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Can the Pope Be a Defendant in American Courts? The Grant of Head of State Immunity and the Judiciary's Role to Answer This Question

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COMMENTS

CAN THE POPE BE A DEFENDANT IN AMERICAN COURTS? THE GRANT OF HEAD OF STATE IMMUNITY AND THE JUDICIARY'S ROLE TO ANSWER THIS QUESTION

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I. INTRODUCTION

Since first enunciated by Chief Justice Marshall in 1812, the doctrine of sovereign immunity has been followed by courts that have "waived jurisdiction over certain activities of foreign sovereigns," foreclosing the possibility that a plaintiff may obtain redress from a transcontinental defendant located far from the American courtroom.[1] Marshall's words became the basic

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[1] Verlinden v. Cent. Bank of Nig., 461 U.S. 480, 486 (1983).

jurisprudence for the evolution of foreign sovereign immunity. His theory of absolute immunity placed the decisions concerning a foreign nation's immunity within the province of the Executive Branch, specifically delegating to the State Department the task of issuing suggestions of immunity where appropriate.[2] The Chief Justice explained that "as a matter of comity, members of the international community had implicitly agreed to waive the exercise of jurisdiction over other sovereigns in certain classes of cases."[3] His words elucidated the original rationale behind the theory of absolute sovereign immunity: the Executive Branch's control over decisions of immunity was necessary because of the "significant implications" a grant or denial of immunity may have on the United States' relationship with foreign nations.[4]

A recent case, initially brought within the Texas state courts and subsequently removed to the federal system, named Pope Benedict XVI as a defendant in an action arising from the alleged sexual abuse of three minors by Roman Catholic clergy.[5] This case was not brought against a foreign state, but rather, only its head of state. The case, therefore, implicates another issue of the foreign sovereign immunity doctrine, namely, whether it applies to foreign heads of state. The three plaintiffs claimed that as the leader of the Roman Catholic Church, Pope Benedict XVI, who at the time of the alleged abuse was known as Cardinal Joseph Ratzinger, "designed and explicitly directed a conspiracy to fraudulently conceal tortious conduct."[6] The case raised the preliminary jurisdictional question of whether the Pope, as head of state for the Holy See, should remain a part of this lawsuit. The particulars of this suit highlight the continuously debated issues of when, if at all, a foreign head of state may be subject to the jurisdiction of a United States court and how suits involving heads of states should be resolved, in light

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[2] *See* A, B, C, D, E, F v. Zemin, 282 F. Supp. 2d 875 (N.D. Ill. 2003), *aff'g sub nom.* Ye v. Zemin, 383 F.3d 620 (7th Cir. 2004).

[3] Austria v. Altmann, 541 U.S. 677, 688 (2004).

[4] *See Zemin*, 383 F.3d at 627.

[5] *See* Brenda Sapino Jeffreys, *Pope Wants Head-of-State Immunity from Texas Suit*, TEXAS LAWYER, Sept. 9, 2005, *available at* http://www.law.com/jsp/newswire_article.jsp?id=1126083917974.

[6] *Id.*

of the governing principles behind the foreign sovereign immunity doctrine.[7]

The United States, along with various other nations, currently adheres to a doctrine of restrictive immunity, which permits courts to withhold immunity from foreign states for acts that are commercial or non-public in nature.[8] The 1976 Foreign Sovereign Immunities Act (FSIA)[9] reflects the transformation from an absolute foreign sovereign immunity theory to a restrictive immunity theory.[10] The codification of Marshall's sovereign immunity concept recognizes that when determinining whether immunity should be granted, a distinction exists between a sovereign's public acts taken on behalf of the state and those acts that are primarily private and lack any nexus attributable to statehood.[11] Previously, the executive and the judiciary answered questions regarding sovereign immunity alternately.[12] By placing the determination of foreign sovereign immunity solely within the Judicial Branch, as distinguished from head of state immunity decisions, the FSIA creates a jurisdictional bar for litigants in the international legal arena. A plaintiff cannot make use of the domestic courts for redress against a foreign sovereign because subject matter jurisdiction is statutorily divested unless the sovereign's acts fall within the statutory exceptions.[13] However, what appears to be a simple device that clarifies when claims brought against a foreign state will be immune from the jurisdiction of United States courts is less clear when applied to determine whether claims which name a foreign nation's head-of-state as a defendant will be granted immunity. Moreover, Congress' 1976 decision to codify

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[7] *See, e.g.*, Erin M. Callan, *In re Mr. and Mrs. Doe: Witnesses Before the Grand Jury and the Head of State Immunity Doctrine*, 22 N.Y.U. J. INT'L L. & POL. 117, 128 (1989); Jerrold L. Mallory, *Resolving the Confusion over Head of State Immunity: The Defined Rights of Kings*, 86 COLUM. L. REV. 169 (1986); Shobha Varguese George, *Head of State Immunity in the United States Courts: Still Confused After All These Years*, 64 FORDHAM L. REV. 1051 (1999).

[8] *See generally* 48 C.J.S. International Law § 39 (2005); CHRISTOPH H. SCHREUER, STATE IMMUNITY: SOME RECENT DEVELOPMENTS 2-9 (Grotius Publications Ltd. 1988).

[9] Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, § 1602, 90 Stat. 2891 (1998).

[10] *See* Schreuer, *supra* note 8, at 2.

[11] *See* Austria v. Altmann, 541 U.S. 677, 688-91 (2004).

[12] *See* Callan, *supra* note 7, at 128.

[13] Foreign Sovereign Immunities Act (FSIA), 28 U.S.C.A. § 1602 (2005).

sovereign immunity and, in turn, strip the State Department from its role in answering the jurisdictional question for foreign states, left uncertain the issue of whether heads-of-states are included within this statutory scheme.

A residuary issue that has been raised by courts concerns the binding effect on the judiciary of the State Department's suggestion of immunity since no provision in the FSIA discusses head of state immunity.[14] *United States v. Noriega*,[15] decided by the Eleventh Circuit, highlights this question. The court noted that, absent a position from the Executive Branch on whether head of state immunity should be granted, the head of state's challenge to the lower court's denial of immunity "likely would not prevail even if this court had to make an independent determination regarding the propriety of immunity in this case."[16] *Noriega* and subsequent cases denying immunity for heads of state suggest that the shield of immunity may be denied where the underlying cause of action is based on the head of state's role in grave human rights offenses, what are considered non-public acts.[17]

In the context of foreign sovereign immunity, the FSIA no longer adheres to a theory of absolute sovereign immunity and allows for jurisdiction over claims that are based on actions that are non-public in nature. When determining whether subject matter jurisdiction exists over claims involving a foreign sovereign, courts reach their conclusions by distinguishing between the public and private acts that the sovereign has taken and finding if those non-public actions that form the basis of a plaintiff's claims fall within the FSIA's enumerated exceptions to immunity.[18] However, after the enactment of the FSIA, there

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[14] *See* A, B, C, D, E, F v. Zemin, 282 F. Supp. 2d 875 (N.D. Ill. 2003), *aff'g sub nom.* Ye v. Zemin, 383 F.3d 620, 625 (7th Cir. 2004).

[15] United States v. Noriega, 117 F.3d 1206, 1212 (11th Cir. 1997).

[16] *Id.* at 1212.

[17] *See, e.g.*, Michael A. Tunks, *Diplomats or Defendants Defining the Future of Head-of-State Immunity*, 52 DUKE L.J. 651, 659-62 (2002) (noting a trend among courts to abrogate immunity for sitting world leaders charged with serious international offenses); Amber Fitzgerald, *The Pinochet Case: Head of State Immunity within the United States*, 22 WHITTIER L. REV. 987, 1014-17 (2001) (discussing the exceptional cases where the U.S. denied immunity based on the status of the head of state and the offense charged).

[18] *See, e.g.*, Leutwyler v. Office of Her Majesty Queen Rania Al-Abdullah, 184 F. Supp. 2d 277, 293 (S.D.N.Y. 2001).

remains no similarly clear analysis for the resolution of whether subject matter jurisdiction exists over a claim that specifically involves a foreign head-of-state. The recent case against the Pope brings to light the issue of whether the question of head of state immunity should continue to be resolved solely by adherence to an absolute theory of immunity, which is inconsistent with the restrictive theory of sovereign immunity behind the FSIA. This Comment shows how, following the guidelines of a restrictive theory of head of state immunity, the requisite tools already exist for the judiciary to resolve head of state immunity claims were the FSIA to contain a separate exception applicable to heads-of-state.

