63</sup> The Tate Letter modified the policy of granting absolute immunity to foreign sovereigns and embraced a policy of restrictive immunity.<sup>64</sup> Under the restrictive theory of sovereign immunity, a court would not grant immunity to a foreign sovereign if the dispute arose from the commercial activities of the sovereign.<sup>65</sup> Immunity was limited to situations where the case arose out of a sovereign's public acts.<sup>66</sup>

The Department issued the Tate Letter in response to the growth of international commerce and the consequent need to distinguish between a foreign state's traditional public activities and its actions as a participant in commerce.<sup>67</sup> The House of Representatives Report on the

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62. *Republic of Austria v. Altmann*, 541 U.S. 677, 689-90 (2004) ("Until 1952 the Executive Branch followed a policy of requesting immunity in all actions against friendly sovereigns. In that year, however, the State Department concluded that 'immunity should no longer be granted in certain types of cases.' In a letter to the Acting Attorney General, the Acting Legal Adviser for the Secretary of State, Jack B. Tate, explained that the Department would thereafter apply the 'restrictive theory' of sovereign immunity . . . ." (footnote and citations omitted)).

63. *Id.* at 689; *see also Verlinden B.V.*, 461 U.S. at 486-87.

64. Letter from Jack B. Tate, Acting Legal Adviser, Dep't of State, to Philip B. Perlman, Acting Attorney Gen., Dep't of Justice (May 19, 1952), in 26 DEP'T ST. BULL. 984, 984-85 (1952) [hereinafter Tate Letter] ("A study of the law of sovereign immunity reveals the existence of two conflicting concepts of sovereign immunity . . . . According to the newer or restrictive theory of sovereign immunity, the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*). . . . [I]t will hereafter be the Department's policy to follow the restrictive theory . . . in the consideration of requests of foreign governments for a grant of sovereign immunity."); *see also Altmann*, 541 U.S. at 690 (quoting passages); *Alfred Dunhill of London, Inc.*, 425 U.S. 682 app. 2 at 711, 714.

65. Letter from Monroe Leigh, Legal Adviser, Dep't of State, to Solicitor General, Dep't of Justice (Nov. 26, 1975), reprinted in *Alfred Dunhill of London, Inc.*, 425 U.S. 682 app. 1 at 707 [hereinafter Leigh Letter] ("Moreover, since 1952, the Department of State has adhered to the position that the commercial and private activities of foreign states do not give rise to sovereign immunity. Implicit in this position is a determination that adjudications of commercial liability against foreign states do not impede the conduct of foreign relations, and that such adjudications are consistent with international law on sovereign immunity.").

66. Tate Letter, *supra* note 64, at 984; *see also* H.R. REP. NO. 94-1487, at 7 (1976), as reprinted in 1976 U.S.C.A.N. 6604, 6605.

67. *Alfred Dunhill of London, Inc.*, 425 U.S. at 699 (asserting that the policy behind the restrictive theory of sovereign immunity was to "assure those engaging in commercial transactions with foreign sovereignties that their rights will be determined in the courts

FSIA explained that “American citizens are increasingly coming into contact with foreign states and entities owned by foreign states. These interactions arise in a variety of circumstances, and they call into question whether our citizens will have access to the courts to resolve ordinary legal disputes.”<sup>68</sup>

The Tate Letter did not significantly affect the procedure courts employed when granting immunity, despite its effect on the substantive law of foreign sovereign immunity.<sup>69</sup> The Department of State continued to issue statements of interest in sovereign immunity cases and courts continued to recognize their significance.<sup>70</sup> In addition to having a

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whenever possible”); see also H.R. REP. NO. 94-1487, at 8, as reprinted in 1976 U.S.C.C.A.N. 6604, 6606-07 (citing *Republic of Mexico v. Hoffman*, 324 U.S. 30 (1945); *Ex Parte Republic of Peru*, 318 U.S. 578 (1943)) (stating that the Tate Letter was issued in response to international law and two Supreme Court cases decided within the previous ten years).

68. H.R. REP. NO. 94-1487, at 6, as reprinted in 1976 U.S.C.C.A.N. 6604, 6605; see also *Trendtex Trading Corp. v. Cent. Bank of Nig.*, (1977) 1 Q.B. 529, 576 (U.K.) (Shaw, L.J.) (expanding on the changing circumstances that made the adoption of restrictive immunity inevitable), cited in von Mehren, *supra* note 59, at 37 n.19. In describing the changing circumstances in international relations, Lord Justice Shaw wrote that

The radical changes in political and economic and sociological concepts since the first world war have falsified the very foundations of the old doctrine of sovereign immunity . . . . To apply a universal doctrine of sovereign immunity to such activities is more likely to disserve than to conserve the comity of nations on the preservation of which the doctrine is founded. It is no longer necessary or desirable that what are truly matters of trading rather than of sovereignty should be hedged about with special exonerations and fenced off from the processes of the law by the attribution of a perverse and inappropriate notion of sovereign dignity.

*Id.*

69. *Altmann*, 541 U.S. at 690 (“[T]he change in State Department policy wrought by the ‘Tate Letter’ had little, if any, impact on federal courts’ approach to immunity analyses: ‘As in the past, initial responsibility for deciding questions of sovereign immunity fell primarily upon the Executive acting through the State Department,’ and courts continued to ‘abid[e] by’ that Department’s suggestions of immunity.” (quoting *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 487 (1983)) (internal quotations omitted)). While the Supreme Court stated in *Altmann* that the procedural mechanisms for determining immunity did not change after the Tate Letter, “[t]he change did, however, throw immunity determinations into some disarray, as ‘foreign nations often placed diplomatic pressure on the State Department,’ and political considerations sometimes led the Department to file ‘suggestions of immunity in cases where immunity would not have been available under the restrictive theory.’” *Id.* (quoting *Verlinden B.V.*, 461 U.S. at 487).

70. *Abiola v. Abubakar*, 267 F. Supp. 2d 907, 912 (N.D. Ill. 2003), *aff’d sub nom. Enahoro v. Abubakar*, 408 F.3d 877 (7th Cir. 2005). While the Department of State continued to issue suggestions of immunity, it adopted a new policy of allowing the parties to a foreign sovereign immunity dispute to appear before an informal hearing to present oral argument and petition the Department of State with written briefs. Von Mehren, *supra* note 59, at 41.

minimal effect on the procedural aspects of sovereign immunity determinations, the Tate Letter and the adoption of the restrictive immunity doctrine did not have significant repercussions for individual foreign official immunity.<sup>71</sup>

### 3. *The Tate Letter and Subsequent Case Law Elucidate the Immunity of Individual Foreign Officials*

The Tate Letter and the subsequent case of *Greenspan v. Crosbie* further clarified the scope of individual foreign official immunity.<sup>72</sup> After the Department of State implemented the restrictive theory of sovereign immunity through the Tate Letter, a separate methodology of legal analysis was required in determining the immunity of individual foreign officials.<sup>73</sup> Although *Greenspan* was a federal district court case and does not have the same precedential weight of a higher court decision, it nonetheless illustrates how a court applied individual foreign official immunity at the time Congress enacted the FSIA.<sup>74</sup> Notably in *Greenspan*, the district court held that the immunity of an individual foreign official was greater than the immunity granted to a foreign state under the theory of restrictive sovereign immunity.<sup>75</sup> The case involved a suit against Canada's Province of Newfoundland and Labrador, as well as individual officials of the Province, for violating U.S. securities laws.<sup>76</sup> The Department of State did not suggest immunity for the Province because the Province had acted in its "commercial capacity" when it publicly sold the stock it owned in Canadian Javelin, a Canadian corporation.<sup>77</sup> However, the Department suggested immunity for the

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71. See *Matar* Statement of Interest, *supra* note 26, at 8 ("As before the Tate Letter, the State Department continued to recognize the immunity of foreign officials for their official acts in suggestions of immunity made to the federal courts. Likewise, the federal courts continued to defer to such suggestions when they were presented." (citations omitted)).

