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Comment

DOES AN INDIVIDUAL GOVERNMENT OFFICIAL QUALIFY FOR IMMUNITY UNDER THE FOREIGN SOVEREIGN IMMUNITIES ACT?: A HUMAN RIGHTS-BASED APPROACH TO RESOLVING A PROBLEMATIC CIRCUIT SPLIT

HEATHER L. WILLIAMS*

“[T]he Courts cannot isolate themselves from the great moral issues of the day. In the application of law, courts, as other organs of government, must also think of the consequences of their decisions and of their effect on human rights.”¹

I. INTRODUCTION

In the years since foreign sovereign immunity was developed in the United States, originally as a common-law doctrine and later under the Foreign Sovereign Immunities Act (“FSIA”),² a split among the circuit courts of appeals has emerged as to whether an individual government official is eligible for sovereign immunity.³ A majority of the circuits hold that individual government officials are entitled to

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1. Judge Edward D. Re, *Human Rights, Domestic Courts, and Effective Remedies*, 67 ST. JOHN’S L. REV. 581, 591–92 (1993).

2. 28 U.S.C. §§ 1330, 1603–1611 (2006). Foreign sovereign immunity is undoubtedly an issue of international law. *See, e.g., id.* § 1602 (noting that the approach taken in the FSIA mirrors the prevailing doctrine in international law). The focus of this Comment, however, is on the approach of United States courts with respect to the specific issues of sovereign immunity currently arising under the FSIA. American courts seem to have taken the approach that because the FSIA operates as a “controlling” legislative act, “resort” to international law is not necessary. *Cf. The Paquete Habana*, 175 U.S. 677, 700 (1900) (“[W]here there is no treaty, and no controlling executive or legislative act or judicial decision, *resort must be had* to the customs and usages of civilized nations” (emphasis added)). Because this piece charts and comments on the circuit split arising under the FSIA in domestic courts, fascinating issues of international law are, unfortunately, left aside.

3. *See infra* Part II.C.

immunity under the statutory framework of the FSIA.⁴ A minority of circuits hold, however, that individual government officials are *not* entitled to FSIA immunity.⁵ Although the circuit courts have, by and large, framed the debate as one of statutory construction, the different conclusions arrived at by each side may be explained by the different factual circumstances in which the issue was confronted. The minority addressed the issue in the context of human rights litigation brought under the Torture Victim Protection Act of 1991 (“TVPA”).⁶ The majority’s interpretation of the statute, however, occurred outside of the TVPA.⁷ Resolution of this circuit split could be meaningfully achieved by accepting the majority doctrine—that individual government officials are entitled to foreign sovereign immunity—while recognizing an exception for human rights cases brought under the TVPA.⁸ Such an exception would create consistency between the FSIA and the TVPA,⁹ ensure that contemporary interpretation of the FSIA adheres to the goals Congress had in mind when the statute was enacted in 1976,¹⁰ and acknowledge that human rights litigation brought under the TVPA involves a set of fundamental values and interests that may not be present in other kinds of litigation.¹¹

II. BACKGROUND

Foreign sovereign immunity is a doctrine of international law “under which domestic courts, in appropriate cases, relinquish jurisdiction over a foreign state.”¹² Foreign sovereign immunity developed over a period of 140 years in the United States, during which time the approach of American courts shifted from a theory of absolute sovereign immunity to one of restrictive immunity.¹³ In its common-law incarnation, courts strongly deferred to the suggestions of the political branches when making determinations of sovereign immunity.¹⁴

4. *See infra* Part II.C.1.

5. *See infra* Part II.C.2.

6. Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note (2006)).

7. *See infra* Part II.C.1.

8. Future resolution of the circuit split seems likely given that the Supreme Court recently granted certiorari to decide the issue of whether an individual government official acting in his official capacity is entitled to immunity under the FSIA. *See Yousuf v. Samantar*, 552 F.3d 371 (4th Cir. 2009), *cert. granted*, 130 S. Ct. 49 (2009); Petition for Writ of Certiorari, *Yousuf*, 130 S. Ct. 49 (No. 08-1555).

9. *See infra* Part III.A.

10. *See infra* Part III.B.

11. *See infra* Part III.C.

12. H.R. REP. NO. 94-1487, at 8 (1976).

13. *See infra* Part II.A.

14. *See infra* Part II.A.2–3.

In 1976, Congress enacted the FSIA to codify the existing common law of restrictive immunity and transfer the power for making immunity determinations from the political branches to the judiciary.¹⁵ The FSIA creates a statutory presumption of immunity from suit in American courts for those entities that constitute a “foreign state,” subject to a set of exceptions.¹⁶ In recent years, a split has developed among the circuit courts of appeals as to whether an individual government official constitutes a “foreign state” for purposes of FSIA immunity.¹⁷ Circuits that have confronted the issue in the context of human rights litigation brought under the TVPA¹⁸ have held that individual government officials are *not* eligible for FSIA immunity.¹⁹ Circuits that have confronted the issue outside of the TVPA context, however, have held that individual governmental officials *are* eligible for immunity under the FSIA.²⁰

A. *As the Theory of Foreign Sovereign Immunity Developed in the United States, It Shifted from an Absolute to Restrictive Theory of Immunity*

Between 1812 and 1976, the theory of foreign sovereign immunity developed in the United States, transforming from a theory of absolute immunity, under which all acts of a sovereign state were entitled to immunity,²¹ to a theory of restrictive immunity, under which only the *public* acts of sovereign states were entitled to immunity.²² It also evolved from common-law doctrine to statute with the 1976 enactment of the FSIA, which provides a presumption of sovereign immunity to foreign sovereigns, subject to various exceptions.²³

1. *Chief Justice John Marshall’s Opinion in The Schooner Exchange First Addressed the Theory of Foreign Sovereign Immunity in American Courts and Adopted an Absolute Approach to Questions of Immunity*

Chief Justice John Marshall issued the first statement of foreign sovereign immunity in American judicial thought in the 1812 case *The*

15. See *infra* Part II.B.1.

16. See *infra* Part II.B.2.

17. See *infra* Part II.C.

18. See *infra* Part II.D.

19. See *infra* Part II.C.2.

20. See *infra* Part II.C.1.

21. See *infra* Part II.A.1.

22. See *infra* Part II.A.2–3.

23. See *infra* Part II.B.

Schooner Exchange v. McFaddon.²⁴ In *The Schooner Exchange*, the Supreme Court of the United States addressed whether an American citizen could assert title in American court to an armed vessel “commissioned by, and in the service of the emperor of France,” and found in American waters.²⁵ The Court held that the ship was the practical equivalent of the foreign sovereign and was therefore immune from suit in American courts.²⁶ The Court based its conclusion, first, on the acknowledgement that all foreign sovereigns possess complete and exclusive territorial jurisdiction over their land.²⁷ The Court then presented several analogous cases in which a common interest in “mutual intercourse, and an interchange of good offices with each other” had led to an understanding among foreign sovereigns that the sovereign had temporarily waived the exercise of its complete jurisdiction.²⁸ Based on that understanding, Chief Justice Marshall offered the following reasons for concluding that a ship of war, such as the *Schooner Exchange*, is entitled to immunity when entering a friendly port: (1) no injury to the country is likely to ensue from the ship’s entry into port without an express waiver or special license;²⁹ (2) ships of war are generally permitted to enter the ports of a friendly nation;³⁰ and (3) the French ship’s entry into the friendly American port constituted an “implied promise”³¹ that while in the port, the ship would be exempt from the jurisdiction of the country that it had entered.³²

24. 11 U.S. (7 Cranch) 116 (1812).

25. *Id.* at 135, 146. McFaddon, the American citizen, claimed prior ownership of the French vessel. *Id.* at 117.

26. *Id.* at 145–46; *see also id.* at 144 (noting that the armed public vessel “constitutes a part of the military force of her nation, acts under the immediate and direct command of the sovereign, [and] is employed by him in national objects”).

27. *Id.* at 136 (“The jurisdiction of the nation within its own territory is necessarily exclusive and absolute.”).

28. *Id.* at 137. The three analogous cases are as follows: (1) the exemption from arrest or detention in a foreign country of the “person of the sovereign,” based on a universal understanding that a sovereign does not intend to subject himself to jurisdiction that is “incompatible with his dignity, and the dignity of his nation” simply by entering another nation; (2) the grant of immunity to foreign ministers, based on the principle that without such immunity, “every sovereign would hazard his own dignity by employing a public minister abroad”; and (3) the grant of immunity to foreign troops when the sovereign has allowed them to pass through its jurisdiction. *Id.* at 137–40.

29. *Id.* at 141. The same injury likely to accrue from “march[ing] . . . an army through an inhabited country” does not ensue from permitting a ship of war to enter a foreign state’s friendly port without an express waiver by that state. *Id.*

30. *Id.* (noting that if no notice of a prohibition on entry is provided by the country of entry, “the ports of a friendly nation are considered as open to the public ships of all powers with whom it is at peace”).

31. *Id.* at 147.

32. *Id.* at 143 (commenting that it is “impossible . . . to conceive” that a foreign sovereign, having secured for its troops safe passage or asylum in times of distress in the ports of

Based on Chief Justice Marshall's declaration that all foreign sovereigns are entitled to complete and exclusive territorial jurisdiction over their land,³³ *The Schooner Exchange* came to be seen as an endorsement of absolute immunity for foreign sovereigns.³⁴ Absolute immunity provides foreign sovereigns with total exemption from suit in United States courts.³⁵ *The Schooner Exchange* also makes clear that 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."³⁶ As such, until 1976, the judiciary routinely deferred to the decisions of the political branches in making sovereign immunity determinations.

2. *Until 1976, the Executive Branch Played a Primary Role in Judicial Determinations of Foreign Sovereign Immunity*

For the 140 years following *The Schooner Exchange*, the judiciary regularly deferred to the recommendations of the Executive Branch in making foreign sovereign immunity determinations.³⁷ During that

a friendly nation, "should mean to subject his army or his navy to the jurisdiction of a foreign sovereign"); *see also id.* at 144 (arguing that the implied license under which a ship enters a friendly port should be reasonably construed as "containing an exemption from the jurisdiction of the sovereign, within whose territory she claims the rites of hospitality").

33. *See supra* note 27 and accompanying text.

34. *Verlinden B. V. v. Cent. Bank of Nig.*, 461 U.S. 480, 486 (1983); *see also Berizzi Bros. v. S.S. Pesaro*, 271 U.S. 562, 571 (1926) ("In the [*Schooner Exchange*] opinion the Chief Justice attributed to every nation an exclusive and absolute jurisdiction within its own territory subject to no limitation not having its consent, [and] observed that the consent might be either express or implied . . .").

35. *Chuidian v. Phil. Nat'l Bank*, 912 F.2d 1095, 1099 (9th Cir. 1990) (commenting that under the absolute view of foreign sovereign immunity expressed by Chief Justice Marshall in *The Schooner Exchange*, "a foreign state enjoy[s] immunity from all suits" in American courts); *see also* BLACK'S LAW DICTIONARY 765 (8th ed. 2004) (defining absolute immunity as a "complete exemption from civil liability, usu. afforded to officials while performing particularly important functions, such as a representative enacting legislation and a judge presiding over a lawsuit").