Part II of this Comment traces the development of foreign sovereign immunity and the derivation of head of state immunity. Part III extensively examines cases which have named foreign heads of state as defendants. This section considers the types of claims brought against heads of state and the circumstances that prompted the State Department to issue a suggestion of immunity. This part also reviews cases which have named foreign governmental officials and individuals as defendants and explores those factors that were significant to the court's determination of whether such individuals should remain a part of the lawsuit. It further suggests that the analysis followed by the courts in discussing whether claims brought against foreign governmental individuals are actionable provides guidance for how claims involving foreign heads of states can similarly be resolved by the judiciary. In the context of sovereign immunity, this section additionally examines cases that have denied sovereign immunity to foreign states falling under the discretionary function exception of the FSIA.

Part IV focuses on the most recent case against Pope Benedict XVI and the claims brought against him as head of the Holy See. This part discusses the arguments raised by the plaintiffs to support a finding of subject matter jurisdiction over the claims brought against the Pope as head of state. This section explores the need to clarify head of state immunity case law and align the resolution of head of state immunity claims with the restrictive theory of foreign sovereign immunity evidenced in the FSIA. In addition, this part explores how courts are well suited to determine if subject matter jurisdiction exists over a

claim brought against a foreign head of state by looking to the gravamen of the plaintiff's complaint, considering the nature of the claim, and determining whether the actions were taken on behalf of his official duties. Part V proposes that, in light of the uncertainty surrounding head of state immunity, the FSIA should include a separate exception for heads of state that would provide, when circumstances warrant, subject matter jurisdiction over a head of state immunity claim.

II. History of Foreign Sovereign Immunity and Head of State Immunity

The Foreign Sovereign Immunities Act (FSIA) of 1976[19] statutorily codified Congress' intent that it remains for the determination of United States courts to adjudicate the claims of foreign states and consider whether subject matter jurisdiction exists over such claims.[20] This decision to vest courts with the authority to determine foreign sovereign immunity was reached by Congress so as to "serve the interests of justice and protect the rights of both foreign states and litigants."[21] However, the final product of the FSIA involved crafting a statute that would neither detrimentally interfere with foreign relations nor risk embarrassment to the executive arm's conduct of foreign affairs.[22] The FSIA's enactment would have to effectively coordinate these principles so as not to upset relations within the international community.

Under the earlier doctrine of absolute sovereign immunity, the pre-FSIA concept that a king could commit no wrong that could cause the "exercise of authority by one sovereign over another" was consistently adhered to by American courts.[23] The absolute theory of foreign sovereignty permitted foreign states to enjoy immunity from all suits in federal courts.[24] The Executive Branch alone, through suggestions of immunity issued by the State Department, determined whether a foreign nation

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[19] Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, § 1602, 90 Stat. 2891 (1998).

[20] *See id.*

[21] *Id.*

[22] *See* Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682, 699 (1976).

[23] *See* Victory Transport Inc. v. Comisaria General de Abastechimientos y Transportes, 336 F.2d 354, 357 (2d Cir. 1964).

[24] *See* George, *supra* note 7, at 1057.

was entitled to immunity. When a suit was issued, the courts would dismiss the suit and all claims against the foreign nation.[25] To subject a foreign sovereign to the jurisdiction of a nation's courts outside of its own territory was held to unduly degrade the dignity of the foreign sovereign's nation and blemish the sovereign's absolute independence among other nations.[26] Thus, sovereign immunity was believed to remain outside the scope of the judiciary.[27]

Although the doctrine appears simple in its theory and application, developments of the twentieth century engendered a movement away from absolute sovereign immunity toward the adoption of restrictive sovereign immunity.[28] When Chief Justice John Marshall first addressed the concept of sovereign immunity in the *Schooner Exchange*,[29] his reasoning was based on the proposition that a foreign sovereign may carry out both public and private duties.[30] The issue that the *Schooner Exchange* case addressed in 1812 was "whether an American citizen can assert, in an American court, a title to an armed national vessel, found within the waters of the United States."[31] Where the behavior of the sovereign involved purposes of trade, he noted "a clear distinction is to be drawn between the rights accorded to private individuals or private trading vessels, and those accorded to public armed ships which constitute a part of the military force of the nation."[32] It was this distinction between governmental or public sovereign acts versus private acts that was recognized after World War II when the United States restricted immunity to those nations with whom it had negotiated treaties that obligated each contracting party "to waive its sovereign immunity for state-controlled enterprises engaged in business activities within the territory of the other party."[33] The creation of these treaties indicated the beginning of the

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[25] *See* A, B, C, D, E, F v. Zemin, 282 F. Supp. 2d 875 (N.D. Ill. 2003), *aff'g sub nom.* Ye v. Zemin, 383 F.3d 620, 624 (7th Cir. 2004).

[26] *See* Schooner Exch. v. McFaddon, 11 U.S. 116, 137 (1812).

[27] *Id.*

[28] *See generally* Austria v. Altmann, 541 U.S. 677 (2004).

[29] *See Schooner Exch.*, 11 U.S. at 147.

[30] *See id.*

[31] *Id.* at 135.

[32] *Id.* at 143.

[33] Victory Transport Inc. v. Comisaria General de Abastechimientos y Transportes, 336 F.2d 354, 358 (2d Cir. 1964).

United States' commitment to a restrictive theory of immunity which would no longer grant immunity to a foreign sovereign when its actions were not related to "state-controlled" matters and, thus, were private or commercial in nature.

In 1952, the Acting Legal Advisor for the Secretary of State, Jack B. Tate, issued a letter ("Tate Letter") that defined the restrictive theory of sovereign immunity and certified its relevance to the growing economy.[34] He expanded on the principle that individuals engaged in transactions with foreign sovereigns should be entitled to a judicial remedy when their rights are hindered by a sovereign's commercial activities.[35] The Tate Letter marked the United States' movement away from the theory of absolute sovereign immunity, but left much confusion regarding the deference that courts were to give the State Department's immunity suggestion.[36]

The courts, however, continued to defer to State Department determinations even though this deference led to inconsistent outcomes and made the application of the restrictive theory appear impractical.[37] Moreover, since the restrictive theory was not yet enacted into law, the courts, without any statutory guidelines, were left with the difficult task of drawing the line between a foreign state's immune and non-immune activities. When nations failed to directly request immunity from the State Department, the immunity issue was left to be resolved by courts, which lacked case law precedent and could answer this jurisdictional question only by reference to prior State Department decisions, if any similar decisions existed.[38] As a result of this uncertainty, Congress was prompted to pass the FSIA. The FSIA was created to rectify the dangerous condition of "sovereign immunity determinations . . . [being] made in two different branches."[39] Codifying the common law of sovereign immunity solved Congress' concern that the State Department

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[34] *See Callan, supra* note 7, at 126.

[35] *See* Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682, 714 (1976).

[36] *See* Abiola v. Abubakar, 267 F. Supp. 2d 907, 912 (N.D. Ill. 2003), *aff'd*, 408 F.3d 877 (7th Cir. 2005).

[37] *See id.* (discussing how the history of the restrictive theory of sovereign immunity, in practice, was troublesome).

[38] *See Schreuer, supra* note 8, at 2-7; *see also* Verlinden v. Cent. Bank of Nig., 461 U.S. 480 (1983).

[39] Austria v. Altmann, 541 U.S. 677, 691 (2004).

was "in the awkward position of a political institution trying to apply a legal standard to litigation already before the courts."[40] After passage of the FSIA, a private citizen was able to avail himself of the privilege of having his dispute with a foreign sovereign determined by the courts.

Due to the FSIA, the government was initially freed from the case-by-case diplomatic pressures associated with granting immunity to a sovereign after 1976. The judiciary was vested with a set of guidelines and "legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities."[41] Under the restrictive view of immunity incorporated into the current FSIA, commercial transactions with foreign sovereigns do not render them immune from adjudication in American courts.[42] As a result, the fear that subjecting sovereigns to an assessment of the legality of their governmental acts is lessened, as "[i]n their commercial capacities, foreign governments do not exercise powers peculiar to sovereigns."[43] This rationale, integrated within the FSIA, is based on the concept that because private individuals can engage in such acts, subjecting a foreign sovereign to the judiciary of another sovereign does not impede foreign relations.[44]

Presently, the FSIA is the sole basis for invoking subject matter jurisdiction over a foreign state in American courts.[45] Under the FSIA, a foreign state is presumptively immune from

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[40] Chuidian v. Phil. Nat'l Bank, 912 F.2d 1095,1100 (9th Cir. 1990).

[41] *See Verlinden*, 461 U.S. at 488.

[42] 28 U.S.C.A. § 1605(a)(2). This section provides:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case in which the action is based on a commercial activity carried on in the United States by the foreign state; or on an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or on an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

Id.

[43] Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682, 704 (1976).

[44] *Id.* at 704.