72. See *Greenspan v. Crosbie*, [1976-1977 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95, 780, at 90,826, 90,827 (S.D.N.Y. Nov. 23, 1976), available at 1976 WL 841; Tate Letter, *supra* note 64, at 984-85.

73. See *Greenspan*, [1976-1977 Transfer Binder] Fed. Sec. L. Rep. (CCH) at 90,827; cf. *Matar* Statement of Interest, *supra* note 26, at 7-8.

74. See *Greenspan*, [1976-1977 Transfer Binder] Fed. Sec. L. Rep. (CCH) at 90,827. As written in the statement of interest filed by the United States in *Matar v. Dichter*, "[d]ecided in late 1976, *Greenspan* reflects the scope of common-law immunity for individual foreign officials as it existed when the FSIA was enacted that same year." *Matar* Statement of Interest, *supra* note 26, at 10.

75. *Matar* Statement of Interest, *supra* note 26, at 9.

76. *Greenspan*, [1976-1977 Transfer Binder] Fed. Sec. L. Rep. (CCH) at 90,826.

77. *Id.* at 90,826-27 ("With respect to the Province of Newfoundland, the Department recognizes and allows the immunity of the Province from suit, except insofar as plaintiffs' claims may be based upon direct injuries to purchasers of securities in the United States arising from (a) any immediate steps taken by the Province to affect the sale of securities

individual foreign official of the Province and the court held these individuals immune from suit.<sup>78</sup>

*Greenspan* illustrates two features of individual foreign official immunity at the time the FSIA was enacted. First, the Department of State separated the analysis of the immunity of the individual foreign officials from the immunity of the foreign state.<sup>79</sup> Second, while the foreign state was subject to the principles of restrictive immunity, the individual foreign officials were not.<sup>80</sup> Referring to *Greenspan*, the Department of Justice, in a letter addressing the Second Circuit, stated that "the immunity then recognized for foreign officials acting in their official capacity did not merely match, but rather exceeded, that of the state: even if the state could be sued for an official's acts under the restrictive theory, the official himself could not be."<sup>81</sup> Therefore, at the time the FSIA was enacted, individual foreign official immunity required a separate legal analysis and as a result, was not subject to the restrictive immunity applied to foreign states by the Department of State and the courts.<sup>82</sup>

### *B. The Foreign Sovereign Immunities Act Codified the Restrictive Theory of Foreign Sovereign Immunity*

The Foreign Sovereign Immunities Act was enacted by Congress in 1976 to codify the "'restrictive' principle of sovereign immunity" and ensure that the determination of whether to grant immunity to a foreign state was a judicial determination rather than a question for consideration by the executive branch.<sup>83</sup> Congress was motivated by the

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in the United States, (b) any alleged misrepresentation in violation of United States securities laws, made by the Province in effecting the sale of securities in the United States, (c) any alleged failure to disclose material information which the Province, in effecting the sale of securities in the United States, was required to disclose under U.S. securities laws."). Though the court held that the Province of Newfoundland was not immune from suit, the complaint was ultimately dismissed because section 10(b) of the Securities and Exchange Act of 1934 applied only to "*persons*," the statutory definition of which did not include governments. *Id.* at 90,827 (emphasis added).

78. *Id.* at 90,826-27.

79. *See id.* (quoting the suggestion of immunity the Department of State issued at the request of the Canadian Embassy); *see also* *Matar* Statement of Interest, *supra* note 26, at 9.

80. *See* *Greenspan*, [1976-1977 Transfer Binder] Fed. Sec. L. Rep. (CCH) at 90,826-27; *see also* *Matar* Statement of Interest, *supra* note 26, at 9-10.

81. *Kensington Int'l* Statement of Interest, *supra* note 27, at 8.

82. *See* *Greenspan*, [1976-1977 Transfer Binder] Fed. Sec. L. Rep. (CCH) at 90,827; *see also* *Kensington Int'l* Statement of Interest, *supra* note 27, at 3-4; *Matar* Statement of Interest, *supra* note 26, at 9.

83. H.R. REP. NO. 94-1487, at 7 (1976), as reprinted in 1976 U.S.C.C.A.N. 6604, 6605-06; *see also id.*, as reprinted in 1976 U.S.C.C.A.N. 6604, 6605 ("At present, there are no

increasing interaction between the United States and foreign parties, and the lack of any clear guidance should litigation arise.<sup>84</sup> Codification of sovereign immunity was also necessary to bring the United States in line with international thought on the subject. Most countries had previously established that sovereign immunity would be decided by their judicial branch counterparts.<sup>85</sup>

The FSIA, at 28 U.S.C. § 1604, provides:

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.<sup>86</sup>

The statute defines a “foreign state” in § 1603(a) as a “political subdivision of a foreign state or an agency or instrumentality of a foreign state.”<sup>87</sup> An agency or instrumentality of a foreign state is defined in § 1603(b) to mean

any entity . . . (1) which is a separate legal person, corporate or otherwise, and . . . (2) which is an organ of a foreign state or a political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and . . . (3) which is neither a citizen of a State of the United States as defined in section 1332 (c) and (e) of this title, nor created under the laws of any third country.<sup>88</sup>

The FSIA definition of what constitutes a foreign state is essential because the exceptions to immunity found in the Act are the only means by which a state or federal court can have subject matter jurisdiction over the foreign state.<sup>89</sup>

comprehensive provisions in our law available to inform parties when they can have recourse to the courts to assert a legal claim against a foreign state.”).

84. *See id.* at 7, as reprinted in 1976 U.S.C.C.A.N. 6604, 6605.

85. *Id.* *See also* von Mehren, *supra* note 60, at 33, 38-39 (“Prior to the passage of the Immunities Act in October 1976, all of the important trading and industrial countries with the sole exception of the United Kingdom, had adopted some form of the other of the restrictive doctrine of foreign sovereign immunity.”).

86. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1604 (2000).

87. *Id.* § 1603(a).

88. *Id.* § 1603(b) (2000 & Supp. V 2005).