36. *Verlinden*, 461 U.S. at 486; *see also* *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895) (noting that comity is "neither a matter of absolute obligation . . . nor of mere courtesy and good will," but rather "is 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 . . . citizens" and all other individuals who might fall "under the protection of its laws"). Simply put, comity is a practice that involves "mutual recognition of legislative, executive and judicial acts" among separate political entities. BLACK'S LAW DICTIONARY 284 (8th ed. 2004).

37. *Verlinden*, 461 U.S. at 486; *see, e.g., Republic of Mexico v. Hoffman*, 324 U.S. 30, 34-35 (1945) (noting that "[i]n the absence of recognition of the claimed immunity by the political branch of the government, the courts may decide . . . whether all the requisites of immunity exist"); *Ex parte Republic of Peru*, 318 U.S. 578, 586-87 (1943) (noting that because questions of sovereign immunity involve the "dignity and rights of a friendly sovereign state," it is particularly important that "the action of the political arm of the

time, the State Department customarily requested that immunity be granted in all proceedings brought against friendly sovereigns.³⁸ The Department made such requests by supplying the court with a “suggestion of immunity.”³⁹ Based on that suggestion, the court would dismiss the suit.⁴⁰ In 1952, Jack B. Tate, the State Department’s Acting Legal Adviser, recommended that the policy of granting immunity to all friendly sovereigns be modified.⁴¹ The Tate Letter, as it came to be called, recommended adopting a more limited theory of foreign sovereign immunity.⁴²

3. *The Tate Letter Signaled the Adoption of a Restrictive Approach to Sovereign Immunity*

In the 1952 Tate Letter, the State Department indicated that it would advise United States courts not to grant sovereign immunity to the non-governmental acts of a foreign state.⁴³ This announcement signaled the Executive Branch’s adoption of a restrictive theory of sovereign immunity, under which immunity is limited to suits involving the *public* acts of a foreign sovereign and does not pertain to suits involving the strictly *commercial* acts of a foreign state.⁴⁴ Upon issuance of the Tate Letter, American courts “formally adopted the restrictive view of sovereign immunity,”⁴⁵ despite the fact that the theory was “not initially enacted into law.”⁴⁶ A Restatement on foreign relations law in the United States summarized the principles that courts used in making determinations of immunity under the new restrictive theory: Courts were to grant immunity to (1) the foreign state itself, (2) the head of the foreign state, (3) the state’s government or any

Government taken within its appropriate sphere be promptly recognized,” and that the court defer to that action).

38. *Verlinden*, 461 U.S. at 486.

39. *Enahoro v. Abubakar*, 408 F.3d 877, 880 (7th Cir. 2005) (citation and internal quotation marks omitted).

40. *Id.* at 880.

41. *Verlinden*, 461 U.S. at 487 & n.9.

42. *Id.* at 487.

43. *Chuidian v. Phil. Nat’l Bank*, 912 F.2d 1095, 1099 (9th Cir. 1990) (citing Jack B. Tate, *Changed Policy Concerning the Granting of Sovereign Immunity to Foreign Governments*, 26 DEP’T ST. BULL. 984–85 (1952), reprinted in Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 711 app. 2 (1976)); see also *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 n.1 (1989) (summarizing the historical background).

44. *Verlinden*, 461 U.S. at 487.

45. *Chuidian*, 912 F.2d at 1099.

46. *Verlinden*, 461 U.S. at 487. Congress later codified the restrictive theory of immunity in the FSIA. See *infra* Part II.B (noting that codification of the common law was a primary motivation behind congressional enactment of the FSIA and generally detailing the process by which the FSIA became law).

governmental agency, (4) the head of government, (5) a foreign minister, or (6) “any other public minister, official, or agent of the state with respect to acts performed in his official capacity.”⁴⁷ The restrictive theory, however, proved difficult to apply, and the Executive Branch retained primary responsibility for making immunity determinations.⁴⁸

Generally, when a foreign state faced litigation in American courts, it would request a finding or suggestion of immunity from the State Department,⁴⁹ often applying diplomatic pressure on the Department in the process.⁵⁰ The State Department usually based its suggestions to the relevant court on interpretation of the common-law principles collected in the Restatement.⁵¹ Courts treated these suggestions, however, as “binding determinations” upon which they would either grant or deny sovereign immunity.⁵² Also complicating foreign sovereign immunity jurisprudence was the fact that foreign governments did not always request a suggestion of immunity from the State Department, which required the courts to determine whether immunity was due, a process that generally involved referring to prior State Department decisions.⁵³ Because immunity determinations were made by both the courts and the Executive Branch, subject to a multitude of legal and diplomatic factors, “the governing standards were neither clear nor uniformly applied.”⁵⁴ By the 1970s, Con-

47. *Chuidian*, 912 F.2d at 1099–100 (quoting RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 66 (1965)).

48. *Vertinden*, 461 U.S. at 487.

49. *Chuidian*, 912 F.2d at 1100.

50. *Vertinden*, 461 U.S. at 487. Occasionally, “political considerations led to suggestions of immunity in cases where immunity would not have been available under the restrictive theory.” *Id.* (citing *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearing on H.R. 11315 Before the Subcomm. on Admin. Law & Governmental Relations of the H. Comm. on the Judiciary*, 94th Cong. 34–35 (1976) (statement of Monroe Leigh, Legal Adviser, Department of State)).

51. *Chuidian*, 912 F.2d at 1100.

52. *Id.*; see, e.g., *Ex parte Republic of Peru*, 318 U.S. 578, 589 (1943) (“The certification and the request that the [sovereign] be declared immune must be accepted by the courts as a conclusive determination by the political arm of the Government that [further judicial action] interferes with the proper conduct of our foreign relations.”); see also RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 69 reporter’s note (1965) (outlining the approach to be taken by courts in cases in which the State Department had spoken to the question of whether or not immunity should be granted).

53. *Vertinden*, 461 U.S. at 487.

54. *Id.* at 488 (citing Frederic Alan Weber, *The Foreign Sovereign Immunities Act of 1976: Its Origin, Meaning and Effect*, 3 YALE STUD. WORLD PUB. ORD. 1, 11 (1976) (noting that under the pre-1976 common law, “the foreign state defendant could determine which branch of the government—the State Department or the court”—would evaluate its claim)).

gress had grown concerned that the application of sovereign immunity law under the Tate Letter subjected “immunity decisions . . . to diplomatic pressures rather than the rule of law.”⁵⁵ Congress enacted the FSIA in 1976 to remedy these concerns.

B. The FSIA Was Designed to Provide a Statutory Basis for Maintaining a Suit Against a Foreign State and for Granting Immunity to a Foreign State Where Appropriate

Congress enacted the FSIA amidst concerns about application of the foreign sovereign immunities doctrine.⁵⁶ The FSIA was designed to provide a statutory basis for determining when and how parties are able to maintain a lawsuit against a foreign state in American courts and when a foreign state is entitled to immunity.⁵⁷

The Supreme Court has definitively ruled that the FSIA provides the “sole basis” for securing subject matter jurisdiction over a foreign state in federal courts.⁵⁸ The Court reasoned that because the district courts are barred from exercising jurisdiction when a foreign state is entitled to immunity under 28 U.S.C. § 1604,⁵⁹ and because 28 U.S.C. § 1330(a) confers jurisdiction on the district courts for all suits brought by citizens and noncitizens so long as the subject of the suit is not entitled to immunity,⁶⁰ the district courts must invoke the FSIA in all actions against a foreign sovereign as the sole basis of subject matter jurisdiction.⁶¹ The House Judiciary Committee Report on the FSIA, which states that the statute “sets forth the sole and exclusive standards to be used in resolving questions of sovereign immunity raised by foreign states before Federal and State courts in the United States,” also supports the Supreme Court’s conclusion.⁶² The House Report indicates that Congress intended, in enacting the FSIA, to codify the existing common-law theory of restrictive immunity and to shift

55. *Chuidian*, 912 F.2d at 1100.

56. *Id.*

57. H.R. REP. NO. 94-1487, at 1 (1976).

58. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989).

59. 28 U.S.C. § 1604 (2006) (providing foreign states with immunity from suit in federal courts with limited exceptions).

60. *Id.* § 1330(a) (providing that the district courts have original jurisdiction over “any nonjury civil action against a foreign state . . . with respect to which the foreign state is not entitled to immunity under [the FSIA] or under any applicable international agreement”). The Supreme Court interpreted § 1330(a) in *Amerada Hess* based on the “settled proposition that the subject-matter jurisdiction of the lower federal courts is determined by Congress in the exact degrees and character which to Congress may seem proper for the public good.” 488 U.S. at 433 (citation and internal quotation marks omitted).

61. *Amerada Hess*, 488 U.S. at 434–35.

62. H.R. REP. NO. 94-1487, at 12.

responsibility for immunity determinations from the executive to the judiciary.⁶³ In an effort to meet these goals, the FSIA provided a statutory presumption of immunity for “foreign states,” subject to a set of limited exceptions.⁶⁴

1. *In Providing a Statutory Basis for Sovereign Immunity, Congress Sought to Codify the Existing Common-Law Doctrine of Restrictive Immunity and to Shift Responsibility for Deciding Questions of Sovereign Immunity to the Judiciary*

According to the House Report, Congress intended that the FSIA codify the restrictive theory of sovereign immunity as it existed in contemporary international law.⁶⁵ Congress endorsed the adoption of this principle because the Judicial and Executive Branches had relied on restrictive immunity since 1952, when the State Department first announced it as official policy.⁶⁶ Furthermore, the theory of restrictive immunity was “regularly applied against the United States” when it was the subject of a suit in foreign courts.⁶⁷ Therefore, consistent application of the restrictive theory of immunity by statutory codification would match the approach of nearly every other country—where decisions as to foreign sovereign immunity were exclusively judicial, rather than political.⁶⁸

While codification of the existing common-law doctrine was one of Congress’s chief aims, “[t]he principal change envisioned by the [FSIA] was to remove the role of the State Department in determining immunity.”⁶⁹ Congress wished to ensure that the restrictive theory of immunity would actually be applied in litigation before federal courts.⁷⁰ Prior to the enactment of the FSIA, this was not always what happened. Foreign states seeking immunity frequently urged the State Department to make a “formal suggestion of immunity to the court,” often using diplomatic tools to influence the Department’s suggestion.⁷¹ Congress determined that authority for immunity decisionmaking should be shifted to the judiciary because the existing policy of deferring to the State Department (1) placed the State Department in the “awkward position of a political institution . . . ap-

63. *See infra* Part II.B.1.

64. *See infra* Part II.B.2.

65. H.R. REP. NO. 94-1487, at 7.

66. *Id.* *See generally supra* Part II.A.3 (discussing the effect of the Tate Letter).

67. H.R. REP. NO. 94-1487, at 7.

68. *Id.*

69. *Chuidian v. Phil. Nat’l Bank*, 912 F.2d 1095, 1100 (9th Cir. 1990).