[45] *See* Argentine Republic v. Amerada Hess Shipping, 488 U.S. 428, 434 (1989) (discussing how a court obtains subject matter jurisdiction over foreign states).

jurisdiction unless one of the statutory exceptions is satisfied.[46] A plaintiff, asserting a cause of action against a foreign sovereign, must initially plead the non-immunity of the foreign state and raise the issue of immunity.[47] In its responsive pleading, the foreign state bears the burden of proof to present a prima facie showing of immunity.[48] The burden then shifts back to the plaintiff to rebut the foreign sovereign's claim of immunity.[49] Once the plaintiff offers evidence that an exception applies, the foreign sovereign must overcome the exception proving by a preponderance of the evidence that immunity is warranted.[50] Although the statute serves as a broad shield of immunity for foreign states, the language provides for numerous exceptions that may pierce the shield and create subject matter jurisdiction based on a party's claim against a foreign state.

Courts consider claims arising from the foreign state's commercial activity as the broadest exception to sovereign immunity. The FSIA appears to "manifest[ ] a preoccupation with the commercial activities of foreign states and a concern with granting 'access to the courts in order to resolve ordinary legal disputes[.]'"[51] Due to the powerfulness of the FSIA to convey subject matter jurisdiction over a claim against a foreign state, complete satisfaction of the statutory criteria is crucial.[52]

Commercial activity, non-commercial tortious activity, and waiver of immunity by the foreign state itself are the primary exceptions under the FSIA providing subject matter jurisdiction over claims brought against a foreign state.[53] The commercial activity exception is the broadest exception under the FSIA.[54]

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[46] Joseph Dellapenna, *Refining the Sovereign Immunities Act*, 9 WILLAMETTE J. INT'L L. & DISPUTE RESOL. 57, 68 (2001) [hereinafter Dellapenna, *Refining the Sovereign Immunities Act*].

[47] *See id.*

[48] *See id.*

[49] *Id.*

[50] 45 AM. JUR. 2D INT'L L § 113 (2005).

[51] Abiola v. Abubakar, 267 F. Supp. 2d 907, 913 (N.D. Ill. 2003), *aff'd*, 408 F.3d 877 (7th Cir. 2005); *see also* Alicog v. Saudi Arabia, 860 F. Supp. 379, 382 (S.D. Tex. 1994) (quoting H.R. REP. No. 94-1487, at 6 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604 , 6605).

[52] *See* Austria v. Altmann, 541 U.S. 677, 691 (2004).

[53] Foreign Sovereign Immunities Act, 28 U.S.C.A § 1605 (1982); *see also* Dellapenna, *Refining the Sovereign Immunities Act*, *supra* note 46, at 67.

[54] *See* Alicog v. Saudi Arabia, 860 F. Supp. 379, 382 (S.D. Tex. 1994).

Specifically, § 1605(a)(2) provides that a foreign state is not immune in any case "in which the action is based on a commercial activity carried on in the United States by the foreign state."[55] In full, the exception continues that a foreign state shall not be immune from jurisdiction where such act is "performed in the United States in connection with a commercial activity of the foreign state elsewhere; or on an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States."[56] The FSIA exceptions apply to the state, its political subdivision, agencies, or instrumentalities.[57] However, what is absent from the statute is whether the statute as a whole, or its exceptions, applies to resolve the status of a foreign sovereign's head of state immunity.

Numerous scholars, as well as those from the bench, have commented that much confusion plagues the current standing of head of state immunity under the FSIA.[58] The courts have continuously questioned whether the judiciary's determination of a foreign sovereign's immunity under the FSIA brings within their authority the determination of a head of state's immunity.[59] In contrast to the codified exceptions to sovereign immunity, the status of head of state immunity is a murky area. Historically, the doctrine of comity has often been cited as the

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[55] Saudi Arabia v. Nelson, 507 U.S. 349 (1993).

[56] 28 U.S.C.A. § 1605(a)(2). The non-commercial tortious activity exception provides that a foreign state shall not be immune where:

> money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office of employment.

28 U.S.C.A. § 1605(a)(2).

[57] Ved P. Nanda, *Human Rights and Sovereign and Individual Immunities (Sovereign Immunity, Act of State, Head of State Immunity and Diplomatic Immunity) – Some Reflections*, 5 ILSA J. INT'L & COMP. L. 467, 469-70 (1999).

[58] *See* George, *supra* note 7, at 1061; 3 David K. Pansius, TRANSNATIONAL BUS. TRANSACTIONS § 15:3 (Aug. 2005) (questioning whether the FSIA left intact the State Department's ability to effect immunity for sovereign officials); *see also* In re Doe v. United States, 860 F.2d 40, 44 (2d Cir. 1988) (stating that the scope of head of state immunity is an amorphous and undeveloped state).

[59] *See* A, B, C, D, E, F v. Zemin, 282 F. Supp. 2d 875 (N.D. Ill. 2003), *aff'g sub nom.* Ye v. Zemin, 383 F.3d 620, 625 (7th Cir. 2004); Abiola v. Abubakar, 267 F. Supp. 2d 907, 913 (N.D. Ill. 2003), *aff'd*, 408 F.3d 877 (7th Cir. 2005); *see also In re Doe*, 860 F. 2d at 40.

reasoning behind head of state immunity.[60] As a principle of international law, the elementary moralistic notion of 'do unto others as you would have them do to you,' is upheld by nations out of respect for the legislative, executive, or judicial actions taken on behalf of another nation.[61] Thus, "each state protects the immunity concept so that its own head-of-state will be protected when he or she is abroad."[62] Were a head of state's immunity revoked, the more private and personal degradation of a sovereign's leader is at risk,for it is a "matter of grace and comity rather than a constitutional requirement" that heads of state not submit to the jurisdiction of a foreign nation's courts.[63] Further, due to the grave political consequences attending head of state immunity, courts concede that "recognition of a government and its officers is the exclusive function of the Executive Branch."[64] Some courts maintain that it is not part of the judiciary's authority to make such a decision because the "conflict between individual private rights and interests of international comity are better resolved by the executive, rather than by judicial decision."[65]

When faced with the unsettled issue of bestowing a head of state with immunity, the "cornerstones of foreign sovereign immunity, comity and the mutual dignity of nations" remain the important principles upheld by courts assessing this jurisdictional question.[66] Unfortunately, these cornerstones are not sufficient to establish a consensus concerning when a head of state will be immune and the head of state immunity doctrine lacks the clarity of statutory codification when this issue is presented to the courts. As a result, the current status of head of state immunity is similar to the period prior to the codification of sovereign immunity. Furthermore, decisions have been

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[60] *See In re Doe*, 860 F.2d at 45; LaFontant v. Aristide, 844 F. Supp. 128, 132 (E.D.N.Y. 1994).

[61] See *Aristide*, 844 F. Supp. at 132.

[62] *Id.*

[63] *See* Austria v. Altmann, 541 U.S. 677, 689 (2004).

[64] *Aristide*, 844 F. Supp. 128, 132 (discussing the concept of absolute immunity in light of head of state immunity and the principles of comity and mutual respect among nations).

[65] *In re Doe*, 860 F.2d at 45; *see also* A, B, C, D, E, F v. Zemin, 282 F. Supp. 2d 875 (N.D. Ill. 2003), *aff'g sub nom.* Ye v. Zemin, 383 F.3d 620 (7th Cir. 2004).

[66] Abiola v. Abubakar, 267 F. Supp. 2d 907, 916 (N.D. Ill. 2003), *aff'd*, 408 F.3d 877 (7th Cir. 2005).

produced that are a hybrid of the Executive Branch's suggestion and the standards and procedures "outlined in the Schooner Exchange and its progeny."[67] During recent years, various factors have been raised by plaintiffs seeking to refute a head of state's immunity, such as whether the cause of action against the head of state arose during his tenure as a sovereign leader, whether the claim itself charges a crime against humanity, torture, or another international offense, and whether the cause of action is related to a non-governmental function.[68] When considering such arguments, courts have noted that "[a]t common law, heads of state enjoyed absolute immunity from all suits, except perhaps those arising from a head of state's personal commercial ventures."[69] This reasoning is applicable under the FSIA to foreign sovereign states that may lose their immunity when the claims brought against the sovereign state are based on its non-public actions. Perhaps, the status of a foreign head of state's immunity could become better defined if the courts were able to address claims against heads of state by following a restrictive head of state immunity doctrine as enumerated in a separate exception under the FSIA.

III. Current Heads of State Case Law

As the Seventh Circuit recently noted in *Abubakar*,[70] "[a] courtroom in Chicago . . . is an unlikely place for considering a case involving seven Nigerian citizens suing an eighth Nigerian for acts committed in Nigeria."[71] The Seventh Circuit's role in serving as the medium to adjudicate such a claim addressed the primary issue raised on appeal: whether the FSIA applied to "individuals connected with the government, as opposed to the state itself, and its agencies."[72] The *Abubakar* court's remarks

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[67] United States v. Noriega, 117 F.3d 1206, 1212 (11th Cir. 1997); *see also* First Am. Corp. v. Al-Nayyan 948 F. Supp. 1107, 1119 (D.D.C. 1996)(addressing the issue of whether the enactment of the FSIA was intended to affect the power of the State Department to assess immunity for heads of state); *Leutwsyler*, 184 F. Supp. 2d 277 (S.D.N.Y. 2001)(discussing the impact of the Suggestion on Immunity filed on behalf of the Queen).