89. *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428, 434 (1989) (“We think that the text and structure of the FSIA demonstrate Congress’ intention that the FSIA be the sole basis for obtaining jurisdiction over a foreign state in our courts.”); *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 489 (1983) (“If one of the specified exceptions to sovereign immunity applies, a federal district court may exercise subject-matter jurisdiction under [28 U.S.C.] § 1330(a); but if the claim does not fall within one of the exceptions, federal courts lack subject-matter jurisdiction.”). The burden of proving that the FSIA applies shifts between the litigants. *Enahoro v. Abubakar*, 408 F.3d 877, 882



### 1. *The Impact of the Foreign Sovereign Immunities Act on Individual Foreign Official Immunity Has Not Been Resolved*

The effect of the FSIA on the sovereign immunity of individual foreign officials has not yet been satisfactorily resolved.<sup>90</sup> The Fourth, Sixth, Ninth, and District of Columbia Circuits have held that the FSIA grants immunity to individual foreign officials.<sup>91</sup> Despite their apparent agreement on this conclusion, the Sixth, Ninth, and District of Columbia Circuits have further held that immunity is granted to individuals through the “agency or instrumentality of a foreign state” language in § 1603(b),<sup>92</sup> while the Fourth Circuit has not done so explicitly.<sup>93</sup> Instead, the Fourth Circuit has held that although the FSIA is silent with respect to individual foreign official immunity, immunity is extended to such individuals through a judicially constructed extension.<sup>94</sup> In sharp contrast to the conclusion of the Fourth, Sixth, Ninth, and District of Columbia Circuits, the Seventh Circuit has held that the FSIA does not apply to individual foreign officials, and therefore immunity must be granted by other means.<sup>95</sup>

### 2. *Individual Foreign Officials Qualify as an “Agency or Instrumentality of a Foreign State” Under the FSIA*

In 1990, the Ninth Circuit interpreted the FSIA to provide sovereign immunity to individual foreign officials acting in their official capacity.<sup>96</sup> In *Chuidian v. Philippine National Bank*, the court considered whether a member of the Presidential Commission on Good Government, an executive agency of the Philippine government, could be granted immunity from suit under the FSIA.<sup>97</sup> The court ultimately resolved the

(2005). First, the party seeking immunity from suit must make a prima facie showing that it qualifies as a foreign state under § 1603 of the statute. *Id.* Then the opposing party must “produce evidence that the entity is not entitled to immunity.” *Id.* Finally, the burden shifts back to the party claiming immunity, as that party bears the “ultimate burden of proving immunity.” *Id.*

90. *Enahoro*, 408 F.3d at 881-82.

91. See cases cited *supra* note 12.

92. *Keller v. Cent. Bank of Nig.*, 277 F.3d 811, 815 (6th Cir. 2002); *El-Fadl v. Cent. Bank of Jordan*, 75 F.3d 668, 671 (D.C. Cir. 1996); *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1101 (9th Cir. 1990).

93. See *Velasco v. Gov't of Indonesia*, 370 F.3d 392, 398-99 (4th Cir. 2004).

94. *Id.*; *Matar Statement of Interest*, *supra* note 26, at 15.

95. *Enahoro*, 408 F.3d at 882.

96. *Chuidian*, 912 F.2d at 1101. The D.C. Circuit followed the Ninth's lead in 1996 and the Sixth did in 2002. *Keller*, 277 F.3d at 815; *El-Fadl*, 75 F.3d at 671.

97. *Chuidian*, 912 F.2d at 1097-98. Vincente B. Chuidian, a citizen of the Philippines and owner of businesses in California, brought suit against Raul Daza, an official of the Philippine government and member of the Presidential Commission on Good Government (PCGG), when Daza forbade the Philippine National Bank from honoring a

inquiry with an analysis of 28 U.S.C. § 1603(b).<sup>98</sup> The court observed that “[w]hile section 1603(b) may not explicitly include individuals within its definition of foreign instrumentalities, neither does it expressly exclude them.”<sup>99</sup> Further, the court noted that the legislative history of the FSIA did not indicate a desire for the immunity of individual foreign officials

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letter of credit Chuidian received from the Republic of the Philippines. *Id.* at 1097. Chuidian also sued the Philippine National Bank and several other officials. *Id.* Daza argued that the case should be dismissed because he was immune from suit. *Id.* at 1098. The district court granted Daza’s motion, holding that as a member of the PCGG acting in an official capacity, he enjoyed sovereign immunity. *Id.* The Sixth Circuit Court of Appeals followed the lead of the Ninth Circuit in the case of *Keller v. Central Bank of Nigeria*. 277 F.3d at 815 (emphasizing that “[i]ndividuals who act outside the scope of their authority are not entitled to immunity”). The case involved claims of breach of contract, misrepresentation, and fraud brought by a United States citizen against several parties, including the Central Bank of Nigeria and individual bank officials. *Id.* at 814. The district court in *Keller* held that the FSIA did not immunize the individual bank officials because they were participants in a commercial activity. *Id.* at 815. On appeal, the Sixth Circuit first considered the individual foreign officials’ immunity under the FSIA commercial activity exception. *Id.* at 815-18. The court observed that “normally foreign sovereign immunity extends to individuals acting in their official capacities as officers of corporations considered foreign sovereigns.” *Id.* at 815 (citing *El-Fadl*, 75 F.3d at 671). The court held that the commercial activity exception applied in this case. *Id.* at 818.

In *El-Fadl*, Hassan El-Fadl brought a wrongful termination suit against the Petra International Banking Corporation as well as tort claims against the Central Bank of Jordan, the bank’s governor and deputy governor, and Petra. *El-Fadl*, 75 F.3d at 669-70. The district court granted defendants’ motion to dismiss, holding that the Central Bank, governor, and deputy governor were immune from suit under the FSIA. *Id.* The district court held that the governor and deputy governor had acted in their official capacity on behalf of the Central Bank and therefore qualified for immunity. *Id.* at 671. El-Fadl appealed the district court’s immunity determination as to the deputy governor, arguing that he had not acted in his official capacity, but in his individual capacity. *Id.* The District of Columbia Circuit concurred with the Ninth Circuit’s holding in *Chuidian* that an individual foreign official can qualify as an agency or instrumentality under the FSIA. *Id.* (citing *Chuidian*, 912 F.2d at 1101-03). Ultimately, the circuit court affirmed the district court’s determination that the deputy governor was immune because El-Fadl failed to carry his evidentiary burden on the issue. *Id.*

98. *Chuidian*, 912 F.2d at 1100-01. Three different arguments were made by the various parties that had an interest in *Chuidian*. *Id.* at 1099. Defendant Daza argued that as a member of a Philippine executive branch committee he was a foreign official, and thereby entitled to immunity as an agency or instrumentality of a foreign state under the FSIA. *Id.* at 1099. The plaintiff alternatively contended that the FSIA did not apply to Daza or that one of the Act’s exceptions applied. *Id.* The United States filed a Statement of Interest in which it argued that the FSIA did not immunize Daza because of his status as an individual, but that Daza was qualified for the immunity set out in the *Restatement (Second) of Foreign Relations Law*. *Id.* at 1099; see *RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW* § 66(b),(f) (1965) (providing immunity to “[a foreign state’s] head of state and any person designated by him as a member of his official party . . . [and] any other public minister, official, or agent of the state with respect to acts performed in his official capacity”).

99. *Chuidian*, 912 F.2d at 1101.

to be considered separately from that of foreign states.<sup>100</sup> The Ninth Circuit noted that to exclude individual foreign official immunity from the FSIA would contradict the purpose of the Act.<sup>101</sup> Because the statute was meant to codify the existing common law and remove immunity decisions from the discretion of the Department of State, exclusion of individual foreign officials from the statute would create a “blanket abrogation of foreign sovereign immunity by allowing litigants to accomplish indirectly what the Act barred them from doing directly.”<sup>102</sup> If individual foreign officials were not permitted to claim immunity under the statute, and the statute was the sole source of foreign sovereign immunity, plaintiffs would be encouraged to sue the individual foreign official instead of the foreign state, which would be immune from suit under the FSIA.<sup>103</sup> The court ultimately concluded that § 1603(b) should be read to include individual foreign officials in the definition of an agency or instrumentality of a foreign state, and the defendant’s claim of sovereign immunity therefore should be analyzed under the FSIA.<sup>104</sup>

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100. *Id.*

101. *Id.* (“Such an omission is particularly significant in light of numerous statements that Congress intended the Act to codify the existing common law principles of sovereign immunity. . . . If in fact the Act does not include such officials, the Act contains a substantial unannounced departure from prior common law. The most that can be concluded from the preceding discussion is that the Act is ambiguous as to its extension to individual foreign officials.”).