70. H.R. REP. NO. 94-1487, at 7.

71. *Id.*

ply[ing] a legal standard” to pending litigation without the necessary “machinery” of evidence-taking or appellate review,⁷² (2) required the foreign state to elect which immunity decisions it would leave to the courts and which decisions it would appeal to the State Department,⁷³ and (3) raised concerns for private litigants about whether their legal disputes with foreign states would be handled on “the basis of nonlegal considerations,” and under the weight of diplomatic pressures.⁷⁴ The FSIA addressed these concerns by (1) eliminating the Department’s ability to make legal evaluations as to sovereign immunity, (2) requiring foreign states to present their immunity defenses to the courts, thereby preventing them from influencing the immunity determination by applying persuasive or diplomatic pressures on the State Department, and (3) ensuring that neutral and non-politically motivated arbiters decide immunity issues.⁷⁵

Under the statute, courts should no longer use suggestions of immunity from the State Department as “binding determinations of immunity.”⁷⁶ Because the FSIA is the sole mode of obtaining jurisdiction over a foreign state, any court’s decision on immunity must be based upon the provisions of the statute.⁷⁷ Therefore, if an entity qualifies as a “foreign state” within the statutory definition, and no exception to immunity applies, that entity should be granted immunity under the FSIA.⁷⁸

72. *Id.* at 8. Furthermore, the FSIA alleviated pressure applied by foreign governments regarding the status of a request for sovereign immunity and eliminated potential “adverse consequences” that might come about from the Department’s unwillingness to support their position on immunity. *Id.* at 7.

73. *Id.* at 8.

74. *Id.* at 9.

75. *See id.* at 7 (discussing how the statute transfers immunity decisionmaking authority to the courts).

76. *Chuidian v. Phil. Nat’l Bank*, 912 F.2d 1095, 1100 (9th Cir. 1990). Interestingly, some courts have continued, despite the enactment of the FSIA, to defer to the judgments of the Executive Branch—often staying cases pending receipt of a governmental statement of interest. *See, e.g., Yousuf v. Samantar*, No. 1:04cv1360, 2007 WL 2220579, at *6 & n.10 (E.D. Va. Aug. 1, 2007) (noting that after waiting two years for the State Department to reply to the court’s request for a statement of interest, the court reinstated the case to the active docket), *rev’d*, 552 F.3d 371 (4th Cir. 2009), *cert. granted*, 130 S. Ct. 49 (2009); *cf. Matar v. Dichter*, 500 F. Supp. 2d 284, 293–94 (S.D.N.Y. 2007) (discussing the role of State Department statements of interest in determining whether a claim against a foreign state is a non-justiciable political question), *aff’d*, 563 F.3d 9 (2d Cir. 2009).

77. *Chuidian*, 912 F.2d at 1100.

78. *See infra* Part II.B.2.

2. *Unless an Exception Applies, the FSIA Generally Provides that a “Foreign State” Is Immune from the Jurisdiction of United States Courts*

According to Section 1604, subject to international agreements existing at the time of the statute’s enactment, “a foreign state shall be immune from the jurisdiction of the courts of the United States,” with limited exceptions.⁷⁹ According to the House Judiciary Committee Report, “the burden [is] on the foreign state to produce evidence in support of its claim of immunity.”⁸⁰ This Section should be read, therefore, as granting a presumption of immunity to foreign sovereigns and their entities, so long as the sovereign can prove that it constitutes a “foreign state” under the statutory definition⁸¹ and that it is not exempted from immunity by one of the seven statutory exceptions.⁸²

a. *A “Foreign State” Includes a “Political Subdivision of a Foreign State” or an “Agency or Instrumentality” of the State*

Under Section 1603(a), a “foreign state” includes a state itself, “a political subdivision of a foreign state,” or an “agency or instrumentality of a foreign state.”⁸³ Subsection (b) defines an “agency or instrumentality” of the state as any entity that is “a separate legal person, corporate or otherwise,” “an organ of a foreign state or political subdivision thereof,” or an entity, a “majority of whose shares or other ownership interest” is owned by the former,⁸⁴ and is neither a United States citizen nor created by the laws of a third country.⁸⁵ The House Judiciary Committee Report and judicial interpretations of the FSIA provide additional meaning to these terms. First, the “separate legal person” criterion is designed to include associations, corporations, foundations, or other entities that can sue or be sued, enter into con-

79. 28 U.S.C. § 1604 (2006).

80. H.R. REP. NO. 94-1487, at 17.

81. See *infra* Part II.B.2.a.

82. See *infra* Part II.B.2.b; see also H.R. REP. NO. 94-1487, at 17 (noting that the statute starts with a presumption of immunity and then creates a set of exceptions to that general rule).

83. 28 U.S.C. § 1603(a).

84. *Id.* § 1603(b). Because the phrase “other ownership interest” follows the word “shares,” it has been interpreted by the Supreme Court as “refer[ring] to a type of interest other than ownership of stock.” *Dole Food Co. v. Patrickson*, 538 U.S. 468, 476 (2003). A political subdivision, as used in the statute, “includes all governmental units beneath the central government, including local governments.” H.R. REP. NO. 94-1487, at 15.

85. 28 U.S.C. § 1603(b); see also *id.* § 1332(c)(1) (providing the statutory definition for when a corporation is deemed to be a citizen of a state); *id.* § 1332(d)(10) (defining citizenship for an unincorporated association).

tracts, or hold property in their own names, based on the foreign state law under which they were created.⁸⁶ Second, the “organ of a foreign state” criterion is intended to indicate that if an entity is entirely owned by a state, it necessarily falls within the “agency or instrumentality” definition.⁸⁷ If, however, ownership is divided between state and private interests, the entity constitutes an “agency or instrumentality” only if a majority of its ownership interests are owned either by the state itself or by a political subdivision thereof.⁸⁸ Finally, the criterion that excludes entities that are citizens of the United States or created by the laws of a third country is intended to address the rationale that if a foreign state either attains or creates a legal entity in a foreign country, that entity is “presumptively engaging in activities that are either commercial or private in nature.”⁸⁹

According to the House Judiciary Committee Report, entities that meet the “agency or instrumentality” definition could come in a variety of forms, including a state trading company, a mining venture, a transport business, including shipping lines and airlines,⁹⁰ a steel industry, a central bank,⁹¹ an export organization, and a “governmental procurement agency or a department or ministry which acts and is suable in its own name.”⁹² Whether an individual government official, acting in his official capacity, constitutes an “agency or instrumentality” of the state is the subject of a current circuit split.⁹³ Two other

86. H.R. REP. NO. 94-1487, at 15.

87. *Id.*; *see, e.g.*, *Globe Nuclear Servs. & Supply GNSS, Ltd. v. AO Techsnabexport*, 376 F.3d 282, 285 (4th Cir. 2004) (holding that a company entirely owned by the Russian Federation constitutes an “agency or instrumentality”); *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371, 1378 (5th Cir. 1980) (holding that an entity “wholly owned by the Dominican government” is “undisputedly” a “foreign state” under the FSIA); *Ofikuru v. Nig. Airlines Ltd.*, 670 F. Supp. 89, 91 (S.D.N.Y. 1987) (holding that an airline is an “instrumentality” of the state because “all of the shares of [its] capital stock are owned” by the Nigerian government).

88. H.R. REP. NO. 94-1487, at 15; *see, e.g.*, *Carey v. Nat’l Oil Corp.*, 453 F. Supp. 1097, 1101 n.10 (S.D.N.Y. 1978) (noting that a corporation is “clearly a ‘foreign state’ for jurisdictional purposes” if a majority of its ownership interest is owned by the foreign government), *aff’d*, 592 F.2d 673, 677 (2d Cir. 1979).

89. H.R. REP. NO. 94-1487, at 15. An example of such an entity would be a “corporation organized and incorporated under the laws of the State of New York, but owned by a foreign state.” *Id.* (citing *Amtorg Trading Corp. v. United States*, 71 F.2d 524, 526–27 (C.C.P.A. 1934)).

90. *See, e.g.*, *Abrams v. Société Nationale des Chemins de Fer Francais*, 332 F.3d 173, 180 (2d Cir. 2003) (national railroad company); *NYSA-ILA Pension Trust Fund v. Garuda Indon.*, 7 F.3d 35, 37–38 (2d Cir. 1993) (national airline).

91. *See, e.g.*, *Chuidian v. Phil. Nat’l Bank*, 912 F.2d 1095, 1098 (9th Cir. 1990) (national bank).

92. H.R. REP. NO. 94-1487, at 15–16.

93. *See infra* Part II.C (detailing the positions of the various courts in the FSIA circuit split).

questions as to the immunity of individual government officials, however, are more settled. First, an individual official acting *outside* the scope of his official capacity is not eligible for FSIA immunity.⁹⁴ Similarly, officials acting beyond the scope of their government-given authority, when that authority is limited by law, are not entitled to immunity under the FSIA.⁹⁵

While questions remain as to what constitutes an “agency or instrumentality” under Section 1603, one thing is clear: If an entity does not meet the definition of a “foreign state,” it should not be granted sovereign immunity in any suit in the United States.⁹⁶ Immunity is not established, however, solely by showing that an entity meets the definition of a “foreign state.”⁹⁷ A court must also consider whether sovereign immunity could be denied on the grounds that one of the immunity exceptions found in Sections 1605 and 1605A applies.

b. Sections 1605(a) and 1605A Provide Seven Exceptions to Section 1604’s General Immunity Rule Under Which a Foreign State Is to Be Denied Sovereign Immunity

Sections 1605(a) and 1605A provide that a foreign state is not immune from suit if it falls within one of seven exceptions.⁹⁸ A foreign state will not have “presumptive immunity”⁹⁹ in cases involving the following: (1) waiver of immunity;¹⁰⁰ (2) commercial activities oc-

94. See *Enahoro v. Abubakar*, 408 F.3d 877, 882 (7th Cir. 2005) (noting that in cases in which the FSIA has been applied to individuals, “the individual must have been acting in his official capacity”); *I.T. Consultants, Inc. v. Islamic Republic of Pak.*, 351 F.3d 1184, 1186 (D.C. Cir. 2003) (concluding that FSIA immunity does not apply to the Pakistani Minister of Agriculture for a suit brought against him in his individual capacity); *Park v. Shin*, 313 F.3d 1138, 1144 (9th Cir. 2002) (holding that a Korean official sued by a personal family employee for employment-related claims was not eligible for immunity because he was not acting within the scope of his official duties when he hired and supervised the employee); *Chuidian*, 912 F.2d at 1106 (noting that the defendant would not be entitled to immunity for acts committed outside of his official capacity).

95. See RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 66(f) (1965) (discussing the immunity of foreign officials acting in their official capacities); cf. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949) (noting, in the context of a suit to enjoin the acts of a domestic administrator, that “where the officer’s powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions” and that “[t]he officer is not doing the business which the sovereign has empowered him to do”).

96. H.R. REP. NO. 94-1487, at 15.

97. *Id.*

98. 28 U.S.C. § 1605(a) (2006); 28 U.S.C.A. § 1605A (West Supp. 2009).

99. *Yousuf v. Samantar*, 552 F.3d 371, 377 n.4 (4th Cir. 2009), *cert. granted*, 130 S. Ct. 49 (2009).