[68] *See, e.g., Zemin*, 383 F.3d at 626; *Abubakar*, 267 F. Supp. 2d at 916; Tunks, *supra* note 17, at 659-60.

[69] *Abubakar*, 267 F. Supp. 2d at 916.

[70] *Abubakar*, 408 F.3d at 878.

[71] *Id.*

[72] *Id. at* 881.

illustrate that, despite the uncertainty surrounding the head of state immunity doctrine, certain circumstances such as the gravity of the plaintiff's claims have prompted courts to engage in their own interpretations of the FSIA.[73] Moreover, without any guidance from the FSIA itself, it is not uncommon for the courts to discuss the preliminary issue of whether the court has jurisdiction to hear claims involving a foreign sovereign's head of state when those claims are based on allegations of torture, cruel and inhuman treatment, or wrongful death.

Courts responding to this jurisdictional question of a head of state's immunity may consider where the foreign individual named as a defendant and the type of claim brought against such person fall within the FSIA, if at all. For example, in *Abubakar*, the plaintiffs' causes of action charged Nigeria's head of state with the torture and killing of various Nigerian citizens at the hands of the nation's military junta.[74] One plaintiff, Hafsat Abiola, was the daughter of a pro-democracy activist.[75] She claimed that her father won the Nigerian presidential election in 1993 but the military regime nullified the election results.[76] He was subsequently arrested and charged with treason after he declared himself president in 1994. The defendant, General Abubakar, assumed control of the military regime in 1998. Particularly unique to the circumstances of the case was the fact that a true head of state failed to exist throughout the various military regimes that remained in control of the country between 1983 and 1999. No official leader personally ran the country during the time period when the plaintiff was subject to torture, arbitrary detention, and cruel and inhumane treatment.[77] However, the defendant moved for immunity on the grounds that he was a Nigerian public official and his acts were official conduct taken while he served as a member of the ruling council.[78]

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[73] *See generally Abubakar*, 267 F. Supp. 2d 907; *Aristide*, 844 F. Supp. at 129; *Tachonia*, 186 F. Supp. 2d 383; *Zemin*, 383 F.3d 620; In re Estate of Ferdinand E. Marcos Human Rights Litigation, 978 F.2d 493 (9th Cir. 1992).

[74] *Abubakar*, 408 F.3d at 878-80.

[75] *Id.* at 879.

[76] *Id.*

[77] *Id.*

[78] *Id.* at 880.

The defendant contended, using the FSIA's definitional § 1603(a)[79] for support, that a "separate legal person" includes an individual.[80] The court had to consider if Congress meant to include individuals acting within the scope of their official capacities under the FSIA, having no suggestion of immunity from the State Department because of the lack of a definitive Nigerian leader.[81] The court ultimately concluded that the FSIA did not apply to General Abubakar.[82] This conclusion was reached after the court engaged in strict statutory analysis of the FSIA's language in § 1603(a). The court held that, because the exceptions to immunity were created in the context of distinguishing a foreign sovereign's commercial activity, the placement of the term "separate legal person" near "corporate or otherwise" was done to reference corporations as distinct legal fictions.[83] In contrast to this court's ruling, the District court held that since the State Department did not deny immunity, Abubakar should be entitled to immunity for his acts only during the period he actually served as Nigeria's head of state.[84] This immunity extended only to plaintiff's claims that arose during this limited period. Although this ruling was overturned on appeal, the District Court's finding suggests that the privilege of head of state immunity should be limited only to those acts where the head of state acted in his official capacity.

The Ninth Circuit similarly recognized the distinction that exists between a governmental individual acting solely within

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[79] 28 U.S.C.A. § 1603(a). This section defines FSIA a foreign state as follows for the purposes of FSIA:

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or 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.

Id.

[80] *See Abubakar*, 408 F.3d at 881.

[81] *Id.* at 882.

[82] *Id.*

[83] *Id.* at 881.

[84] *Abubakar*, 267 F. Supp. 2d at 916.

his official capacities and his actions taken outside of those duties.[85] In *Park v. Shin*,[86] the court addressed the issue of whether the defendant, who at the time of the suit served as the Deputy Consul General of the Republic of Korea Consulate General in San Francisco, and his wife were entitled to immunity under the FSIA.[87] The basis of the plaintiff's complaint included both federal and state statutory claims, as well as common law claims that arose from her employment as the defendant's domestic servant.[88] The defendant asserted that he qualified as a "foreign state" under the FSIA and was therefore entitled to immunity.[89] The plaintiff contended that the statutory bar did not apply to her claims because the defendant was "not acting within the scope of his official duties when he committed the acts."[90]

The court held that not all acts undertaken by individual government employees are covered under the FSIA.[91] Rather, the court used a number of factors to determine whether an individual was acting in an official capacity and fell within the FSIA's protection. These factors included a consideration of whether the official purported to act as an individual and not an official, whether the cause of action against the official is a disguised action against the representative nation, and whether the action, if allowed to proceed against the official, would interfere with the sovereign state.[92] The Ninth Circuit found that the mere action of hiring the plaintiff as his domestic servant was not taken "exclusively or even primarily as an agent of the Republic of Korea."[93] Moreover, such factors, including the fact that the defendant paid the plaintiff from his family funds and required her to work within the Consulate for only a few days each month, did not trigger the FSIA's immunity bar.[94]

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[85] *See* Park v. Shin, 313 F.3d 1138 (9th Cir. 2002).
[86] *See id.* at 1140.
[87] *Id.*
[88] *Id.* at 1140-41.
[89] *Id.* at 1141.
[90] *Id.* at 1143.
[91] *Id.* at 1144.
[92] *Id.*
[93] *Id.*
[94] *See id.* at 1144-46.

In another case that concerned the applicability of the FSIA to an "individual," a photographer residing in the United States brought suit against a royal head of state, Queen Rania Al-Abdullah of the Hashemite Kingdom of Jordan.[95] The claims brought against the Queen and the Office of Her Majesty included defamation, breach of contract, and copyright infringement. The claims all arose as a result of the plaintiff's photography of the Royal Family in Jordan and a contract which granted the plaintiff usage rights of any photos taken.[96] After the photos were taken, the plaintiff alleged that they appeared in a publication issued on behalf of the Royal Family without his permission.[97] In addition, Leut alleged that the office of Her Majesty interfered with his right to use the pictures of the Royal Family in good faith and that they made false allegations to both magazines claiming the plaintiff improperly used the photos.[98] The court deferred to the United States government's suggestion of immunity for her Majesty, but still at issue before the court was whether, as the defendants contended, subject matter jurisdiction existed over the claims brought against the named agents of the Queen's Office.[99] The court addressed the issue by first asking whether the individual defendants acted "within [their] official capacities during the events that gave rise to [the] action" because the FSIA provides no immunity for acts that exceed the scope of one's official capacities.[100] The court stated that the nature of the individual's actions, rather than the alleged motives, is of great importance in distinguishing between official and personal actions.[101] The actions that formed the basis of plaintiff's complaint, namely the Queen's office official's oversight of the Queen's public image and all press-related matters, were found to be done in furtherance of their official duties and, thus, did not pierce the "public" veil.[102] Furthermore, the court found that "whether or

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95 Leutwyler v. Office of Her Majesty Queen Rania, 184 F. Supp. 2d 277 (S.D.N.Y. 2001).

96 *Leutwyler*, 184 F. Supp. 2d at 280.

97 *Id.* 282-83.

98 *Id.* at 283-84.

99 *Id.* at 280.

100 *Id.* at 287.

101 *Id.*

102 *Id.* at 288.

not the photographing of the Royal family . . . was arranged in the Royal Family's capacity as private citizens[;] . . . once the photos were sought to be injected into the international media, they [became] of public and, therefore, official import."[103] Therefore, these individual defendants were found to fall within the FSIA's class of "foreign states" after the court carefully analyzed the relationship between their public and private duties and the nexus that existed between these roles and the basis of the plaintiff's complaint.