102. *Id.* at 1102.

103. *Id.*

104. *Id.* at 1103. After holding that the FSIA should be read to grant immunity to individual foreign officials who qualify under the statute, the court considered whether Daza’s conduct fell into one of the FSIA’s statutory exceptions. *Id.* at 1103-06. The court ultimately held that none of the exceptions applied to Chuidian’s case. *Id.* at 1106; *see also* Velasco v. Government of Indonesia, 370 F.3d 392, 398 (4th Cir. 2004) (finding that the FSIA is silent as to individual foreign officials). In the Fourth Circuit case of *Velasco v. Government of Indonesia*, the plaintiff brought suit against former staff members of the National Defense Security Council of the Republic of Indonesia (NDSC) claiming he was owed a payment of \$2.8 million on a promissory note the NDSC issued. 370 F.3d at 395. The district court held that the FSIA granted sovereign immunity to the former staff members as they were individual foreign officials and that the circumstances of the dispute did not implicate the commercial activities exception to the FSIA. *Id.* at 397. On appeal, the Fourth Circuit affirmed and noted the *Chuidian* holding. *Id.* at 398; *Herbage v. Meese*, 747 F. Supp. 60, 66 (D.D.C. 1990) (“Nowhere does the FSIA discuss the liability or role of natural persons, whether governmental officials or private citizens. Nonetheless, decisions in other federal courts, as well as reason, indicate—even if only indirectly—that the sovereign immunity granted in the FSIA does extend to natural persons acting as agents of the sovereign.”); *see also* First Am. Corp. v. Al-Nahyan, 948 F. Supp. 1107, 1120 (D.D.C. 1996) (citing *Herbage*, 747 F. Supp. at 66) (noting that the FSIA is silent as to individual immunity, but that policy considerations dictate that individuals acting in their official rather than individual capacity should be granted immunity).

### 3. *The Foreign Sovereign Immunities Act Does Not Provide for the Immunity of Individuals Acting in Their Official Capacity*

In contrast to the interpretation of the FSIA illustrated by the Ninth Circuit, which held that individual foreign officials could claim immunity from suit under the FSIA, is the approach of the Seventh Circuit, rejecting an interpretation of the FSIA that would extend immunity to individual foreign officials.<sup>105</sup> *Enahoro v. Abubakar* involved several Nigerian citizens who brought suit against Nigerian General Abubakar under the Alien Tort Statute, alleging torture and other causes of action.<sup>106</sup> Abubakar claimed immunity as a Nigerian public official under the FSIA.<sup>107</sup> The Seventh Circuit held that Abubakar, as an individual foreign official of the state, was not immune from suit.<sup>108</sup> The Seventh Circuit disagreed with the Ninth Circuit's immunity analysis. The court rejected the argument that Congress's failure to explicitly exclude individual foreign officials from the statute implied that individuals should be included.<sup>109</sup> The court disputed the Ninth Circuit's assertion that the requirement that an agency or instrumentality be a separate legal person did not necessarily exclude individuals.<sup>110</sup> The court reasoned that the placement of the phrase "corporate or otherwise" directly after "separate legal person" in § 1603(b)(1) was done purposefully, with the intention that the phrase "corporate or otherwise" would modify "separate legal person." The entire clause therefore would "refer[] to a legal fiction—a business entity which is a legal person."<sup>111</sup> In the court's view, it followed that "[i]f Congress meant to include individuals acting in the [sic] official capacity in the scope of the FSIA, it would have done so in clear and unmistakable terms."<sup>112</sup> The court further warned that concluding that Congress had impliedly included individual foreign official immunity in the FSIA would interfere with the placement of the burden of proof.<sup>113</sup> Under the FSIA, the individual

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105. *Enahoro v. Abubakar*, 408 F.3d 877, 881-82 (7th Cir. 2005).

106. *Id.* at 878-79.

107. *Id.* at 880.

108. *Id.* at 882.

109. *Id.* (citing *Chuidian*, 912 F.2d at 1101) ("We are troubled by this approach—that is, by saying Congress did not exclude individuals; therefore they are included.").

110. *Id.* at 881; *see also* Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1603(b)(1) (2000).

111. *Enahoro*, 408 F.3d at 881.

112. *Id.* at 881-82. The Seventh Circuit had recently decided that immunity for heads of state was not governed by the FSIA, and the court used its analysis in *Ye v. Zemin*, 383 F.3d 620 (7th Cir. 2004) as a point of comparison. *Enahoro*, 408 F.3d at 881.

113. *Enahoro*, 408 F.3d at 882 ("Not only does [this approach] seem upside down as a matter of logic, but it ignores the traditional burden of proof on immunity issues under the FSIA.").

claiming immunity must establish that he meets the requirements set out in the FSIA to qualify as foreign state and that he is eligible for immunity.<sup>114</sup>

## II. THE FOREIGN SOVEREIGN IMMUNITIES ACT DOES NOT GOVERN THE IMMUNITY OF INDIVIDUAL FOREIGN OFFICIALS

The text and legislative history of the statute, statements made by the Department of State, as well as customary international law, all support the approach taken by the Seventh Circuit Court of Appeals when it denied that individual foreign official immunity was governed by the FSIA. These sources each indicate that the common law of immunity developed prior to the enactment of the FSIA should govern individual foreign official immunity.

### A. *The Text and Legislative History Indicate that the FSIA Does Not Apply to Individual Foreign Officials*

Both the text and legislative history of the Foreign Sovereign Immunities Act illustrate that the Act was not intended to govern the immunity of individual foreign officials. Instead, these sources indicate that individual foreign immunity should be governed by the pre-existing common law.

#### 1. *The Statutory Language "Agency or Instrumentality of a State" Does Not Apply to Individuals*

The legislative history of the FSIA demonstrates that the primary concern that made the FSIA "urgently needed legislation" was the recognition that "[i]n a modern world where foreign state enterprises are every day participants in commercial activities,"<sup>115</sup> judicially created standards were needed to assure those dealing with foreign government market participants that any disputes between the parties would be fairly resolved.<sup>116</sup> The language of the statute mirrors the legislature's primary

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114. *Id.*; see also *supra* note 88 (discussing the shifting burden of proof).

115. H.R. REP. NO. 94-1487, at 7 (1976), as reprinted in 1976 U.S.C.C.A.N. 6604, 6605; see also *Lafontant v. Aristide*, 844 F. Supp. 128, 137 (E.D.N.Y. 1994) (asserting that the FSIA "was crafted primarily to allow state-owned companies, which had proliferated in the communist world and in the developing countries, to be sued in United States courts in connection with their commercial activities"); *Matar* Statement of Interest, *supra* note 26, at 11.