100. 28 U.S.C. § 1605(a)(1). Immunity may be waived either explicitly or by implication. *Id.*

curing in the United States or causing a direct effect therein;¹⁰¹ (3) property expropriated in violation of international law;¹⁰² (4) property located in the United States that was inherited, gifted, or is immovable;¹⁰³ (5) non-commercial torts occurring in the United States;¹⁰⁴ (6) arbitration agreements;¹⁰⁵ and (7) state-sponsored terrorism.¹⁰⁶ If one of these seven exceptions is applicable, the presump-

101. *Id.* § 1605(a)(2). The commercial activity must be the subject of the action. *Id.*

102. *Id.* § 1605(a)(3). That property, or any property exchanged for it, must either be (1) itself located in the United States in connection with the commercial activities of a foreign state in the United States, or (2) “owned or operated by an agency or instrumentality of [a] foreign state . . . that [is] engaged in . . . commercial activity in the United States.” *Id.*

103. *Id.* § 1605(a)(4). The word “property” refers to rights in property. *Id.*

104. *Id.* § 1605(a)(5). The non-commercial torts exception covers any suit in which (1) a plaintiff seeks monetary damages, (2) for personal injury or death, or property damage or loss, (3) that occurred in the United States, and (4) that was caused by a tortious act or omission by a foreign state or its official or employee acting in his official capacity. *Id.* The rule does not apply to (1) claims based on “failure to . . . perform a discretionary function,” or (2) claims “arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.” *Id.* § 1605(a)(5)(A)–(B).

105. *Id.* § 1605(a)(6). This exception is limited to cases in which the action was brought either to (1) “enforce an agreement made by the foreign state . . . to submit to arbitration” any issues arising under a “defined legal relationship” with itself and a private litigant, or (2) “to confirm an award [that was] made pursuant to . . . an agreement to arbitrate.” *Id.*

106. 28 U.S.C.A. § 1605A (West Supp. 2009). This exception grants jurisdiction to federal courts over cases brought by United States citizens against foreign governments seeking damages for alleged acts of extrajudicial killing, torture, aircraft sabotage, hostage-taking, and providing material support or resources for such acts. *Id.*; H.R. REP. NO. 104-383, at 62 (1995). To proceed under the terrorism exception, a host of factors must be met: (1) the victim must have been a U.S. national, a member of the armed forces, or a U.S. government employee or contractor at the time of the alleged terrorist action; (2) the lawsuit must allege that the terrorist conduct was performed or material support or resources were offered by an “official, employee, or agent” of a foreign state, acting in his official capacity; and (3) the foreign state against whom the conduct is alleged must have either been designated a state sponsor of terrorism at the time the act occurred or was designated a state sponsor as a result of the act in question, and remains so designated at the time the claim is filed or was so designated in the six months prior to the filing of the claim. 28 U.S.C.A. § 1605A. A country’s government is designated a “state sponsor of terrorism” by the Secretary of State. *Id.* § 1605A(h)(6). That determination is based on a finding that the government in question “has repeatedly provided support for acts of international terrorism.” *Id.* Currently, four countries are designated state sponsors of terrorism: Cuba, Iran, Sudan, and Syria. U.S. Department of State, State Sponsors of Terrorism, <http://www.state.gov/s/ct/c14151.htm> (last visited Apr. 11, 2010). The terrorism exception to the FSIA applies, therefore, only to cases brought by U.S. citizens who have been injured by the terrorist activity of or material support of terrorism by one of these four states or their employees operating in their official capacity. Prior to enactment of the terrorism exception, some legislators argued that a broader and more general exception to the FSIA for all cases of human rights violations would be appropriate. *See infra* note 221 (outlining a variety of proposals to amend the FSIA to include a human rights exception).

tion of foreign sovereign immunity is lost, and the “foreign state” may be eligible for suit in the courts of the United States.¹⁰⁷

C. *After the FSIA Was Enacted, a Split Developed Among the Circuits as to Whether an Individual Government Official Constitutes an “Agency or Instrumentality” of the State Under Section 1603(b) and Is Therefore Eligible for Foreign Sovereign Immunity*

Over the last twenty years, the federal circuits have split as to whether individual government officials are eligible for FSIA immunity on the grounds that they meet the statutory definition of a “foreign state” as provided in Section 1603.¹⁰⁸ Five circuits—the Ninth Circuit, the District of Columbia Circuit, the Fifth Circuit, the Sixth Circuit, and the Second Circuit—have held that individual government officials *are* immune from suit under the FSIA because they constitute an “agency or instrumentality” of the state when acting in their official capacity.¹⁰⁹ Two circuits—the Fourth Circuit and the Seventh Circuit—have held that individual officials are *not* eligible for FSIA immunity because they do not constitute an “agency or instrumentality” of the state.¹¹⁰ The courts involved in the circuit split confronted the issue in different contexts. While the courts in the minority of the circuit split addressed the issue in the context of serious human rights litigation brought under the TVPA, the majority tackled the issue outside of the TVPA context, and in some cases, in the context of banking, commercial, and industrial transactions.¹¹¹

1. *According to the Majority of Circuits, Which Addressed the Question Outside of the Context of Human Rights Litigation Brought Under the TVPA, an Individual Government Official Constitutes an “Agency or Instrumentality” of the State Under Section 1603(b) and Is Therefore Eligible for Immunity*

In 1990, the question of whether an individual government official is eligible for immunity under the FSIA was first addressed at the circuit court level by the United States Court of Appeals for the Ninth Circuit, in what has come to be regarded as the “seminal . . . deci-

107. See 28 U.S.C. § 1604 (providing a presumption of immunity); *id.* § 1605(a) (outlining exceptions to immunity).

108. See *id.* § 1603 (defining “foreign state”); see also *supra* Part II.B.2.a.

109. See *infra* Part II.C.1.

110. See *infra* Part II.C.2.

111. See *infra* Part II.C.1–2.

sion”¹¹² for the majority viewpoint—*Chuidian v. Philippine National Bank*.¹¹³ In *Chuidian*, a Philippine citizen (plaintiff Chuidian) brought suit against a Philippine government official (defendant Daza) for instructing the Philippine National Bank to dishonor a letter of credit that the Philippine government had issued to Chuidian.¹¹⁴ The state-owned Philippine National Bank had issued an irrevocable letter of credit in 1985 to Chuidian, the owner of various business interests, to settle a previous lawsuit.¹¹⁵ In 1986, however, President Corazon Aquino took control of the Philippine government and formed the Presidential Commission on Good Government to recover “ill-gotten wealth” accumulated under the former Marcos presidency.¹¹⁶ Daza, as a member of that commission and acting pursuant to authority granted to him by the President, instructed the bank to prevent payment under the letter of credit issued to Chuidian based on concerns that Chuidian’s letter of credit was the result of a fraudulent settlement with Marcos.¹¹⁷ When the bank refused to make payment, Chuidian brought suit against Daza and the bank.¹¹⁸ Daza moved to dismiss the suit on the grounds that, *inter alia*, he was entitled to sovereign immunity.¹¹⁹ The Ninth Circuit, on appeal, held

112. *Yousuf v. Samantar*, 552 F.3d 371, 378 (4th Cir. 2009), *cert. granted*, 130 S. Ct. 49 (2009).

113. 912 F.2d 1095 (9th Cir. 1990).

114. *Id.* at 1097.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 1098. Chuidian argued that because the “agency or instrumentality” language of the FSIA does not apply to individual government officials, and because the FSIA provides the sole source of sovereign immunity, Daza could not be granted immunity. *Id.* at 1101. The U.S. government argued in a “Statement of Interest” submitted to the court, however, that while Daza was not eligible for immunity under the FSIA, he may have been eligible for immunity under the pre-FSIA common-law doctrine of immunity. *Id.* According to the government’s argument, the FSIA applies only to “foreign states” as defined in Section 1603(b). *Id.* (internal quotation marks omitted). Entities not covered by the FSIA may still be immune from suit under common-law principles of immunity. *Id.* This continues to be the position of the United States government today. *See, e.g.*, Statement of Interest of the United States of America at 2, *Matar v. Dichter*, 500 F. Supp. 2d 284 (S.D.N.Y. 2007) (No. 05 Civ. 10270) (“[F]oreign officials . . . 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.”); *cf.* Brief for the United States as Amicus Curiae Supporting Affirmance at 6, *Samantar v. Yousuf*, 130 S. Ct. 49 (2009) (No. 08-1555) (arguing that the “principles articulated by the Executive Branch, [and] not the FSIA properly govern” questions of sovereign immunity for individual government officials). The Ninth Circuit in *Chuidian* dismissed the government’s argument that the pre-FSIA common law should apply on the grounds that “[a]bsent an explicit direction from the statute . . . such a bifurcated approach to sovereign immunity was not intended by the Act” for the following reasons: (1) Congress intended the FSIA to be comprehensive, and the

that Daza was eligible for FSIA immunity for acts undertaken in his official capacity as an “agency or instrumentality of the state.”¹²⁰

The Ninth Circuit reached this conclusion for three reasons. First, the court noted that because neither Section 1603(b) nor the accompanying legislative history explicitly includes or excludes individuals, the most that can be said is that the statute is ambiguous on the issue, and therefore, limiting the statute’s application would be inappropriate.¹²¹ Second, because suing an individual for actions undertaken in his official capacity is the “practical equivalent” of suing the sovereign directly, permitting suit against individual government officials would “amount to a blanket abrogation of foreign sovereign immunity” and would permit individuals to do indirectly what the FSIA forbids them from doing directly—bring suit against a foreign sovereign.¹²² Finally, permitting suit against individual government officials would amount to a “substantial unannounced departure from prior common[-]law” principles and would therefore run counter to Congress’s announced desire to codify existing common-law principles in the statute.¹²³ The Ninth Circuit’s reasoning proved to be influential throughout other circuits.

In 1996, the D.C. Circuit confronted the same issue in *El-Fadl v. Central Bank of Jordan*.¹²⁴ In *El-Fadl*, a Jordanian resident (plaintiff El-Fadl) brought suit against a variety of defendants, including the Deputy Governor of the Central Bank of Jordan (defendant Marto), for various employment-related tort claims.¹²⁵ On appeal, the D.C. Cir-

courts have consistently interpreted it as such; (2) Congress intended, in creating the FSIA, to remove the role of the State Department; and (3) “[N]o authority supports the continued validity of the pre-1976 common law in light of the Act.” *Chuidian*, 912 F.2d at 1102–03. At present, therefore, the FSIA, and not pre-existing common-law doctrines, governs this area of the law.

120. *Chuidian*, 912 F.2d at 1103.

121. *Id.* at 1101. According to the court, while the terms “agency,” “instrumentality,” “organ,” “entity,” and “legal person” more easily “connot[e] an organization or collective,” they do not “in their typical legal usage necessarily *exclude* individuals.” *Id.* (emphasis added).

122. *Id.* at 1101–02; *see also* *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 690 n.55 (1978) (noting that “official-capacity suits” are another method of pleading an action against the entity for which the individual officer is acting as an agent); *Morongo Band of Mission Indians v. Cal. St. Bd. of Equalization*, 858 F.2d 1376, 1382 n.5 (9th Cir. 1988) (“A claim . . . against a state officer acting in his official capacity is treated as a claim against the state itself.”).

123. *Chuidian*, 912 F.2d at 1101–02 (arguing that prior to 1976, the common law granted immunity to individual officials acting in their official capacity).

124. 75 F.3d 668 (D.C. Cir. 1996).