A. *Types of Claims Against Heads of State*

Along with "who" falls under the FSIA, the question of "what" claims underlie a plaintiff's suit is significant in determining when the court has subject matter jurisdiction over claims against a foreign head of state. Where the claim may involve some violation of *jus cogens*,[104] courts seek to determine whether such an action taken on behalf of the head of state bears any connection to the head of state's official duties.[105] For example, the Seventh Circuit, in *Ye v. Zemin*,[106] faced the issue of determining whether a suggestion of immunity from the Executive Branch was binding.[107] The court deferred to the suggestion of immunity and reasoned that the State Department's conclusion accounted for the "significant implications for this country's relationships with other nations."[108] Although the alleged claims against the head of state President Jiang of China included primarily those of *jus cogens* violations such as torture, genocide, arbitrary arrest and imprisonment, the court recognized that by allowing the Executive Branch alone to resolve the immunity decision, these grave actions were accounted for by the Executive Branch's decision to issue a suggestion let-

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[103] *Id.*

[104] *Jus cogens* is defined as international norms.

[105] *See* Fitzgerald, *supra* note 17, at 1023-28 (highlighting the case against Pinochet and the fact that torture could not be considered an official act); *see also* A, B, C, D, E, F v. Zemin, 282 F. Supp. 2d 875 (N.D. Ill. 2003), *aff'g sub nom.* Ye v. Zemin, 383 F.3d 620, 627 (7th Cir. 2004) (discussing the plaintiff's argument that in at least a particular class of cases, a court cannot defer to the position of the Executive Branch, for example those cases involving violations of *jus cogens* norms).

[106] *See Zemin*, 383 F.3d at 620.

[107] *See id.*

[108] *See id.*

ter.[109] In dicta, the court highlighted that a violation of *jus cogens* norms was a distinction that failed to be taken into account under the FSIA, as it was not a statutory exception whereby a foreign sovereign may be subject to jurisdiction.[110] The *Zemin* court was unwilling to supersede the Executive Branch's authority to address the immunity issue but, as indicated by the court's reasoning, the court recognized the possibility that the type of claim brought against a head of state could affect whether subject matter jurisdiction may be found.

Similarly, in *United States v. Noriega*,[111] the Eleventh Circuit also recognized that since foreign sovereignty in the criminal context is not specifically addressed in the FSIA, the ability to determine a head of state's immunity remains vested completely in the Executive Branch.[112] However, unlike in *Zemin*, the *Noriega* court went further in responding to the head of state immunity issue before it. The court reasoned that because of the Executive Branch's failure to issue a clear suggestion of immunity and "capture and prosecute" Noriega himself, Noriega should be denied head of state immunity.[113] The court further stated that had it "ma[d]e an independent determination regarding the propriety of immunity in this case; Noriega's homeland's failure to request immunity, along with his alleged acts being linked to his "private pursuit of personal enrichment," would have moved it to assert jurisdiction.[114] In reaching its conclusion to deny immunity, the *Noriega* court itself interpreted the Executive Branch's action in pursuing a head of state to return for prosecution and went even further in discussing head of state immunity by expressing how it would rule were it forced to evaluate the Executive Branch's immunity decision. Thus, the *Noriega* court's progressive reasoning here suggests that, despite the uncertainty surrounding the head of state immunity doctrine, the court was able to recognize the significant factors that it would have to consider in order to resolve the issue on its own.

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109 *Id.* at 627.

110 *Id.*

111 *See* United States v. Noriega, 117 F.3d 1206, 1212 (11th Cir. 1997).

112 *See id.*

113 *Id.*

114 *Id.*

In re Doe first distinguished when a head of state may be stripped of immunity for not acting solely within his official capacities.[115] This case involved an appeal by former Philippine President Ferdinand Marcos, who served for twenty years as president of the Philippines.[116] In 1988, a federal grand jury in the United States District Court of the Southern District of New York indicted Ferdinand and his wife for embezzling large sums of money that belonged to both the Philippine and United States government.[117] The Marcos refused to obey the subpoenas and, as a result, were held in contempt of the court. Subsequently, the Marcos asked the district court to reconsider its contempt order and asserted head of state immunity as their defense for resisting the subpoenas. The court found that the Philippine government's waiver of whatever head of state immunity the Marcos might have once been entitled to as former leaders avoided the necessity for a ruling on the merits of their immunity defense.[118] Although the court did not rule on the head of state immunity issue, as it recognized the fact that the Philippine government "clearly and unequivocally" waived the Marcos' immunity, the court, in its dicta, remarked that the legal status of heads of state exists in a state of uncertainty under the FSIA.[119]

The *In re Doe* court noted that, despite the appropriate role the Executive Branch serves in defining the scope of head of state immunity, a court may be left to decide "for itself whether a head-of-state is or is not entitled to immunity" when lacking guidance from the Executive Branch.[120] The Marcos' case was unique because the causes of actions brought against Ferdinand were based on actions taken after he was no longer a head of state. Yet, he still sought to invoke the immunity defense and contended that it applied to a former head of state. This circumstance challenged the idea behind head of state immunity, namely that "[s]uch immunity is a personal right. It derives from and remains 'an attribute of state sovereignty.'"[121] The

115 In re Doe v. United States, 860 F.2d 40, 45 (2d Cir. 1988).
116 *Id.* at 42.
117 *Id.*
118 *See* Callan, *supra* note 7, at 123.
119 *See In re Doe*, 860 F.2d at 46.
120 *Id.* at 45.
121 *Id.*

court considered the fact that even if Marcos' acts could have been considered public Marcos was a former head of state and his previous title would not trigger the foreign policy ramifications were he subjected to jurisdiction.[122] Therefore, if the court was able to rule on whether the immunity doctrine applied to Marcos, according to its reasoning it is likely that his status at the time of the lawsuit as a former head of state would have moved the court to deny immunity.

B. *Foreign Sovereign Immunity: The FSIA's Discretionary Function Exception and Heads of State*

In contrast to the ambiguity that surrounds head of state immunity decisions, resolution of foreign sovereign immunity is handled solely by the courts, which will find subject matter jurisdiction over a claim brought against a foreign sovereign after a determination of whether the statutory exceptions to the FSIA have been satisfied.[123] Courts, in determining what constitutes a commercial activity for purposes of the FSIA, will likely deny immunity and hold that subject matter jurisdiction exists over a claim brought against a foreign sovereign where "[the sovereign] acts in the manner of a private player in the market."[124] However, where the claim is based on "the exercise or performance or the failure to exercise or perform a discretionary function regardless of the where the discretion [is] abused" or "any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights" then the court will likely dismiss such claims brought against the foreign sovereign because the stat-

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[122] *See* Callan, *supra* note 7, at 129.

[123] *See* Cicippio v. Islamic Republic of Iran, 271 F.3d 1101,1105 (D.C. 1994) (stating that the FSIA "immunizes foreign sovereigns . . . from federal court jurisdiction . . . unless the case falls within one of several exceptions specified in the act").

[124] *Compare* Saudi Arabia v. Nelson, 507 U.S. 349, 359-60 (1993) (holding that the ultimate basis for the plaintiff's suit, the personal injuries caused by defendant's intentional wrongs and its negligent failure to warn that such wrongs might be committed, did not qualify as commercial activity) *with* Bao Ge v. Li Peng, 201 F. Supp. 2d 14, 17 (D.D.C. 2000) (holding that the commercial activity exception was not satisfied and the foreign sovereign state, the Chinese government, was immune from suit because the basis of the plaintiff's complaint arose out of "an alleged abuse of China's police power).

ute provides for immunity.[125] Thus, the discretionary function exception is "the exception to the FSIA's exceptions" and renders immune claims brought against a foreign sovereign if the claim revolves around the sovereign's performance of a discretionary function.[126] A court, when determining if the sovereign is executing a discretionary function, is required to ask whether there was a choice of conduct that was "grounded in social, economic, or political policy."[127] This provision of the FSIA reflects the concept of restrictive sovereign immunity: it allows for subject matter jurisdiction over claims that involve a foreign sovereign's non-public function, but maintains immunity for actions based on a sovereign's discretionary function that are linked to those taken on behalf of the foreign state.

Case law discussing the discretionary function provision indicates that foreign government officials and individuals are often named as defendants in suits involving foreign sovereigns.[128] The analysis utilized by the courts in determining whether the claim falls under the discretionary function exception to the FSIA indicates that whether the claim should proceed will likely depend on the egregiousness of the sovereign's action, as in case law involving claims brought against a foreign sovereign that involved a violation of *jus cogens* or implicated the sovereign in a criminal context.[129] This analysis may provide guidance for courts to respond to head of state immunity claims were a restrictive head of immunity doctrine to exist. For example, at issue in *Alicog v. Kingdom of Saudi Arabia*,[130] was whether the actions taken by the Saudi Arabian Royal Family fell within the FSIA's discretionary function provision.[131] In *Alicog*, two former servants of the Saudi Arabian Royal Family claimed that they were falsely imprisoned and

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[125] *Id.*

[126] *See* Maalouf v. The Swiss Confederation, 208 F. Supp. 2d 31, 34 (D.D.C. 2002) (explaining that the FSIA waives jurisdictional immunity for "claims of money damages for personal injury or death, *unless,* the case is based on . . . a discretionary function . . . regardless of whether that discretionary function is abused") (emphasis added). *Id.*

[127] *Id.*

[128] *See, e.g.* Alicog v. Kingdom of Saudi Arabia, 860 F. Supp. 379 (S.D. Tex. 1994); Kline v. Kaneko, 686 F. Supp. 386 (S.D.N.Y. 1988).