116. H.R. REP. NO. 94-1487, at 6-7, as reprinted in 1976 U.S.C.C.A.N. 6604, 6605. The legislative history of the statute provides examples of situations to which Congress envisioned the FSIA would apply, such as where a foreign state trading company enters into a business agreement with an American citizen, or where a foreign government entity invests in real estate sold by an American citizen, and disputes arise as to the contracts between the parties. *Id.* Note that both of these examples involve situations where an

concern for commercial enterprises of a foreign state. The FSIA codifies immunity for a foreign state and § 1603(a) further defines a foreign state to include a “political subdivision” or an “agency or instrumentality of a foreign state as defined in [§ 1603(b)].”<sup>117</sup> To qualify as an agency or an instrumentality within the FSIA, the entity must meet three conjunctive requirements. First, an agency or instrumentality must be a “separate legal person, corporate or otherwise.”<sup>118</sup> Second, the entity must be an “organ” of the foreign state itself or a political subdivision of the foreign state.<sup>119</sup> Third, the agency or instrumentality cannot qualify as a citizen of the United States under 28 U.S.C. § 1332(c) or (e)<sup>120</sup> and cannot be “created under the laws of any third country.”<sup>121</sup>

Noticeably missing from the definition of an agency or instrumentality of a foreign state in the FSIA is mention of an individual foreign official or a head of state.<sup>122</sup> The definition does not include an “individual” or refer to a “natural person.”<sup>123</sup> These definitions establish the contrary by defining a foreign state narrowly to include only foreign states themselves, “political subdivisions of foreign states,” or the “agenc[ies] or instrumentalit[ies] of a foreign state.”<sup>124</sup> While the statute uses the phrase “separate legal person,” it is immediately qualified by the phrase “corporate or otherwise,” indicating a desire to limit the definition to incorporated and unincorporated business entities.<sup>125</sup>

The House of Representatives Report on the Foreign Sovereign Immunities Act provided several examples of what would be considered

agency- or government-owned corporation is involved, as opposed to an individual foreign official. *See id.*

117. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1603(a) (2000); *Matar* Statement of Interest, *supra* note 26, at 10-11.

118. *Id.* § 1603(b)(1).

119. *Id.* § 1603(b)(2). In the event that an entity does not meet the organ requirement, the separate legal person may qualify if a majority of its shares are held by a foreign state or its political subdivision. *Id.*

120. 28 U.S.C. § 1603(b)(3) (2000 & Supp. V 2005); *see also* 28 U.S.C. § 1332(c) (2000) (governing the citizenship of corporations and the legal representatives of estates, infants, and incompetents); 28 U.S.C. § 1332(e) (2000 & Supp. V 2005) (defining the term “states”).

121. 28 U.S.C. § 1603(b)(3).

122. *See id.* § 1603; *see also* Michael A. Tunks, Note, *Diplomats or Defendants? Defining the Future of Head-of-State Immunity*, 52 DUKE L.J. 651, 666 (2002).

123. *See* § 1603; *see also* *Enahoro v. Abubakar*, 408 F.3d 877, 881 (7th Cir. 2005) (“The definition does not explicitly include individuals who either head the government or participate in it at some high level.”).

124. 28 U.S.C. § 1603(a) (2000). *But see* *Chuidian v. Philippine Nat’l Bank*, 912 F.2d 1095, 1101 (9th Cir. 1990) (“The terms ‘agency,’ ‘instrumentality,’ ‘organ,’ ‘entity,’ and ‘legal person,’ while perhaps more readily connoting an organization or collective, do not in their typical legal usage necessarily exclude individuals.”).

125. *See* § 1603(b)(1); *see also* *Enahoro*, 408 F.3d at 881-82.

a separate legal person.<sup>126</sup> The Report explained that a separate legal person was “intended to include a corporation, association, foundation, or any other entity which, under the law of the foreign state where it was created, can sue or be sued in its own name, contract in its own name or hold property in its own name.”<sup>127</sup> These illustrations support the proposition that generally, the law does not speak of natural persons as being created by law.<sup>128</sup> The Report also provided some examples of entities that would meet the three requirements necessary to satisfy the statutory definition of an agency or instrumentality.<sup>129</sup> These entities included “a state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel company, a central bank, an export association, a governmental procurement agency or a department or ministry which acts and is suable in its own name.”<sup>130</sup> Again, the examples provided by the House of Representatives Report illustrate the legislature’s exclusive concern with immunity determinations of *commercial enterprises* of a foreign state.<sup>131</sup>

Prior to providing examples of entities that would qualify as agents or instrumentalities of a foreign state, the Report explicitly affirms that “[a]n entity which does not fall within the definitions of sections 1603 (a) or (b) would not be entitled to sovereign immunity in any case before a Federal or State court.”<sup>132</sup> Thus, the legislative history of the FSIA confirms that Congress intended for the statute to be the source of immunity determinations in only specifically delineated circumstances.<sup>133</sup>

During the congressional hearings that occurred prior to the enactment of the Foreign Sovereign Immunities Act, Bruno Ristau, an

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126. H.R. REP. NO. 94-1487, at 15 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6614; *see also* § 1603(b)(1).

127. H.R. REP. NO. 94-1487, at 15, *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6614; *see also* 13A FED. PROC. L. ED. *Foreign Relations* § 36:398 (2006) (listing entities that have qualified as a foreign state under the FSIA as including “[a] corporation wholly owned by a foreign government[;] [a] nationalized bank; [c]entral banks[;] [a] permanent mission to the United Nations; [b]ranches of the armed forces of a foreign country[;] [a] national railroad or national airline[;] [a] petroleum company owned and controlled by the foreign state[;] [a] foreign state’s central bank, or a liquidator appointed by the foreign state’s central bank[;] [a] national university; and [a] wholly owned foreign trading company organized under the laws of a foreign state” (footnotes omitted)).

128. *See* 13A FED. PROC. § 36:398 (“The term [foreign state] does not include natural persons, such as a minister in the government of a foreign state sued in his individual capacity.” (footnotes omitted)).

129. *See* H.R. REP. NO. 94-1487, at 15-16, *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6613-14.

130. *Id.* at 16, *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6614.

131. *See id.* at 15-16, *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6613-14.

132. *Id.* at 15, *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6614.

133. *See id.* at 7, 14, *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6613.

official with the Department of Justice, commented on the scope of the FSIA.<sup>134</sup> He mentioned that while Lufthansa, a German airline, may be subject to the jurisdiction of the United States under the statute, American courts would never have jurisdiction over the German chancellor under the FSIA.<sup>135</sup> Akin to this statement is the explicit acknowledgement in the House Report that “the bill deals only with the immunity of foreign states and not its diplomatic or consular representatives.”<sup>136</sup> While an individual foreign official is distinct from a head of state or diplomatic official, individual foreign officials more closely resemble these other officials than foreign state market participants whose immunity the FSIA was intended to codify.<sup>137</sup> Thus, the legislative history of the FSIA indicates that Congress intended to separate a class of natural persons from the class of foreign states and agencies or instrumentalities of foreign states whose immunity the statute was intended to address.<sup>138</sup>

## *2. The Department of State Maintains that Individual Foreign Official Immunity Should be Governed by the Pre-Existing Common Law*

Both the Department of State and the Department of Justice recommended the enactment of the Foreign Sovereign Immunities Act.<sup>139</sup> Yet the Department of State has maintained that individual foreign official immunity is governed by the body of common law that existed prior to the enactment of the FSIA.<sup>140</sup> The Department continued to issue Statements of Interest when suits were brought against individual foreign officials in federal district court.<sup>141</sup> The executive branch

134. *Immunities of Foreign States: Hearing on H.R. 3493 Before the Subcomm. on Claims and Government Relations of the H. Comm. on the Judiciary*, 93rd Cong. 16 (1976) (statement of Bruno Risteau, Chief, Foreign Litigation Unit, Dep’t of Justice), *quoted in* Tunks, *supra* note 121, at 667.