125. *Id.* at 669–70. From 1982 to 1989, Petra Bank, a privately owned Jordanian bank, employed El-Fadl under a contract that guaranteed him employment for life. *Id.* at 670. The Central Bank of Jordan announced that it had discovered prevalent “financial impro-

cuit, holding that an individual may qualify as an “agency or instrumentality” of the state, affirmed the lower court’s dismissal of the claims against Marto on the grounds that he was eligible for sovereign immunity under the FSIA.¹²⁶ The court cited the *Chuidian* decision as support for its conclusion that an individual may constitute an “agency or instrumentality” of the state, but it did not discuss the question further except to note that although El-Fadl claimed that he was suing Marto in his individual capacity, the record “show[ed] that Marto’s activities . . . were neither personal nor private, but were undertaken only on behalf of the Central Bank.”¹²⁷ Given the lack of evidentiary support for El-Fadl’s individual-capacity claim against Marto, the court dismissed the action against him.¹²⁸

The Fifth Circuit faced the same immunity issue in the 1999 case *Byrd v. Corporacion Forestal Y Industrial de Olancho S.A.*¹²⁹ *Byrd* concerned a sawmill run by defendants Pacheco and Figueroa, both citizens of Honduras, and owned by defendant CORFINO, a private corporation, ninety-eight percent of which was owned and controlled by the Honduran government.¹³⁰ In 1995, plaintiff Byrd, an American citizen, became involved as general manager of a project involving the sawmill.¹³¹ Byrd alleged that defendants Pacheco and Figueroa concocted a scheme to remove Byrd from his position.¹³² Byrd brought suit to recover the significant monetary damage that he had incurred as a result of the illegal plot to remove him from his various management positions.¹³³ While Byrd conceded that CORFINO was a “foreign state” and immune from suit under the FSIA because its stock was almost “entirely in the hands of” the Honduran government, he argued that Pacheco and Figueroa, CORFINO’s chief officers, were not eligible for immunity under the FSIA.¹³⁴ In holding that the officers *were* eligible for immunity, the Fifth Circuit explicitly adopted

prieties” at Petra Bank and placed the bank in receivership. *Id.* Following this announcement, the Jordanian government appointed a Liquidation Committee, administered by defendant Marto, to run the bank. *Id.* In September 1989, Marto sent El-Fadl a letter terminating his employment at Petra Bank. *Id.* Four years later, El-Fadl filed suit in the D.C. District Court alleging that Marto had wrongfully terminated him from his employment. *Id.* at 671.

126. *Id.* at 671.

127. *Id.*

128. *Id.*

129. 182 F.3d 380 (5th Cir. 1999).

130. *Id.* at 382.

131. *Id.* at 382–83.

132. *Id.* at 384.

133. *Id.*

134. *Id.* at 388.

the reasoning of *Chuidian*, noting as follows: (1) the FSIA “[n]ormally” extends to protect individuals acting in their official capacity “as officers of corporations considered foreign sovereigns”;¹³⁵ (2) the protections of the FSIA cease only when the individual acts beyond his official capacity;¹³⁶ and (3) personal motives do not always convert an official action into an individual one, but instead may represent only a “convergence” of personal interests and official duties and authority.¹³⁷ Despite the possibility of some personal motivation, because Pacheco and Figueroa acted in their official capacity during the alleged conduct, they were held to be immune from suit under the FSIA.¹³⁸

The Sixth Circuit next addressed the issue in *Keller v. Central Bank of Nigeria*.¹³⁹ In *Keller*, an American citizen (plaintiff Keller) who worked as a sales representative for a Michigan manufacturer that produced mobile hospital and medical centers, was contacted by an individual who identified himself as Prince Arthur Ossai and claimed that he was Nigerian royalty and a Nigerian government official.¹⁴⁰ Ossai proposed that Keller grant him exclusive rights to the distribution of his hospital and emergency care facilities in Nigeria.¹⁴¹ Ossai and Keller then reached a deal that included the transfer of a large amount of funds into an escrow account set up by Keller from which disbursements would be made.¹⁴² After paying over \$28,000 in fees and charges that Ossai had requested, Keller realized that he had been the victim of a con.¹⁴³ Keller brought suit against Ossai, the Central Bank of Nigeria and six of its employees, and others.¹⁴⁴ On appeal, Keller did not challenge the district court’s finding that the individual defendants fell within the FSIA’s definition of “agency or instrumentality.”¹⁴⁵ The Sixth Circuit therefore affirmed the district court’s

135. *Id.*; see also *supra* text accompanying note 130 (stating that CORFINO was almost entirely owned and controlled by the Honduran government); *supra* text accompanying notes 87–88 (noting that an entity that is entirely owned by the state constitutes an “agency or instrumentality” for purposes of the FSIA, as does an entity where a majority of its ownership interests are owned by the state).

136. *Byrd*, 182 F.3d at 388.

137. *Id.* at 389 (“Such a circumstance does not serve to make his action any less an action of his sovereign.” (quoting *Chuidian v. Phil. Nat’l Bank*, 912 F.3d 1095, 1107 (9th Cir. 1990))).

138. *Id.*

139. 277 F.3d 811 (6th Cir. 2002).

140. *Id.* at 814.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* at 815–16.

finding of immunity for the individual defendants based on acceptance of the precedent established by the Ninth and D.C. Circuits in *Chuidian* and *El-Fadl* and construction of Keller's silence on the issue as a concession that the individual defendants were immune from suit under the FSIA.¹⁴⁶

The Second Circuit cast the most recent vote in favor of the majority viewpoint in *In re Terrorist Attacks on September 11, 2001*.¹⁴⁷ In *In re Terrorist Attacks*, plaintiffs, persons injured by the September 11, 2001, terrorist attacks, "brought tort claims against hundreds of parties," including "foreign governments, charitable entities, and individuals," all of whom "alleged[ly] . . . provided financial and logistical support to al Qaeda" preceding the attacks.¹⁴⁸ Most relevant to the question of the immunity of individual government officials are the claims against four defendants referred to as the "Four Princes." The plaintiffs alleged that the Four Princes, a group of Saudi Arabian princes that sit on various governing bodies, acting in their official capacity as members of those bodies, caused monies to be donated to Muslim charities "with the knowledge that the charities would transfer the funds to al Qaeda."¹⁴⁹ The Second Circuit, in granting immunity to the Four Princes, "join[ed its] sister circuits in holding that an individual official of a foreign state acting in his official capacity is the 'agency or instrumentality' of the state, and is thereby protected by the FSIA."¹⁵⁰ In so doing, the court explicitly accepted the reasoning of *Chuidian*, observing the following: (1) the term "'agency'" may mean "any thing or person through which action is accomplished," and is not limited to governmental bureaus or offices;¹⁵¹ (2) such a reading is "consistent with the evident principle that the state cannot act except through individuals";¹⁵² and (3) the notion that individuals

146. *Id.*

147. 538 F.3d 71 (2d Cir. 2008), *cert. denied sub nom.* Fed. Ins. Co. v. Kingdom of Saudi Arabia, 129 S. Ct. 2859 (2009).

148. *Id.* at 75.

149. *Id.* at 75, 77.

150. *Id.* at 81. The court also noted that several district judges in its circuit had reached the same conclusion in several cases. *Id.*; *see, e.g.*, *Leutwyler v. Office of Her Majesty Queen Rania Al-Abdullah*, 184 F. Supp. 2d 277, 286–87 (S.D.N.Y. 2001) (holding that individual government officials are eligible for immunity under the FSIA); *Tannenbaum v. Rabin*, No. CV-95-4367, 1996 WL 75283, at *2 (E.D.N.Y. Feb. 13, 1996) (same); *Bryks v. Can. Broad. Corp.*, 906 F. Supp. 204, 210 (S.D.N.Y. 1995) (same); *Kline v. Kaneko*, 685 F. Supp. 386, 389 n.1 (S.D.N.Y. 1988) (same).

151. *In re Terrorist Attacks*, 538 F.3d at 83.

152. *Id.* at 84. In fact, the law generally recognizes that the "immunity of a principal does not amount to much without the extension of that immunity to its agents." *Id.* (citing *Gravel v. United States*, 408 U.S. 606, 616–17 (1972) (legislative immunity for Senate aides); *Olivia v. Heller*, 839 F.2d 37, 40 (2d Cir. 1988) (judicial immunity for law clerks)).

may constitute an “agency or instrumentality” of the state is consistent with the terrorism exception to the FSIA, which “makes specific reference to the legal status of ‘an official, employee or agent’ of the foreign state.”¹⁵³ Based on this language in the terrorism exception, the court reasoned that Congress must have intended to include individuals in the definition of an “agency or instrumentality” of the state; if individuals were not otherwise immune from suit under the FSIA, the provisions in the terrorism exception that apply to individual government officials would be superfluous.¹⁵⁴

Three years before the Second Circuit reached its decision in *In re Terrorist Attacks*, the Seventh Circuit announced a divergent viewpoint on the issue of whether an individual government official is eligible for immunity as an “agency or instrumentality” of the state.¹⁵⁵ The Fourth Circuit recently joined the Seventh Circuit.¹⁵⁶

2. *According to the Seventh and Fourth Circuits, Which Addressed the Question in the Context of Human Rights Litigation Brought Under the TVPA, Individual Government Officials Are Not Eligible for Immunity Under the FSIA Because They Do Not Constitute an Agency or Instrumentality of the State Within the Meaning of Section 1603(b)*

In 2005, the Seventh Circuit broke from the majority of circuits in *Enahoro v. Abubakar*¹⁵⁷ by holding that the FSIA’s “agency or instrumentality” language does not encompass individual government officials.¹⁵⁸ As Judge Evans, writing for the *Enahoro* majority, noted, “A courtroom in Chicago, one would think, is an unlikely place for considering a case involving seven Nigerian citizens suing an eighth Nigerian for acts committed in Nigeria.”¹⁵⁹ Unlikely as it was, the court in *Enahoro* was tasked with evaluating a complicated and “thorny” international human rights issue.¹⁶⁰ In December 1983, a military coup overthrew Nigeria’s democratically elected president, leading to a string of military rulers, each overthrown by the next.¹⁶¹

153. *Id.* (citing 28 U.S.C.A. § 1605A(c) (West Supp. 2009)). Section 1605A(c) creates a private right of action against “any official, employee, or agent of [a listed] foreign state while acting within the scope of his or her office, employment, or agency.” 28 U.S.C.A. § 1605A(c).

154. *In re Terrorist Attacks*, 538 F.3d at 84.

155. *See infra* notes 157–79 and accompanying text.

156. *See infra* notes 180–200 and accompanying text.

157. 408 F.3d 877 (7th Cir. 2005).

158. *Id.* at 882.

159. *Id.* at 878.

160. *Id.* at 879.

161. *See id.* (detailing the history of military rule in Nigeria during the 1980s and 1990s).