[129] *See supra* Part III. A.

[130] *See* Alicog v. Saudi Arabia, 860 F. Supp. 379 (S.D. Tex. 1994).

[131] *See id.* at 382.

abused while working for the family in Houston, Texas.[132] Both the King and the Kingdom of Saudi Arabia were named as defendants. The King moved to dismiss on grounds that as head of state he was immune and the Kingdom moved to dismiss on grounds that subject matter jurisdiction was lacking under the FSIA.[133] On the head of state immunity issue, the court recognized that the King was immune because "the United States has appeared in this action to acknowledge that King Fahd is the head of state of Saudi Arabia."[134] The remaining issue before the court then was whether Saudi Arabia was immune or jurisdiction existed over the personal injury claims, which were caused by government employees acting within the scope of their employment.[135]

The *Alicog* court held that the Saudi Arabian consular officer's assistance in keeping the plaintiffs in the hotel and abusing them would have been an actionable basis for the claim to proceed under the tort exception to the FSIA, but that immunity existed over these claims because the actions alleged "occur[ed] during the performance of a discretionary function."[136] In addition, the *Alicog* court found that the specific action taken by the Saudi government officials, namely their retention of the plaintiff's travel papers, qualified as a discretionary function for it was an "element effectuating policy."[137] The passport disputes, which comprised a component of the plaintiff's claim, were not a matter that required resolution through the judiciary but were best left to the Executive Branch because "judicial interference with this core of a foreign government's diplomatic operation is precisely what the FSIA and this country's traditional foreign relations policies are meant to eliminate."[138] However, the court held that limits exist on what claims fall under the discretionary function provision.[139] The plaintiff's charges of imprisonment and abuse were the type of acts that,

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[132] *See* Alicog v. Kingdom of Saudi Arabia, 860 F. Supp. 379 (S.D. Tex. 1994).

[133] *Id.* at 381-82.

[134] *Id.* at 382. It is interesting to note that the court did not go into detail about the State Department's reasoning as to why the King was immune and only took as binding the fact that he was a recognized head of state.

[135] *Id.*

[136] *Alicog*, 860 F. Supp. at 382.

[137] *Id.*

[138] *Id* at 382-83.

[139] *Id.* at 383.

even though they implicated some of a sovereign's action taken on behalf of the statehood, they were of such kind that they may be considered outside the scope of the discretionary function.[140]

The *Alicog* court continued that "kidnapping, private imprisonment, and assassination are all beyond the scope of legitimate diplomatic operations and are not protected by the discretionary function exception."[141] Additionally, the court stated that if the sovereign's consular officers committed "serious criminal acts" such as murder, immunity would not exist as well.[142] Yet, despite the limitations that exist on when a foreign sovereign will be immune under the discretionary function exception, according to the basis of the plaintiff's complaints in *Alicog*, the court found that the Saudi Arabian government did not exceed the boundaries of discretion by merely detaining the plaintiffs in the hotel, as the evidence lacked indications of more egregious acts.[143] This ruling indicates that, although not satisfied by the facts at issue in *Alicog*, a higher bar of illegal acts is necessary to fall outside the scope of the FSIA's discretionary function exception. Moreover, the *Alicog* reasoning suggests that, as in the *Zemin* and *Noriega* cases discussed above, where an action is brought against a foreign sovereign that involves a violation of *jus cogens*, the court will likely find that immunity is not warranted after determining that such acts are egregious in nature and, thus, wholly non-public acts.[144]

IV. Pope Benedict XVI, The Judiciary, and Resolving the Head of State Immunity Doctrine

The Vatican and the Holy See are not foreign to the jurisdiction of American Courts. In 1987, *English v. Thorne*[145] named the Vatican as a defendant in connection with the alleged tortious conduct towards minors by a Mississippi Catholic

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[140] *Id.*

[141] *See* Saudi Arabia v. Nelson, 507 U.S. 349, 383 (1993)

[142] *Id.* at 384.

[143] *Id.*

[144] *Id. Cf.* Kline v. Kaneko, 685 F. Supp. 386, 388 (S.D.N.Y. 1988) (holding the discretionary function test was also satisfied where the Secretary of Mexico's enforcement of Mexican immigration laws and the decision to expel the plaintiff from Mexico were within the scope of the defendant's official duties).

[145] English v. Thorne, 676 F. Supp. 761 (S.D. Miss. 1987).

priest, Father Vance Zebulon Thomas.[146] The plaintiff's claim sought to impose liability against the Vatican on grounds that the Vatican "negligently employed, retained and reassigned Thomas as pastor of The Holy Ghost Parish" and "breached their fiduciary and professional duties and responsibilities to the plaintiffs."[147] The Vatican raised the argument that subject matter jurisdiction over these claims did not exist and moved to dismiss.[148] The court addressed the immunity issues under the FSIA, specifically, whether any exceptions to the general rule of immunity were met based on the claims asserted against the defendant.[149] The plaintiffs contended that their claims fell within the non-commercial tortious exception to immunity.[150] The court addressed the plaintiff's argument against immunity by first determining whether the FSIA's discretionary function exception was met. In contrast to the plaintiff's attempts to prove that the Vatican should be subject to suit, the court held that it was "unable to discern any alleged conduct by the Vatican which does not involve the performance of a discretionary function."[151] From a careful examination of the complaint, all of the allegations were linked to the policies or procedures utilized by the Vatican in the instruction and ordination of its priests. The court held that these matters were "undeniably of a policy-making nature and clearly discretionary functions."[152] Thus, the court concluded that the actions did not fall within the FSIA's exception and subject matter jurisdiction was lacking.[153]

Almost twenty years later, in the most recent case concerning the Vatican alleging similar complaints to that of *English*, the plaintiffs did not limit their complaints solely to actions taken by the Vatican. Rather, in *Doe v. Roman Catholic Diocese of Galveston-Houston*,[154] the plaintiffs named the Pope as an individual defendant. Unlike in *English*, head of state immunity became an issue by virtue of naming Pope Benedict XVI as a

146 *Id.*
147 *Id.* at 762.
148 *Id.*
149 *Id.* at 762-63.
150 *Id.* at 763.
151 *Id.*
152 *Id.* at 764.
153 *Id.* at 764.
154 Doe v. Roman Catholic Diocese of Galveston-Houston, 408 F. Supp. 2d 272 (S.D. Tex. 2005).

defendant. The underlying incident that led to this suit concerned the conduct of a Columbian seminarian, Juan Carlos Patino-Arango, who was training to become a priest at the St. Francis de Sales Church in Houston, Texas.[155] The three youths alleged that Patino recruited the young men to his "counseling sessions" where he sexually abused them.[156] The young men claimed that the priest boasted of his engagement in similar behavior with other boys in the church and told the young men not to report their encounters.[157] In naming the Pope, the plaintiffs alleged that he assisted Patino in his flight from Texas in order to avoid possible investigation and prosecution for the indicated sexual abuse.[158] Furthermore, the plaintiffs contended that the Archdiocese concealed the priest's crimes and aided in the evasion of law enforcement so as to comport with the directives from the Vatican.[159]

What is unique to this case are the allegations against Pope Benedict XVI. Pope Benedict XVI's involvement with this suit does not stem from his action solely as Pope and head of the Roman Catholic Church. Instead, the plaintiffs argued that his position held prior to becoming Pope comprises the basis of the chargeable actions in the sexual abuse allegations.[160] By doing so, the case brought against Pope Benedict XVI is analogous to the circumstances of *In re Doe* (discussed in Part III. A), where the claims were based on actions that occurred during a time period when Philippine President Ferdinand Marcos was not a sitting head of state.[161] In their suit against Pope Benedict XVI, the plaintiffs challenged the Crimen Sollicitationis, also known as the "Manner of Proceeding in Cases of Solicitation," which were letters published in 1962 by the Congregation for the Doctrine of the Faith.[162] The Crimen, according to the plaintiffs, outlines a trial manual governing how matters in which priests are accused of sexual assault of children would be

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155 *See id.*

156 *Id.* at 274-75.

157 *Id.* at 275.

158 *Id.*

159 *Id.*

160 *See id.* at 276.

161 The claims brought against Marcos were based upon his actions taken as a former head of state. *See* In re Doe v. United States, 860 F.2d 40 (2d Cir. 1988).