135. *Id.*

136. H.R. REP. NO. 94-1487, at 21, *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6620. Neither the doctrine of sovereign immunity nor the Foreign Sovereign Immunities Act applied to the immunity of foreign diplomatic individuals in the United States. *Id.* at 8, *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6606 (distinguishing diplomatic immunity). Diplomatic immunity is governed by a separate statute and Congress did not intend to change this immunity with the enactment of the FSIA. *Id.* at 12, *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6610.

137. *See id.* at 7, *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6605.

138. *See Kensington Int’l Statement of Interest*, *supra* note 27, at 6-7.

139. H.R. REP. NO. 94-1487, at 6, *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6605.

140. *See Matar Statement of Interest*, *supra* note 26, at 2 (“[F]oreign officials such as Dichter do enjoy immunity from suit for their official acts. This immunity is not codified in the FSIA but instead is rooted in longstanding common law that the FSIA did not displace.”).

141. *E.g.*, *Kensington Int’l Statement of Interest*, *supra* note 27; *Matar Statement of Interest*, *supra* note 26.



explicitly stated that immunity determinations of individual foreign officials should not be made under the FSIA in a Statement of Interest issued to the court in the 2007 case of *Kensington International Ltd. v. Itoua*.<sup>142</sup> The executive branch has vigorously maintained this position in response to the conflicting interpretations of the FSIA by the Fourth, Sixth, Ninth, and District of Columbia Circuits.<sup>143</sup>

*B. Concluding that Immunity of Individual Foreign Officials is Within the Scope of the FSIA is at Odds with Customary International Law*

As the application of foreign sovereign immunity has repercussions for international law and policy,<sup>144</sup> a primary motivation behind the enactment of the FSIA was to bring United States sovereign immunity doctrine into conformity with the doctrines of other countries.<sup>145</sup> As stated in the House of Representatives Report, the enactment of the FSIA would ensure that “U.S. immunity practice would conform to the practice in virtually every other country.”<sup>146</sup> Upon signing the FSIA into law on October 22, 1976, President Ford stated, “the Foreign Sovereign Immunities Act carries forward a modern and enlightened trend in international law. And it makes this development in the law available to all American citizens.”<sup>147</sup> The desire to harmonize American policy with that of the international community is a recurring theme in the area of foreign sovereign immunity. The restrictive theory of sovereign immunity was adopted in the Tate Letter in part because of the policy developments in foreign states who themselves distinguished between the public and commercial acts of foreign states when deciding whether a state should be immune from suit.<sup>148</sup> Restrictive immunity was

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142. *Kensington Int’l* Statement of Interest, *supra* note 27, at 3 (citing *Matar* Statement of Interest, *supra* note 26, at 2).

143. *Id.* (“While a number of courts, following the Ninth Circuit’s decision in *Chuidian v. Philippine National Bank*, have construed the FSIA to extend to individuals, this construction is unsound and yields problematic results.” (citation omitted)); see *Velasco v. Government of Indonesia*, 370 F.3d 392, 398 (4th Cir. 2004); *Keller v. Cent. Bank of Nig.*, 277 F.3d 811, 815-16 (6th Cir. 2002); *El-Fadl v. Cent. Bank of Jordan*, 75 F.3d 668, 671 (D.C. Cir. 1996); *Chuidian v. Philippine Nat’l Bank*, 912 F.2d 1095, 1103 (9th Cir. 1990).

144. *Matar* Statement of Interest, *supra* note 26, at 2.

145. H.R. REP. NO. 94-1487, at 7 (1976), as reprinted in 1976 U.S.C.C.A.N. 6604, 6606.

146. *Id.*

147. Foreign Sovereign Immunities Act of 1976, 12 WEEKLY COMP. PRES. DOC. 1554 (Oct. 22, 1976), quoted in von Mehren, *supra* note 60, at 33.

148. See Clive M. Schmitthoff & Frank Wooldrige, *The Nineteenth Century Doctrine of Sovereign Immunity and the Importance of the Growth of State Trading*, 2 DENV. J. INT’L L. & POL’Y 199, 204 (1972) (“The Tate Letter was the culmination of a policy which had been pursued by the State Department for many years. In this statement a survey of the practice regarding immunity in various countries was made, and it concluded that only

recognized in “all of the important trading and industrial countries of the Western world, with the sole exception of the United Kingdom”<sup>149</sup> prior to its adoption in the United States. It gained further recognition in international law when it was integrated into international agreements such as “the European Convention on State Immunity, the Brussels Convention for the Unification of Certain Rules relating to the Immunity of State-Owned Vessels, and the Treaty of Peace with Germany.”<sup>150</sup>

One foreign state that has enacted a sovereign immunity statute and yet has continued to assess immunity as to individual foreign officials according to common law is Canada.<sup>151</sup> The Canadian court system has declined to read immunity for individual foreign officials into the statute that provides immunity to foreign states.<sup>152</sup> While Canada has recognized that individual foreign officials should be granted immunity, Canadian courts have held that common law principles should govern foreign sovereign immunity when applied to individuals.<sup>153</sup> In *Jaffe v. Miller*, the leading case, the Ontario Court of Appeals asserted that although Canada’s foreign sovereign immunity statute “is silent on its application to employees of the foreign state [it] can only mean that Parliament is content to have the determination of which employees are entitled to immunity determined at common law.”<sup>154</sup> Canada’s method of determining individual foreign official immunity is very similar to the approach urged by the United States executive branch through the Department of State.<sup>155</sup>

### III. COMMON LAW IMMUNITY SHOULD BE EXTENDED TO INDIVIDUAL FOREIGN OFFICIALS UNTIL THE FSIA IS AMENDED BY CONGRESS

The Foreign Sovereign Immunities Act, as currently enacted, does not provide immunity to individual foreign officials.<sup>156</sup> The statute governs

English and Soviet law recognized the doctrine of absolute immunity.” (footnote omitted)); *see also* Tate Letter, *supra* note 63, at 985.

149. von Mehren, *supra* note 60, at 38.

150. *Id.* (footnotes omitted). The relevant provision of the Treaty of Peace with Germany provided that “[i]f the German Government engages in international trade, it shall not in respect thereof have or be deemed to have any rights, privileges or immunities of sovereignty.” *Id.* at 39 n.25 (quoting 2 TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA, 1776-1949, 43, 170 (C.I. Bevans ed., U.S. Department of State 1969)).

151. *Jaffe v. Miller*, [1993] 103 D.L.R. 315, 328 (Ont. Ct. App. Can.); *see also* Matar Statement of Interest, *supra* note 26, at 20-21.

152. *Jaffe*, 103 D.L.R. at 328.

153. *Id.*

154. *Id.*

155. *See* Matar Statement of Interest, *supra* note 26, at 19-23.