Defendant Abubakar was one such military ruler and presided over a regime that actively curtailed civil liberties in Nigeria.¹⁶² Plaintiffs, all pro-democracy political activists or the representatives of the estates of pro-democracy political activists, alleged a variety of claims against Abubakar, including “torture; arbitrary detention; cruel, inhuman and degrading treatment; false imprisonment; assault and battery; intentional infliction of emotional distress; and wrongful death.”¹⁶³ Abubakar responded to the complaint by contending that he was entitled to immunity for actions taken in his official capacity as a Nigerian governmental official and part of the ruling council.¹⁶⁴ Underlying his contention was the assumption that the FSIA applies to individual officials, not just to governments and agencies.¹⁶⁵

The Seventh Circuit rejected Abubakar’s claims of immunity under the FSIA on the following grounds: (1) the language of the statute indicates that it was not intended to apply to individual government officials; (2) the *Chuidian* court used “upside down” logic in concluding that because individuals were not explicitly excluded, they must be included; and (3) a recent Seventh Circuit decision had held that the FSIA similarly does not apply to heads of state.¹⁶⁶ First, the court explained, Section 1603(b) of the FSIA does not explicitly mention any individuals, heads of government, or high-level officials.¹⁶⁷ If Congress meant to provide individuals acting in the scope of their

162. *Id.* Abubakar was the leader of the Provisional Ruling Council (“PRC”) between 1998 and 1999. *Id.* The PRC was the highest governmental body throughout the various military regimes and was chaired by the current military ruler. *Id.* Eventually, Nigeria held a presidential election, and in May 1999, the regime of military rulers came to an end when the first democratically elected President in fifteen years was sworn into office. *Id.*

163. *Id.* at 879–80. Plaintiff Abiola, the daughter of Nigerian pro-democracy activists, asserted that Abubakar was responsible for her parents’ deaths. *Id.* at 879. Abiola’s father had been a candidate for President in 1993 and challenged the election results through the Nigerian court system, eventually declaring himself President. *Id.* He was then allegedly “arrested and charged with treason” and “was kept in prison under inhumane conditions, was tortured, and denied access to lawyers, doctors, and his family” for a period of four years. *Id.* He died in prison. *Id.* Abiola’s mother, also a pro-democracy activist, began a campaign to free her husband and called for democracy in Nigeria. *Id.* After receiving threatening telephone calls, she was shot multiple times in broad daylight in 1996 and died. *Id.* Named plaintiff Enahoro was a political activist who played a primary role in securing Nigeria’s independence from Great Britain in 1960. *Id.* at 880. In 1994, at the age of seventy, Enahoro was arrested and imprisoned for four months, during which time he was denied medical treatment despite being a diabetic. *Id.* Finally, plaintiff Nwankwo, also a political activist, was arrested in 1998, stripped naked, flogged, and held in custody for two months without medical treatment. *Id.*

164. *Id.* at 880.

165. *Id.*

166. *Id.* at 881–82.

167. *Id.* at 881.

official capacity with FSIA immunity, it would have done so in “clear and unmistakable terms.”¹⁶⁸ Rather, observed the court, the statute’s use of the phrase “separate legal person” seems to indicate that Congress did not intend to include natural persons in the statutory definition because the former phrase has the “ring of the familiar legal concept that corporations are persons . . . subject to suit.”¹⁶⁹ Furthermore, because the phrase “separate legal person” is followed by the phrase “corporate or otherwise,” the court was convinced that the former refers to the concept that a business entity is treated as a legal person.¹⁷⁰ Second, the court found “upside down as a matter of logic” the *Chuidian* court’s reasoning that because individuals were not explicitly excluded by the statute, they must be included.¹⁷¹ The Seventh Circuit also noted that such an approach “ignores the traditional burden of proof on immunity issues under the FSIA.”¹⁷² Under the FSIA, the party claiming immunity is required to make a prima facie showing that it meets the statutory definition of a foreign state.¹⁷³ The burden then shifts to the plaintiff to produce evidence showing that the claimant is not entitled to immunity, typically because it falls within one of the FSIA exceptions.¹⁷⁴ Under the *Chuidian* approach, however, the plaintiff is required to prove that the defendant is *not* an “agency or instrumentality” of the state, likely by showing that his conduct was outside the scope of his official capacity.¹⁷⁵ Finally, the court drew an analogy between the present case and a similar issue discussed in *Ye v. Zemin*,¹⁷⁶ a case in which the court addressed whether heads of state are immune from suit under the FSIA.¹⁷⁷ According to the court in *Ye*, the FSIA does not apply to heads of state because the statute “defines a foreign state to include a political subdivision, agency or instrumentality of a foreign state but makes no mention of heads of state,” and the FSIA does not seem to subscribe to the view of

168. *Id.* at 881–82.

169. *Id.* at 881 (internal quotation marks omitted).

170. *Id.* (internal quotation marks omitted); see *infra* note 194 and accompanying text.

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

172. *Id.*

173. *Id.* (citing *Virtual Countries, Inc. v. Republic of South Africa*, 300 F.3d 230, 241 (2d Cir. 2002); *Int’l Ins. Co. v. Caja Nacional de Ahorro y Seguro*, 293 F.3d 392, 397 (7th Cir. 2002); *Keller v. Cent. Bank of Nig.*, 277 F.3d 811, 815 (6th Cir. 2002)).

174. *Id.* at 881–82.

175. See *id.* (“The FSIA has been applied to individuals, but in those cases one thing is clear: the individual must have been acting in his official capacity. If he is not, there is no immunity.”).

176. 383 F.3d 620 (7th Cir. 2004).

177. *Id.* at 625.

Louis XIV that “‘L’État, c’est moi.’”¹⁷⁸ Therefore, if the FSIA does not apply to heads of state, as stated in *Ye*, the court reasoned that it was even less likely that it could apply to General Abubakar, who simply served as “a member of a committee,” even if that committee “ran the country.”¹⁷⁹

In 2009, the Fourth Circuit joined the Seventh Circuit in its conclusion that individual government officials are not eligible for immunity as an “agency or instrumentality of the state” under the FSIA. In *Yousuf v. Samantar*,¹⁸⁰ natives of Somalia brought an action against a former Somali government official for human rights abuses occurring under his command.¹⁸¹ The Fourth Circuit joined the Seventh Circuit in concluding that individual government officials are not eligible for immunity under the FSIA.¹⁸² In October 1969, authoritarian socialist rule was successfully instituted in Somalia following a military coup led by the Supreme Revolutionary Council (“SRC”), a group composed primarily of Somali Army officers, including defendant Samantar.¹⁸³ The SRC used Somalia’s clan system to its advantage by giving top military and governmental positions to members of favored clans while targeting and systematically oppressing other clans, including the well-educated and wealthy Isaaq clan, of which plaintiffs are all

178. *Id.* at 625 & n.7 [“I am the state.”] (author’s translation).

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

180. 552 F.3d 371 (4th Cir. 2009), *cert. granted*, 130 S. Ct. 49 (2009).

181. *Id.* at 373–74.

182. *Id.* at 373. In 2004, the Fourth Circuit addressed the issue of *when* the acts of an individual bind a foreign sovereign claiming FSIA immunity. *Velasco v. Gov’t of Indon.*, 370 F.3d 392, 398 (4th Cir. 2004). Reasoning that “the act of an agent beyond what he is legally empowered to do is not binding upon the government,” the court held that the *unauthorized* acts of individual government officials did not bind the foreign government claiming FSIA immunity. *Id.* at 399–400. The *Velasco* decision cited *Chuidian* to note that many courts have held that the FSIA provides immunity to foreign officials acting within their official authority. *Id.* at 398–99. For this reason, many courts and commentators believed that *Velasco* represented the Fourth Circuit’s adoption of the majority viewpoint. *Yousuf*, 552 F.3d at 378–79 (referencing *Kensington Int’l Ltd. v. Itoua*, 505 F.3d 147, 160 (2d Cir. 2007) (reading *Velasco* as concluding that the FSIA applies to foreign officials); David P. Stewart, *The UN Convention on Jurisdictional Immunities of States and Their Property*, 99 AM. J. INT’L L. 194, 196 n.13 (2005) (including *Velasco* in a list of decisions holding that the FSIA applies to individual government officials)). The Fourth Circuit maintained that *Velasco* did not, however, “settle the question of whether Congress intended to confer sovereign immunity under the FSIA on an individual acting within the scope of his authority.” *Id.* at 379. Although *Velasco* referenced *Chuidian* and other decisions ruling on the scope of Section 1603(b), the holding in *Velasco* was not, according to the *Yousuf* court, about whether the FSIA provides immunity to individual government officials, but rather about “whether the Indonesian government was bound, through *agency principles*, by the unauthorized acts of individual government officials.” *Id.*

183. *Yousuf v. Samantar*, No. 1:04cv1360, 2007 WL 2220579, at *1 (E.D. Va. Aug. 1, 2007), *rev’d*, 552 F.3d 371 (4th Cir. 2009), *cert. granted*, 130 S. Ct. 49 (2009).

members.¹⁸⁴ In 1978, Ethiopia defeated Somalia in the Ogden War, which, combined with a fear of growing local opposition movements, prompted the SRC's increasingly brutal campaign against perceived opponents.¹⁸⁵ That campaign used terrorism as a means to deter the civilian population from supporting opposition movements and led to the perpetration of numerous atrocities against the Somali people.¹⁸⁶ These atrocities were perpetrated by "government intelligence agencies, including the National Security Service ('NSS') and the military police," who engaged in the pervasive and "systematic use of torture, arbitrary detention and extrajudicial killing."¹⁸⁷ Three plaintiffs alleged that they personally were victims of this brutality; the remaining plaintiffs represented the estates of alleged victims of extrajudicial killing.¹⁸⁸ The plaintiffs did not allege that Samantar personally participated in these atrocities, but rather, that as Minister of Defense and later as Somali Prime Minister, Samantar tacitly approved of the actions undertaken by the NSS and the military police.¹⁸⁹ Samantar filed a motion to dismiss the plaintiffs' suit on the grounds that the court lacked jurisdiction because he is entitled to sovereign immunity under the FSIA.¹⁹⁰

The Fourth Circuit reversed the lower court's granting of Samantar's motion to dismiss and concluded that because the FSIA does not apply to present or former individual government officials, Samantar is not shielded from liability.¹⁹¹ Judge Traxler, writing for the

184. *Id.*

185. *Id.*

186. *Yousuf*, 552 F.3d at 373.

187. *Id.* at 374.

188. *Id.* Named plaintiff Yousuf alleged that he was abducted by NSS agents on suspicion of anti-governmental activity and was tortured by various methods, including electric shock and "the Mig," a torture technique in which a victim's hands and feet are bound together behind the back and a heavy rock is placed upon the back to induce great pain. *Id.* (internal quotation marks omitted). Some of the plaintiffs in this case participated anonymously because they feared that they or their families would be subject to retribution for their participation in the suit. *Yousuf*, 2007 WL 220579, at *4 n.8. Anonymous plaintiff Jane Doe alleged that she was abducted by NSS agents, tortured, raped, beaten until she was immobile, and placed in solitary confinement for a period of three and a half years. *Yousuf*, 552 F.3d at 374. Anonymous plaintiff John Doe II, a former member of the Somali National Army, alleged that he and other soldiers were arrested and shot during a mass execution. *Id.* Doe survived by hiding under a pile of dead bodies. *Id.* Plaintiff Deria alleged that his father and brother were abducted, tortured, and killed by Somali soldiers. *Id.* Anonymous plaintiff John Doe I alleged that government forces abducted and executed his brothers. *Id.*

189. *Yousuf*, 552 F.3d at 375. Samantar fled to the United States when the regime collapsed. *Id.* at 374.

190. *Id.* at 375.