162 *Roman Catholic Diocese of Galveston-Houston,* 408 F. Supp. 2d at 275-76.

conducted.[163] The Crimen explains that such trials are led by a secret Church tribunal, which ultimately sends the priest on a pious pilgrimage and leaves the victim silenced under a papal secret.[164] By referring to this letter as early as May 18, 2001, when the Pope then held the title of Cardinal of the Congregation for the Doctrine of the Faith, rather than head of state of the Holy See, the plaintiffs contended that this demonstrated the Church's commitment to a history of concealment and conspiracy in a history of sexual abuse allegations by priests against young men.[165] Moreover, the plaintiffs alleged that the 2001 letter authored by Cardinal Ratzinger "is conspiratorial on its face in that it reminds the archdioceses that clerical sexual assault of minors is subject to exclusive clerical control and pontifical secrecy."[166] Along with another 2002 letter written by Cardinal Ratzinger reminding United States' bishops that cooperation with civil authorities in cases of alleged child sexual abuse was contrary to the Church's period of exclusive control and secrecy over such matters, the plaintiffs' primary argument behind the conspiracy claims were comprised of this powerful evidence, which was not created at all during the Pope's tenure.[167]

On December 22, 2005, the District Court for the Southern District of Texas concluded that Pope Benedict XVI was immune from suit within the U.S. courts.[168] Prior to the court's decision, the State Department heeded the Pope's request for immunity and filed a suggestion of immunity on grounds that the allowance of the lawsuit "would be incompatible with the United States' foreign policy interest."[169] In addition, the Pope adopted the United States' suggestion of immunity and moved to dismiss on various grounds, including lack of subject matter jurisdiction.[170] As a result of these pre-trial motions, at issue before the court was whether the Pope's motion to dismiss

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[163] *Id.* at 276.

[164] *Id.*

[165] *See id.*

[166] *Id.*

[167] *See id.*

[168] *Id.* at 282.

[169] Pope's Immunity Affirmed; Court told to Dismiss Suit, JOURNAL GAZETTE, Sept. 21, 2005, at A8.

[170] *Roman Catholic Diocese of Galveston-Houston*, 408 F. Supp. 2d at 274.

should be granted on grounds that he was immune.[171] The plaintiffs argued that Pope Benedict XVI waived his immunity defense by consenting to the removal of the lawsuit from state to federal court.[172] However, the stronger argument raised by the plaintiffs in favor of denying immunity concerned their contention that Pope Benedict XVI exceeded the authority granted to him by Pope John Paul II at the time he was Cardinal and not a head of state.[173] The plaintiffs argued that as in *Clinton v. Jones*,[174] a sitting head of state may be haled into federal court so as to account for the allegations brought against him at a time when he did not hold office.[175] Thus, the plaintiffs asserted that, because Pope Benedict XVI's actions were being challenged during the time when he was Cardinal, head of state immunity was inappropriately asserted.[176]

The court granted Pope Benedict's motion to dismiss all claims based on the court's recognition of a head of state's immunity and the judiciary's inability to make a ruling on the merits of such an issue.[177] All pending motions were denied and the plaintiff's ability to seek redress was foreclosed by the jurisdictional bar created by the finding of head of state immunity. In addressing the plaintiffs' arguments, the court began with the proposition that "under long established procedure, the [E]xecutive [B]ranch makes a determination to grant immunity to a head of state sued in the United States."[178] The court firmly stated that the State Department's determination of immunity was not subject to review.[179] The court's opinion was centered on the principle that foreign sovereign immunity decisions "are delicate, complex, and involve large amounts of prophecy . . . . [T]hey are decisions of a kind for which the Judiciary has neither aptitude nor facilities nor responsibilities."[180]

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171 *See id.*

172 *Id.* at 279.

173 *Id.* at 280.

174 Clinton v. Jones, 520 U.S. 681 (1997).

175 *Roman Catholic Diocese of Galveston-Houston*, 408 F. Supp. 2d 272, 281 (S.D. Tex. 2005).

176 *Id.*

177 *Id.* at 282.

178 *Id.* at 278.

179 *Id.*

180 *Id.* at 278 (citing Chicago & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103 (1948)).

However, despite the dismissal of all claims, the court did not ignore the head of state immunity issue raised by this suit.

In addressing the plaintiffs' argument that the Cardinal exceeded the authority granted to him in such position, the court noted that "plaintiffs appear to raise an argument that would be relevant to a qualified immunity analysis, such as that used in assessing whether state actors . . . may be held liable for their individual conduct that violates federally protected rights."[181] This argument, although acknowledged by the court, was ultimately struck down because it was solely limited to domestic immunity arguments and, thus, was "misplaced" under the FSIA.[182] Finally, the court held the fact that the plaintiffs' claims against the Pope based on acts that he performed while he was Cardinal were insignificant to the determination of the head of state immunity issue.[183] The court ultimately determined that the principles of foreign sovereign immunity apply even if, at the time, the party did not hold such status during the alleged wrongdoing.[184]

The case brought against Pope Benedict XVI prompted the court to address the head of state immunity arguments raised by the plaintiffs as the claims specifically named the Pope as a defendant. Yet, in responding to this issue, the court's primary authority for wholly adhering to the absolute theory of head of state immunity was based on cases that were decided before the 1976 adoption of the FSIA.[185] In relying on these cases, it is arguable that the court was ignorant of the evolving body of case law that has developed which calls into question how head of state immunity issues are resolved and whether immunity suggestions are still the only source for deciding claims against foreign heads of state.[186] Moreover, the relevance of these cases can be questioned in light of the thirty years that have transpired since the FSIA first codified a restrictive theory of sover-

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[181] *Id.* at 280.

[182] *Id.*

[183] *Id.* at 281.

[184] *Id.*

[185] *Id.* at 278 (citing Spacil v. Crowe, 489 F.2d 614 (5th Cir. 1974) and *Ex parte* Peru, 318 U.S. 578 (1943)).

[186] *See, e.g.,* George, *supra* note 7, at 1068 (arguing that "the 'suggestion' of immunity procedure for head-of-state immunity still presents the same problems for the courts as it did during pre-FSIA sovereign immunity cases").

eign immunity. As discussed above, head of state immunity case law indicates that courts will typically conclude that the pre-1976 theory of absolute immunity doctrine applies to heads of states.[187] However, because this theory is no longer relevant to the resolution of foreign sovereign immunity given the FSIA's restrictive theory, there is a need to align the resolution of head of state immunity with that of the restrictive theory outlined in the FSIA. Since immunity is a right derived from statehood, courts have continuously espoused that it is the nature of the activity that is omnipotent in moving a court to deny or grant immunity.[188] In resolving a claim brought against a foreign sovereign, courts focus on the basis of the plaintiff's claims and on whether they are of the type that a private person could engage in because they have no nexus to the sovereign.[189] If any element of a specifically state-centered activity underlies the plaintiff's claims, despite the gravity of the alleged acts, the illegal character of the alleged acts is irrelevant in judging their non-sovereign character.[190] The statutory language governing the FSIA's exception requires that the sovereign shield be pierced and there is some nexus between this private activity and its effects on United States plaintiffs seeking redress. Moreover, under the FSIA's discretionary function provision, courts must account for a variety of factors including the causes of actions alleged and whether there is a strong relationship between the sovereign's behavior and whether this action was one grounded in the sovereign's "social, economic, or political policy."[191]

The question remains how to make the head of state immunity doctrine settled so that it is aligned with the rationale behind the larger concept of restrictive foreign sovereign immunity that was incorporated into the FSIA. Scholars have suggested amending the FSIA to specifically include heads of state under the broad definition of foreign sovereigns.[192] Villa-

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[187] *See, e.g.*, Abiola v. Abubakar, 267 F. Supp. 2d 907 (N.D. Ill. 2003), *aff'd*, 408 F.3d 877 (7th Cir. 2005).

[188] *See, e.g.*, Cicippio v. Iran, 30 F.3d 164, 167-68 (D.D.C. 1994).

[189] *Id.*

[190] *See generally,* Bao Ge v. Li Peng, 201 F. Supp. 2d 14 (D.D.C. 2000).

[191] *See* Alicog v. Saudi Arabia, 860 F. Supp. 379, 382 (S.D. Tex. 1994).