156. *Enahoro v. Abubakar*, 408 F.3d 877, 881-82 (7th Cir. 2005).

immunity as to foreign states and agencies or instrumentalities or organs of foreign states, but excludes individual foreign officials.<sup>157</sup> A close examination of the text of the FSIA,<sup>158</sup> its legislative history,<sup>159</sup> and certain principles of international law<sup>160</sup> supports this interpretation. Although Congress enacted the FSIA with the intent that it would clarify existing foreign sovereign immunity doctrine, the law has not produced such a result, at least with regard to individual foreign officials.<sup>161</sup> As the situation presents itself in 2008, individual foreign officials may be subject to an immunity determination under the FSIA depending upon the location of federal court in which the plaintiff files suit.<sup>162</sup>

#### *A. Individual Foreign Officials Must Be Entitled to Sovereign Immunity to Prevent Litigants from Circumventing Foreign Sovereign Immunity*

Despite doctrinal confusion, individual foreign official immunity is a vital part of the broader concept of foreign sovereign immunity. If a court fails to recognize that an individual foreign official qualifies for immunity from suit when performing official duties on behalf of his country, plaintiffs could frustrate the purposes behind the enactment of the FSIA.<sup>163</sup> A plaintiff could sue the individual foreign official responsible for a foreign state entity, as opposed to the entity itself, and thereby frustrate the legislative policy goal of granting immunity to qualified foreign state actors.<sup>164</sup> As the executive branch cautioned,

157. See Foreign Sovereign Immunities Act of 1976, 28 U.S.C.A. §§ 1602-1611 (West 2006 & Supp. 2007); *Enahoro*, 408 F.3d at 882.

158. See 28 U.S.C.A. §§ 1603-04; *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1102 (9th Cir. 1990).

159. See H.R. REP. NO. 94-1487, at 6-7 (1976), as reprinted in 1976 U.S.C.C.A.N. 6604, 6604-06.

160. *Id.*; *Matar* Statement of Interest, *supra* note 26, at 22-23.

161. Working Group of the American Bar Association, *supra* note 24, at 531-32 (summarizing the interpretations of the FSIA term "foreign state" and recommending that the FSIA be amended to include immunity for individual foreign officials acting in their official capacities, but not foreign heads of state).

162. See *Enahoro*, 408 F.3d at 882; *Velasco v. Government of Indonesia*, 370 F.3d 392, 398-99 (4th Cir. 2004); *Keller v. Cent. Bank of Nigeria*, 277 F.3d 811, 815-16 (6th Cir. 2002); *El-Fadl v. Cent. Bank of Jordan*, 75 F.3d 668, 671 (D.C. Cir. 1996); *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1103 (9th Cir. 1990).

163. *Matar* Statement of Interest, *supra* note 26, at 4.

164. *Chuidian*, 912 F.2d at 1102. It could be argued that the United States has permitted plaintiffs to circumvent sovereign immunity by authorizing them to bring suit against individual United States officials in certain circumstances, and thus it is acceptable to permit the circumvention of foreign sovereign immunity. Most notably, the Supreme Court has permitted suit to be brought against state officials in two contexts: (1) when a plaintiff alleges that a state official has violated the Constitution or a "federal statute or regulation that is the supreme law of the land," or (2) when a plaintiff brings a suit against a state official under the Federal Tort Claims Act (FTCA). 17A CHARLES ALAN

“unless sovereign immunity extends to individual foreign officials, litigants could easily circumvent the immunity provided to foreign states by the FSIA.”<sup>165</sup> This unwelcome result was acknowledged by the Ninth Circuit in *Chuidian*.<sup>166</sup> In an effort to prevent this possibility, the Ninth Circuit held that individual foreign official immunity should be governed by the FSIA. Thus, a plaintiff with a claim against a foreign state could not simply name a foreign official as a defendant, in an effort to bring about a more successful outcome.<sup>167</sup> The Ninth Circuit’s holding temporarily resolved the controversy over the immunity of individual foreign officials and the FSIA. However, in 2005, the Seventh Circuit decision in *Enahoro* rejected the holding of the Ninth Circuit, forcing the immunity of individual foreign officials into dispute and creating a circuit split that has encouraged forum shopping.<sup>168</sup>

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WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4232 (3d ed. 2007) (describing the *Young* doctrine); see also *Ex parte Young*, 209 U.S. 123, 159-60 (1908). The Court does not authorize the plaintiff to make an end run around the sovereign immunity of the United States by suing the state official because the right of the sovereign to immunity has been stripped from the situation. However, both of these situations strengthen, rather than undermine, the argument that plaintiffs should be prohibited from making an end run around foreign sovereign immunity by suing an individual foreign official.

In *Ex parte Young*, the Supreme Court held that where “[t]he act to be enforced is alleged to be unconstitutional . . . the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of . . . the State in its sovereign or governmental capacity.” 209 U.S. at 159-60. The state actor essentially loses her affiliation with the sovereign when she enforces an act that violates the supreme law of the land. *Id.* at 159-60 (stating that the state official would be “stripped of his official or representative character and . . . subjected in his person to the consequences of his individual conduct,” and that “[t]he State has no power to impart to him any immunity from responsibility to the supreme authority of the United States”).

The FTCA, enacted in 1946, was “designed primarily to remove the sovereign immunity of the United States from suits in tort and, with certain specific exceptions, to render the Government liable in tort as a private individual would be under like circumstances.” *Richards v. United States*, 369 U.S. 1, 6 (1962). The rationale for the enactment of the FTCA illustrates that neither the legislature nor the courts authorized an end run around the sovereign immunity of the United States. The statute was meant to abrogate the sovereign immunity of the state as well as the individual official for tort claims brought against the government as a result of an individual official’s negligence. 14 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3658 (3d ed. 1998). The FTCA does not authorize the plaintiff to evade the sovereign immunity of the United States by bringing suit against an individual official, but it abrogates the sovereign immunity of the state and individual official under circumstances deemed appropriate by Congress. Federal Tort Claims Act, 28 U.S.C.A. §§ 1346(b), 2671-2680 (West 2006 & Supp. 2007).

165. *Matar* Statement of Interest, *supra* note 26, at 14.

166. *Chuidian*, 912 F.2d at 1102.

167. *Id.*

168. *Enahoro v. Abubakar*, 408 F.3d 877, 881-82 (7th Cir. 2005).

*B. To Allow Litigants to Circumvent Foreign Sovereign Immunity Would Risk Violating Principles of International Comity*

As a result of the conflicting legal interpretations, a plaintiff may be able to successfully bring a suit, depending on the jurisdiction, against an individual foreign official and circumvent the sovereignty of a foreign state.<sup>169</sup> The circuit split encourages a plaintiff to choose a forum whose laws would be most receptive to a particular legal position.<sup>170</sup> Allowing plaintiffs to exploit the ambiguity in the FSIA is particularly dangerous because of the potential foreign policy ramifications and the risk of violating principles of international comity.<sup>171</sup> International comity has been defined as “the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.”<sup>172</sup> The House of Representatives Report on the FSIA clearly stated that a major impetus behind the law was to bring American foreign sovereign immunity policies in line with “virtually every other country.”<sup>173</sup> While in other areas of the law a court may be reluctant to look to international norms, foreign sovereign immunity is an area of the law where international norms are a necessary factor.<sup>174</sup> The Department of State has articulated a need to comply with these standards in the name of reciprocity.<sup>175</sup> The Department of State warned against the dangers of refusing to recognize immunity as to individual foreign officials, stating that “[g]iven the global leadership responsibilities of the United States, its officials are at special risk of being made the targets of politically driven lawsuits abroad.”<sup>176</sup> These international policy

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169. *Matar* Statement of Interest, *supra* note 26, at 14; *cf.* *Kensington Int’l Ltd. v. Itoua*, 505 F.3d 147, 160 (2d Cir. 2007).