191. *Id.* at 381.

majority, reasoned that because the language of the FSIA does not contain an explicit mention of individuals or natural persons, it is not obvious that Congress intended—as the majority of circuits have held—for individual government officials to fall within the scope of FSIA immunity.¹⁹² In evaluating congressional intent, Judge Traxler focused on three factors: (1) the precise language of the statute; (2) its overall structure; and (3) its purpose, as evidenced by the congressional record.¹⁹³ First, the statute’s use of the language “separate legal person,” a common phrase in corporate law,¹⁹⁴ suggests that Section 1603(b)’s “agency or instrumentality” language was intended to apply to corporations or business entities, not to natural persons.¹⁹⁵ Second, this reading of the “agency or instrumentality” language is consistent with the overall structure of the statute, particularly the Sections addressing service of process, which do not anywhere mention service upon individuals.¹⁹⁶ Rather, these Sections more closely resemble Federal Rule of Civil Procedure 4(h)(1)(B), which provides the procedures for service on a corporation or business entity, than Rule 4(f), which outlines the procedures for serving an individual located in a foreign country.¹⁹⁷ Finally, the court found support for its conclusion in the House Judiciary Committee Report on the FSIA, which provides a definition and examples of a “separate legal person.”¹⁹⁸ Neither the definition nor the examples given in the House Report offer any indication that Congress intended for individual officials to fall within the scope of FSIA immunity.¹⁹⁹ For these reasons, the court concluded that Samantar was not eligible for immunity under the FSIA.²⁰⁰

192. *Id.* at 378.

193. *Id.* at 379–80.

194. *Id.* at 380 (internal quotation marks omitted). The phrase is typically used to “‘capture the essence of the principal of limited liability’ that results from the ‘fiction of corporate personhood.’” *Id.* (quoting *Beiser v. Weyler*, 284 F.3d 665, 670 (5th Cir. 2005)); cf. *First Nat’l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 625 (1983) (noting that the idea of “[s]eparate legal personality has been described as an almost indispensable aspect of the public corporation” (internal quotation marks omitted)).

195. *Yousuf*, 552 F.3d at 380 (internal quotation marks omitted).

196. *Id.* (internal quotation marks omitted). Section 1608(b) outlines service upon an “agency or instrumentality,” noting that a copy of the summons or complaint must be sent to an “‘officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process.’” *Id.* (emphasis omitted) (citing 21 U.S.C. § 1608(b) (2006)). If service must be provided to an *agent*, presumably the “agency or instrumentality” language is not intended to include individuals.

197. *Id.* at 381; FED. R. CIV. P. 4(h)(1)(B); FED. R. CIV. P. 4(f).

198. *Yousuf*, 552 F.3d at 381 (internal quotation marks omitted); see *supra* text accompanying notes 90–92.

199. *Yousuf*, 552 F.3d at 381; see *supra* text accompanying note 86.

200. *Yousuf*, 552 F.3d at 381. The court also concluded that even if the FSIA were to apply to individual government officials, it does not apply to *former* government officials.

In cases such as *Enahoro* and *Yousuf*, in which courts considered defenses of sovereign immunity in the context of human rights abuses, plaintiffs' claims have generally been brought under the Torture Victim Protection Act.²⁰¹ While the FSIA provides the jurisdictional basis for bringing suit against a foreign state, the TVPA provides the necessary cause of action for plaintiffs pursuing claims that they were injured by torture abroad.²⁰²

D. When Invoked by Defendants in the Human Rights Context, the FSIA Often Confronts Claims Brought by Plaintiffs Under the TVPA

Congress enacted the TVPA²⁰³ to provide a civil redress to victims of torture. Because a state that practices torture and extrajudicial killing is unlikely to adhere to the rule of law, judicial protections against human rights violations are least effective in those countries where protections are most needed.²⁰⁴ Countries that are "scourged by massive violations of fundamental rights" often suffer the "general collapse of [their] democratic [and judicial] institutions."²⁰⁵ The TVPA provides a cause of action for individuals injured in that sort of circumstance.

The TVPA provides that "[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation . . . subjects an individual to torture . . . or . . . extrajudicial killing" is liable for civil damages to the victim or the victim's representative.²⁰⁶ Six features of the TVPA are particularly important. First, the statute provides that

Id. This conclusion was supported by several factors. First, the Supreme Court's holding in *Dole Food Co. v. Patrickson* indicates that the "plain text" of the statute, "because it is expressed in the present tense, requires that instrumentality status be determined at the time the suit is filed." 538 U.S. 468, 478 (2003). Second, case law favors a strong presumption that identical words used in the same sentence of a statute have the same meaning. *Yousuf*, 552 F.3d at 382. Third, the purpose of the doctrine of foreign sovereign immunity "has never been to permit foreign states and their instrumentalities to shape their conduct in reliance on the promise of future immunity from suit," but rather "to give foreign states . . . some *present* protection from the inconvenience of suit as a gesture of comity." *Republic of Austria v. Altmann*, 541 U.S. 677, 696 (2004) (internal quotation marks omitted). According to Judge Traxler, even if the FSIA shields *current* individual government officials from suit, because Samantar is no longer a Somali government official, and was not at the time that plaintiffs brought action, he is not entitled to immunity. *Yousuf*, 552 F.3d at 383.

201. See *infra* Part II.D.

202. See *infra* Part II.D.

203. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note (2006)).

204. H.R. REP. NO. 102-367, at 3 (1991).

205. *Id.*

206. § 2, 106 Stat. at 73.

only individuals, not foreign states, may be sued.²⁰⁷ The Senate Judiciary Committee Report makes special note of the fact that defendants may be sued only if a court in the United States has personal jurisdiction over them, so that the TVPA will “not turn the U.S. courts into tribunals” for the world.²⁰⁸ Second, the phrase “under actual or apparent authority” requires that the plaintiff establish some governmental involvement.²⁰⁹ Third, the definitions of “torture” and “extrajudicial killing” used in the TVPA are derived from international standards.²¹⁰ Fourth, the TVPA only creates a cause of action for victims of torture or extrajudicial killing or their legal representatives in cases in which the victim is not alive to bring suit.²¹¹ Fifth, the TVPA provides that a court shall refuse to hear a claim if the defendant establishes that the claimant has not exhausted “adequate and available remedies in the place in which the conduct giving rise to the claim occurred.”²¹² This requirement is designed to prevent U.S. courts from intruding into cases that would be more appropriately handled by courts in the location where the killing or torture alleg-

207. *Id.*; H.R. REP. NO. 102-367, at 4; *see also* S. REP. NO. 102-249, at 7 (1991) (“The legislation uses the term ‘individual’ to make crystal clear that foreign states or their entities cannot be sued under this bill under any circumstances: only individuals may be sued.”). The statute is not, therefore, “meant to override” the FSIA, which provides immunity for foreign governments and their entities. *Id.*

208. S. REP. NO. 102-249, at 7 (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (providing the “minimum contacts” standard for obtaining personal jurisdiction); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 413–14 (1984) (same)).

209. § 2, 106 Stat. at 73; *see also* H.R. REP. NO. 102-367, at 5 (“The bill does not attempt to deal with torture or killing by purely private groups.”). The House Judiciary Committee Report recommends that courts look to 42 U.S.C. § 1983 to construe the “color of law” language and draw from agency law to interpret the “actual or apparent authority” language in the statute. H.R. REP. NO. 102-367, at 5 (internal quotation marks omitted).

210. H.R. REP. NO. 102-367, at 4–5. The definition of torture in the TVPA is limited to acts “by which severe pain or suffering . . . whether physical or mental, is intentionally inflicted . . . for such purposes as obtaining . . . information or a confession, . . . punish[ment], intimidat[ion], coer[cion], or for any reason based on discrimination of any kind.” § 3(b)(1), 106 Stat. at 73. This language “tracks the definition” of torture adopted in Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. H.R. REP. NO. 102-367, at 4. The TVPA defines extrajudicial killing as “a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples,” and excludes any execution, which “under international law, is lawfully carried out under the authority of a foreign nation.” § 3(a), 106 Stat. at 73. The definition is based on Common Article 3 of the Geneva Conventions. H.R. REP. NO. 102-367, at 5.

211. § 2(a), 106 Stat. at 73.

212. § 2(b), 106 Stat. at 73.

edly occurred.²¹³ Finally, a ten year statute of limitations prevents the courts from hearing “stale” claims.²¹⁴

The TVPA is not a jurisdictional statute.²¹⁵ Rather, its cause of action must be paired with a jurisdictional grounding.²¹⁶ Presumably, if an individual government official qualifies as an “agency or instrumentality” of the state under the FSIA, because the FSIA is the sole method for gaining jurisdiction over a “foreign state,” the human rights claim would be barred.²¹⁷

III. ANALYSIS

Holding, as the majority of circuits have held, that an individual government official acting in his official capacity constitutes a “foreign state” for purposes of FSIA immunity may have wide-reaching implications for plaintiffs seeking to adjudicate human rights claims in this

213. *Id.*; see also H.R. REP. NO. 102-367, at 5 (noting that this requirement avoids the imposition of additional burdens on the American judicial economy while also stimulating the development of “meaningful remedies” in other countries).

214. § 2(c), 106 Stat. at 73. *But see* H.R. REP. NO. 102-367, at 5 (noting that for cases in which a defendant has concealed his or her identity or hidden from the plaintiff, equitable tolling remedies may preserve the plaintiff’s claim beyond ten years).

215. See *Kadic v. Karadžić*, 70 F.3d 232, 246 (2d Cir. 1995) (concluding that the TVPA allows “appellants to pursue their claims of official torture [only] under the jurisdiction” conferred by another relevant federal statute).

216. Jurisdiction may be brought under either the Alien Tort Statute (“ATS”), 28 U.S.C. § 1350 (2006), or the general federal question jurisdiction of 28 U.S.C. § 1331. *Kadic*, 70 F.3d at 246; see also *Arce v. Garcia*, 434 F.3d 1254, 1257 n.8 (11th Cir. 2006) (noting that § 1331 is the appropriate jurisdictional basis for the TVPA). The ATS provides district courts with original jurisdiction over “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.” 28 U.S.C. § 1350. To summarize, the ATS “confers federal subject-matter jurisdiction” if (1) an alien brings suit, (2) for a tort, (3) “committed in violation of the law of nations (*i.e.*, international law).” *Kadic*, 70 F.3d at 238. The ATS does not create any causes of action, but rather was “enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.” *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004). The TVPA represents an additional cause of action that may be brought under the ATS.

217. See *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428, 434 (1989) (holding that the FSIA is the sole method for obtaining jurisdiction over a foreign state in federal court). To be clear, the logic above is as follows: (1) if an individual government official constitutes an “agency or instrumentality” of a foreign state, they meet the statutory definition of a “foreign state”; (2) “foreign states” are immune from suit in federal court unless one of the FSIA exceptions applies; (3) because there is no explicit exception for cases involving human rights allegations, a “foreign state” (which may be an individual person) accused of human rights violations is immune from suit under the FSIA; (4) if the foreign state is immune, and the FSIA is the sole method for obtaining subject matter jurisdiction over a foreign state, the case must be dismissed for lack of jurisdiction.

country.²¹⁸ Such a conclusion may be acceptable in a variety of other factual contexts, such as those encountered by some of the courts in the majority of circuits ruling on this issue.²¹⁹ In the context of human rights litigation brought under the TVPA, where a far different set of values are at stake, this proposition is unacceptable.²²⁰ Without requiring statutory amendment,²²¹ the circuit split could be resolved in a manner favorable to human rights litigants if the majority position on the question of whether an individual government official is eligible for immunity under the FSIA were adopted as the general rule, excepting situations in which claims of human rights

218. Cf. Jennifer Correale, Comment, *The Torture Victim Protection Act: A Vital Contribution to International Human Rights Enforcement or Just a Nice Gesture?*, 6 *PACE INT'L L. REV.* 197, 199 (1994) ("Whether the [TVPA] will be successful in adjudicating the claims of human rights victims depends very much on the alleviation of its doctrinal and practical limitations.").