[192] *See* Mallory, *supra* note 7, at 187-88. She suggests that by including the term head of state under the FSIA's definitional section, without consideration of

nova University School of Law Professor Joseph Dellapenna noted that this method would be the simplest means for resolving the uncertainty surrounding head of state immunity.[193] He continued that it was possible for courts by themselves to achieve the same result through their own interpretation and application of the FSIA and whether, at times, a head of state may or may not qualify as a foreign state.[194] This would allow the head of state's immunity to be denied when, like a foreign sovereign statehood, the action does not derive from his public duty. By allowing foreign heads of states to enjoy the presumption of immunity under the FSIA unless one of the statutory exceptions is met, courts would have a standard to adequately address what truly is a jurisdictional question. Both the British and Canadian statutes follow this procedure and include heads of state within foreign sovereign immunity.[195]

Although the British and Canadian statutes state that the immunities and privileges conferred by their sovereign immunity acts apply to the "sovereign or other head of the state in his public capacity," it appears that the United States' FSIA should not merely have a blanket provision including heads of state within its provisions.[196] Rather, this Comment suggests that what would be most conducive to enabling the courts to address a head of state immunity issue is if the FSIA contained a separate enumerated exception under the FSIA that applies only to foreign heads of state. The exception would be crafted similarly to the language of the FSIA's commercial activity provision such that the type of claim that the plaintiff's action is based on be-

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the State Department's suggestion of immunity, the FSIA should be amended to account for heads of state like foreign sovereigns and would also be subject to the specific FSIA exceptions. *See id.*; *See also* Joseph W. Dellapenna, *Sovereign Immunity: A Comparative Perspective*, 88 AM. SOC'Y INT'L L. PROC. 509, 514 (1994).

193 *See* Dellapenna, *Sovereign Immunity: A Comparative Perspective*, *supra* note 192, at 514.

194 *See id.*

195 *Cf.* State Immunity Act, 1978, c. 33, § 14(1) (Eng.). This statute provides that "the immunities and privileges conferred by this Part of this Act apply to any foreign or commonwealth State other than the United Kingdom; and references to a State include references to – (a) a sovereign or other head of that State in his public capacity. . . ." with State Immunity Act, R.S.C., c. S-18, s. 2.2 (1985). This statute provides that "foreign state" includes "any sovereign or other head of the foreign state or of any political subdivision of the foreign state while acting as such in a public capacity." *Id.*

196 *Id.*

comes a significant focus of the court's analysis under a more restrictive head of state immunity doctrine. The focus under this statutory exception would then shift to linking the cause of action brought against the head of state with the nature of his conduct in light of his official duties taken during a time when he was in office. It would require courts to balance the gravity of the claim asserted against the foreign head-of-state with whether the actions that form the foundation of the claims are largely based on actions that were the result of decisions stemming from their official capacities. As indicated from the above discussed case law which named foreign heads of states and governmental officials as defendants,[197] the courts have already indicated that they are well suited to account for the unique circumstances of each case brought against such individuals and the nature of the particular claims alleged. Further, the courts have already created a head of state immunity dialogue when addressing this issue,[198] but now require the authority so that binding precedent can exist in this area of law. By assuring that the statutory exception applicable to heads of state identifies the type of claims that warrant a denial of immunity, the relationship between the head of state's official duties and the acts he took in carrying out those duties will be central to the court's determination of whether piercing the shield of immunity is truly warranted based upon the gravamen of the plaintiff's claims.

The strongest argument against allowing the judiciary to address the head of state immunity issue was restated by the District Court in *Doe v. Roman Catholic Diocese of Galveston-Houston*.[199] The court, citing 1974's *Spacil v. Crowe*,[200] held that "the executive's determination is not subject to additional review by a federal court."[201] The majority of the court's opinion in the case against Pope Benedict XVI relied on the separa-

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[197] *See generally* Abiola v. Abubakar, 267 F. Supp. 2d 907 (N.D. Ill. 2003), *aff'd*, 408 F.3d 877 (7th Cir. 2005); Leutwyler v. Office of Her Majesty Queen Rania Al-Abdullah, 184 F. Supp. 2d 277 (S.D.N.Y. 2001).

[198] *See, e.g.*, A, B, C, D, E, F v. Zemin, 282 F. Supp. 2d 875 (N.D. Ill. 2003) (stating that courts in "dictum" have recognized that head of state immunity may not extend to a former head of state's private acts).

[199] Doe v. Roman Catholic Diocese of Galveston-Houston, 408 F. Supp. 2d 272 (S.D. Tex. 2005).

[200] *See* Spacil v. Crowe, 489 F.2d 614, 619 (5th Cir. 1974).

[201] *Roman Catholic Diocese of Galveston-Houston*, 408 F. Supp. 2d at 278.

tion of powers argument that prevents the judiciary from ever addressing head of state immunity questions because such a role belongs solely to the Executive Branch.[202] The language used by the court in *Spacil* no longer seems applicable in the context of the FSIA's restrictive immunity theory.

> Separation-of-powers principles impel a reluctance in the judiciary to interfere with or embarrass the executive in its constitutional role as the nation's primary organ of international policy. And the degree to which granting or denying a claim of immunity may be important to foreign policy is a question on which the judiciary is particularly ill-equipped to second-guess the executive. The executive's institutional resources and expertise in foreign affairs far outstrip those of the judiciary.[203]

Moreover, where acts undertaken by a head of state lack any nexus to the sovereign, applying the language of Chief Justice Marshall a suit comprised of actions which are not "under the immediate and direct command of the sovereign"[204] will result in minimal interference with his power and dignity.

The case involving Pope Benedict XVI provides an illustration of how the judiciary is best suited to address the multifaceted circumstances of a head of state immunity issue. Some of the causes of actions brought against the Pope included breach of confidential relationships, fraudulent concealment, and conspiracy to fraudulently conceal.[205] By first identifying the types of claims brought against the Pope in light of the language of FSIA's statutory exceptions, the court would be prompted as it is under the commercial and non-commercial tort exceptions to consider the gravamen of the plaintiff's complaint. In doing so, the court is able to address the nature of the conduct in which the head of state is accused of engaging and whether this behavior can be traced to his official duties. In the Pope's case, the causes of actions involve his role as leader of the Holy See and appear to be tied to his official duties, but these actions occurred at the time when he was not yet leader of the Roman Catholic Church.[206] Similar to a court's finding that

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[202] *Id.* at 279-81.

[203] Spacil, 489 F.2d at 619.

[204] *See* Schooner Exch. v. McFaddon, 11 U.S. 116, 144 (1812).

[205] *Roman Catholic Diocese of Galveston-Houston*, 408 F. Supp. 2d at 274.

[206] *See id.* at 274-75.

a private party could engage in the very type of behavior that forms the basis of the plaintiff's complaint against a foreign sovereign, the court itself can begin by applying this foundational question behind the restrictive immunity concept of the FSIA to the behavior of the head of state. Moreover, consideration of both the Pope's role at the time of the alleged abuse and the nexus between his actions and their direct effect on the United States plaintiffs, are factors that the court could weigh as part of its ultimate decision on whether subject matter jurisdiction over such claims exist.

V. CONCLUSION

Although resolution of a head of state immunity issue is less clear than one involving only a foreign sovereign, the judiciary has implicitly adopted the role of clarifying the confusion and proceeded to determine this issue themselves. Courts continuously cite the principles of the *Schooner Exchange* when addressing a head of state immunity question.[207] These principles remain viable today and provide the authority for the courts to make the distinction between the public and private acts in which a head of state engages and, where appropriate, warrant a finding of subject matter jurisdiction over claims tied to those private acts. By providing for a separate statutory exception under the FSIA, the courts would be able to account for the multitude of factors that affect a finding of jurisdiction when addressing a head of state immunity issue; such factors include the nature of the claim and the link between the cause of action and the duties of a sitting head of state, and uphold the restrictive theory of foreign sovereign immunity.[208] Despite the potentially grave ramifications that could result from haling a head of state overseas to submit to the jurisdiction over the particular claims brought within American courts, the doctrines of comity and sovereign dignity will not be hindered.[209] By allowing courts alone to hear claims involving a head of state who

[207] *See, e.g.,* Enohoro v. Abubakar, 408 F.3d 877 (Ill. 2005); *Zemin*, 282 F. Supp. 2d 875.

[208] *See, e.g.,* Abiola v. Abubakar, 267 F. Supp. 2d 907, 907 (N.D. Ill. 2003).

[209] *See* George, *supra* note 7, at 1069 (arguing that the courts are the "appropriate body to make determinations of immunity because the State Department is subject to greater political pressures in issuing these determinations").

has acted outside the scope of his official capacities, this setting appears the most apt to ensure that an adequate remedy exists for a domestic plaintiff when the circumstances satisfy the FSIA's separate head of state exception.

The language of the nearly two hundred year old *Schooner Exchange* case is embedded in the FSIA. The concept of foreign sovereign immunity exists to protect the true sovereign. However, the interests of justice and the ability for plaintiffs whose actions are premised on common law causes of actions or even grave offenses that do not involve the sovereign's use of police power warrant the grant of subject matter jurisdiction over such claims. When Judge Evans remarked in *Abubakar* that an American courtroom was an unlikely place to hear the torture and murder claims of Nigerians suing the Nigerian government, his words should not be interpreted to mean that American courts are forever foreclosed to plaintiffs. Rather, long before the courtroom is the appropriate setting for such actions, the judiciary possesses the tools to first answer when, if at all, head of state claims can even proceed inside an American courtroom.