170. *Chuidian*, 912 F.2d at 1102; *see also* 32A AM. JUR. 2D *Federal Courts* § 1276 (2007) (defining forum shopping as “bring[ing] an action in a particular district because the court of appeals in the circuit encompassing that district has decided a question of law involved in the suit that has not been decided in the transferee district, and such forum-shopping may be considered a factor in favor of the transfer,” unless that is the district in which the plaintiff resides).

171. *Matar* Statement of Interest, *supra* note 26, at 22.

172. *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895).

173. H.R. REP. NO. 94-1487, at 7 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6606.

174. *See id.* at 7, *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6605-06; *see also Matar* Statement of Interest, *supra* note 26, at 22.

175. *Matar* Statement of Interest, *supra* note 26, at 22.

176. *Id.*; *see also* BANKAS, *supra* note 32, at 35 (“The trends which are already clear in the study of public international law with respect to the concept of sovereign immunity logically are not mere birth pangs of a new legal order. These trends in the real sense are the harbinger of fundamental problems which will arise one after another in search for a legal solution that perhaps will command the *opinio juris* the world over. It is submitted

considerations dictate that inaction by Congress or the Supreme Court in this area of the law is not acceptable.<sup>177</sup>

*C. Congress Should Amend the FSIA to Clarify the Procedure for Granting Immunity to Individual Foreign Officials*

The most efficient way to resolve the circuit split is to amend the FSIA to explicitly provide for individual foreign official immunity. A Working Group of the American Bar Association (ABA) issued a report in 2002 addressing the “difficulties courts and parties are encountering [with the FSIA] and propos[ing] relevant amendments to improve the overall operation of the Act.”<sup>178</sup> The Report recommended that the FSIA be amended to explicitly state that individual foreign officials acting in their official capacities are entitled to immunity, similar to a foreign state under the statute.<sup>179</sup> The ABA Report recognized that as the statute exists currently, the text of the FSIA is silent as to whether individual foreign officials should be included in the statute’s immunity determination,<sup>180</sup> and that if the statute were to be amended to include individual foreign officials, other provisions of the statute would need to be modified accordingly.<sup>181</sup> For example, regarding service of process, the statute would have to be amended to recognize “treaty obligations conferring certain jurisdictional immunities on diplomatic and consular officials” and other special circumstances that may arise in the course of service of process on individual foreign officials.<sup>182</sup> Thus, the courts would be ill-advised to apply the FSIA to individual foreign officials without such an amendment to the statute.<sup>183</sup>

However, until the FSIA is amended or the Supreme Court clarifies the issue, courts should look to the pre-existing common law when

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that any piecemeal attempt . . . to resolve the problem of state immunities and commercial activities on the international plane . . . will consume so much time and resources that little will be left for other . . . equally pressing legitimate problems of concern in international law.”).

177. *Matar* Statement of Interest, *supra* note 26, at 22.

178. Working Group of the American Bar Association, *supra* note 24, at 489-90.

179. *Id.* at 538.

180. *Id.* at 531.

181. *Id.* at 536-37.

182. *Id.* (“Service of process and a consequent claim of personal jurisdiction on a . . . government official on official business may cause personal affront and can be a violation of diplomatic immunity.”).

183. *See id.* The Fourth, Sixth, Ninth, and District of Columbia Circuits granted individual foreign officials immunity under the FSIA but did not address service of process under the FSIA. *See Velasco v. Government of Indonesia*, 370 F.3d 392, 398-99 (4th Cir. 2004); *Keller v. Cent. Bank of Nigeria*, 277 F.3d 811, 815-16 (6th Cir. 2002); *El-Fadl v. Cent. Bank of Jordan*, 75 F.3d 668, 671 (D.C. Cir. 1996); *Chuidian v. Philippine Nat’l Bank*, 912 F.2d 1095, 1103 (9th Cir. 1990).

making individual foreign official immunity determinations.<sup>184</sup> The Supreme Court reaffirmed its general reluctance to recognize a body of federal common law in *Sosa v. Alvarez-Machain*.<sup>185</sup> The Court in *Sosa* did, however, recognize that disputes of international law have serious implications for United States foreign policy.<sup>186</sup> Although the application of federal common law is not favored, the Supreme Court has at least recognized that countervailing considerations of foreign policy may mitigate an absolute prohibition on the use of federal common law.<sup>187</sup> A primary concern relating to the use of federal common law is that the Constitution does not explicitly authorize the federal courts to do so.<sup>188</sup> It is feared that the federal common law is “‘little less than what the judge advancing the doctrine thinks at the time should be the general law on a particular subject.’”<sup>189</sup> But in the area of foreign sovereign immunity, this concern is unfounded. The common law on individual foreign official immunity determinations (at least until the split of authority is resolved) is not susceptible to a variety of judicial interpretations.<sup>190</sup> The common law establishes that “American jurisprudence has long recognized individual officials of foreign sovereigns to be immune from civil suit with respect to their official acts.”<sup>191</sup> Thus, the reliance of federal courts on the pre-FSIA common law, until a more satisfactory resolution of the issue can be reached, is an acceptable solution.

#### IV. CONCLUSION

United States foreign policy requires the resolution of the split of authority on the issue of foreign sovereign immunity as applied to individual foreign officials. Congress did not intend to supersede the pre-existing common law as it applied to individual foreign officials with the enactment of the Foreign Sovereign Immunities Act, as evidenced by

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184. See *Kensington Int'l Statement of Interest*, *supra* note 27, at 3.

185. 542 U.S. 692, 724-25 (2004). *Sosa* addresses federal common law in the context of the Federal Tort Claims Act not the Foreign Sovereign Immunities Act, however, the Supreme Court's discussion of federal common law in the realm of international law is nonetheless significant.

186. See *id.* at 730 (noting that “‘international disputes implicating . . . our relations with foreign nations’ are one of the ‘narrow areas’ in which ‘federal common law’ continues to exist”) (quoting *Tex. Indus., Inc. v. Radcliffe Materials, Inc.*, 451 U.S. 630, 641 (1981)).

187. *Id.* (“It would take some explaining to say now that federal courts must avert their gaze entirely from any international norm intended to protect individuals.”).

188. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

189. *Id.* (quoting *Balt. & Ohio R.R. Co. v. Baugh*, 149 U.S. 368, 401 (1893) (Field, J., dissenting)).

190. See *Kensington Int'l Statement of Interest*, *supra* note 27, at 3.

191. *Id.*

the text of the statute,<sup>192</sup> its legislative history,<sup>193</sup> and international trends.<sup>194</sup> As rapid globalization and the growing interdependence of foreign states continues to increase international litigation, the FSIA will become more important for adjudicating the rights of both litigants and targeted foreign officials. An inefficient and confusing application of the FSIA to individual foreign officials will not only detract from efficient judicial administration, but may also have serious repercussions for United States foreign policy.

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192. See Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1603-04 (2000 & Supp. V 2005); *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1102 (9th Cir. 1990).

193. See H.R. REP. NO. 94-1487, at 6-7 (1976), as reprinted in 1976 U.S.C.C.A.N. 6604, 6604-06.

194. *Id.*; *Matar* Statement of Interest, *supra* note 26, at 22-23.