219. See *supra* Part II.C.1. In other words, cases pertaining to banking, commercial, and industrial transactions, such as those addressed by the Ninth, District of Columbia, Sixth, and Fifth Circuits, involve interests altogether different than those presented to the Seventh and Fourth Circuits in ruling on the issue of whether an individual government official is entitled to immunity. The Second Circuit, in addressing a terrorism-related claim, was, like the Seventh and Fourth Circuits, confronted with a human rights element. For a more lengthy discussion of the implications of the issues confronted by the Second Circuit, see *infra* note 232.

220. See *infra* Part III.C.

221. Creation of a statutory FSIA exception for human rights has proven problematic. Three legislative proposals have attempted to add an exception to the FSIA that would allow American courts to hear lawsuits against foreign sovereigns for human rights violations. First, in 1991, Congressman Lawrence J. Smith proposed an amendment that would have incorporated the language of the TVPA into the FSIA. H.R. 2357, 102d Cong. (1991). Later that year, Congressman Smith reintroduced a more limited amendment that would have created an exception for situations in which an American citizen was injured by tortious acts arising out of employment contracts with a foreign corporation and was designed to overturn the Supreme Court's holding in *Saudi Arabia v. Nelson*. 137 *CONG. REC.* 11,169-70 (1991) (statement of Rep. Smith); see also *Saudi Arabia v. Nelson*, 507 U.S. 349, 351-53 (1993) (holding that the defendant state was entitled to sovereign immunity under the FSIA for alleged acts of detention and torture of a United States citizen arising out of his employment in a foreign country despite the fact that he had been recruited for that position in the United States). Finally, in 1993, Senators Charles Schumer and Frank Pallone introduced a bill similar to that of Congressman Smith's 1991 bill that also included war crimes as a possible element of exemption. 139 *CONG. REC.* 12,314 (1993) (statement of Sen. Schumer regarding the proposed legislation). See generally David J. Bederman, *Dead Man's Hand: Reshuffling Foreign Sovereign Immunities in U.S. Human Rights Litigation*, 25 *GA. J. INT'L & COMP. L.* 255, 282-84 (1996) (outlining a variety of proposals to add a human rights exception to the FSIA); Jeffrey Jacobson, Comment, *Trying to Fit a Square Peg Into a Round Hole: The Foreign Sovereign Immunities Act and Human Rights Violations*, 19 *WHITTIER L. REV.* 757, 773-75 (1998) (same). At least one scholar believes that given the difficulty of amending the FSIA, creation of an independent bill that focuses only on a human rights exception would be useful. Hari M. Osofsky, *Foreign Sovereign Immunity from Severe Human Rights Violations: New Directions for Common Law Based Approaches*, 11 *N.Y. INT'L L. REV.* 35, 65 (1998).

abuse are brought under the TVPA.²²² Such a standard would place the majority's presumption of immunity for individual government officials in line with congressional intent in enacting the TVPA,²²³ remedy concerns that contemporary use of the FSIA, particularly in the context of human rights, has not adhered to the congressional goal of removing the role of the political branches in immunity decisionmaking,²²⁴ and acknowledge the fundamental difference between the implications of granting foreign sovereign immunity in the context of human rights litigation and the granting of such immunity as "a matter of comity" in other contexts.²²⁵

A. *Recognizing an Exception for Cases Brought Under the TVPA Could Resolve the Present Circuit Split and Would Place the Doctrine in Line with the Intent of Congress in Enacting the TVPA*

This Comment proposes reading the FSIA as exempting individual government officials from liability for acts taken in their official capacity except when challenges to those acts are brought under the TVPA. Such a reading (1) explains and could resolve the circuit split as to whether an individual government official constitutes an "agency or instrumentality" of the state under the FSIA,²²⁶ (2) conforms statutory interpretation of the FSIA to the congressional motivations behind enactment of the TVPA,²²⁷ and (3) addresses the problems with holding that the TVPA applies only in those instances in which an existing FSIA exception applies.²²⁸

1. *A Reading of the FSIA that Includes an Exception for Cases Brought Against Individual Government Officials Under the TVPA Explains and Could Resolve the Current FSIA Circuit Split*

Congress enacted the TVPA in 1991 in recognition of the epidemic of torture around the world²²⁹ and did not intend that the FSIA

222. See *infra* Part III.A–C.

223. See *infra* Part III.A.

224. See *infra* Part III.B.

225. See *infra* Part III.C.

226. See *infra* Part III.A.1.

227. See *infra* Part III.A.2.

228. See *infra* Part III.A.3.

229. Rachael E. Schwartz, "And Tomorrow?" *The Torture Victim Protection Act*, 11 ARIZ. J. INT'L & COMP. L. 271, 273 (1994). Interestingly, the TVPA does not apply to torture perpetrated by the United States. *Id.* at 273 n.5. See generally Leland H. Kynes, Note, *Letting the CAT Out of the Bag: Providing a Civil Right of Action for Torture Committed by U.S. Officials*

would provide immunity to individual government officials in cases in which human rights claims were alleged under the TVPA.²³⁰ The exception proposed by this Comment not only accounts for the different results reached by the majority and minority of courts in the present circuit split, but also could resolve the circuit split entirely. First, in reviewing the cases falling on either side of the circuit split, one thing seems clear—the majority and minority confronted the question of whether an individual government official constitutes an “agency or instrumentality” of the state in different contexts.²³¹ None of the cases confronted by the majority involved human rights claims brought under the TVPA. Rather, *Chuidian*, *El-Fadl*, *Byrd*, *Keller*, and *In re Terrorist Attacks* respectively addressed claims based on the following: (1) a state bank’s refusal to make payment on a letter of credit; (2) employment termination-related tort claims; (3) an illegal plan to remove the plaintiff from his employment management position; (4) a financial scam resulting in the loss of a large sum of money; and (5) the provision of funds to charities, allegedly with the knowledge that such funds would eventually be transferred to terrorist organizations.²³² The minority, however, confronted the question in the

Abroad, An Obligation of the Convention Against Torture?, 34 GA. J. INT’L & COMP. L. 187, 214, 219 (2005) (noting that because the TVPA applies only to individuals acting under the authority of a foreign nation, the statute may not be invoked against domestic officials, and arguing in favor of “[p]roviding a civil right of action for foreign victims of torture committed by U.S. officials” according to the standards that appear in the TVPA).

230. Brief of United States Member of Congress and Law Professors as Amici Curiae in Support of the Plaintiffs-Appellants and Reversal of the District Court’s Decision at 6, *Yousuf v. Samantar*, 552 F.3d 371 (4th Cir. 2009) (No. 07-1893).

231. See *supra* Part II.C.

232. See *supra* Part II.C.1. Terrorist actions undoubtedly implicate human rights, and this Comment should not be construed as suggesting otherwise. See Michael A. Newton, *Exceptional Engagement: Protocol I and a World United Against Terrorism*, 45 TEX. INT’L L.J. 323, 325 (2009) (“Terrorism in all its forms and manifestations constitutes . . . perhaps the most pernicious threat to the fundamental human rights of private, peace-loving citizens.”). The plaintiffs in *In re Terrorist Attacks* pursued their claims under the common law of torts. *In re Terrorist Attacks* on September 11, 2001, 538 F.3d 71, 75 (2d Cir. 2008), *cert. denied sub nom. Fed. Ins. Co. v. Kingdom of Saudi Arabia*, 129 S. Ct. 2859 (2009). In addition to holding that the Four Princes were entitled to FSIA immunity for acts undertaken in their official capacity as members of various governing bodies, the Second Circuit also concluded that the terrorism exception to the FSIA, which grants jurisdiction to federal courts for cases brought by American citizens against foreign governments seeking damages for, *inter alia*, providing material support for terrorist actions, was inapplicable in this case. *Id.* at 88–89; see also *supra* text accompanying notes 149–50 (discussing the court’s grant of immunity to the Four Princes); *supra* note 106 (describing the requirements for proceeding under the FSIA terrorism exception). The court also concluded that applying the FSIA torts exception when the alleged conduct amounts to terrorism would “evade and frustrate” the terrorism exception, which applies only when the state in question has been designated a state sponsor of terrorism. *In re Terrorist Attacks*, 538 F.3d at 89; see *supra* note 106. *In re Terrorist Attacks* serves, therefore, as a useful example of the inherent limitations

course of human rights litigation that was either brought under the TVPA, or that should have been brought under the TVPA.²³³ The different factual circumstances confronted by the majority and minority of courts may, therefore, help to explain why they reached such different results. Where claims of human rights abuse were brought under the TVPA, or another relevant statute, the courts of appeals concluded that individual government officials are not eligible for immunity.²³⁴ Where other sorts of non-TVPA claims were brought against individual government officials, the courts of appeals concluded that those officials *were* entitled to immunity under the FSIA.²³⁵ Given the different interests at stake in each kind of litigation, such results seem reasonable.²³⁶ This circuit split could be resolved by acknowledging that factual distinction. Recognizing the exception proposed by this Comment would do just that.

2. *Recognizing an Exception to the Doctrine of Immunity for Individual Government Officials in Cases Brought Under the TVPA Would Conform the Interpretation of the FSIA to Congress's Motivations in Enacting the TVPA*

Statutes are not interpreted “in isolation,” but rather in the context of each other, including later-enacted statutes.²³⁷ Recognizing a doctrine in which individual government officials are presumptively immune from suit except where suit is brought under the TVPA is therefore strongly supported by (1) congressional ratification of the Convention Against Torture, and enactment of the TVPA in response,

of the FSIA terrorism exception. If a state is not designated a “state sponsor of terrorism,” the FSIA, by and large, operates as a bar to human rights litigation against that state. *See infra* Part III.A.3. This Comment proposes an exception that would prevent the FSIA from barring human rights litigation brought under the TVPA. Unfortunately, the TVPA, unlike the FSIA terrorism exception, does not create a cause of action against states or individual government officials accused of providing material support to terrorist organizations. While this author strongly supports the creation of a mechanism that would allow victims of human rights abuse, including victims of terrorism, to seek remedy in American courts, this Comment focuses solely on claims brought under the TVPA.

233. The plaintiffs in *Enahoro* originally pled under the ATS. *Enahoro v. Abubakar*, 408 F.3d 877, 883 (7th Cir. 2005). The court determined, however, that the TVPA “occup[ies] the field,” and that the plaintiffs were therefore required to plead under the specific standards of the TVPA rather than under the common law of nations as described in the ATS. *Id.* at 884–85.

234. *See supra* Part II.C.2.

235. *See supra* Part II.C.1.

236. *See infra* Part III.C; *see also supra* note 232 (noting that *In re Terrorist Attacks* highlights a unique human rights issue, but one that is, quite unfortunately, outside of the scope of both the TVPA and this Comment).

237. *Branch v. Smith*, 538 U.S. 254, 281 (2003) (referring to this idea as the “most rudimentary rule of statutory construction”).

(2) the plain text of the TVPA, (3) explicit statements in the TVPA's congressional record, and (4) limitations built into the TVPA that expressly narrow the field of claims that may be brought under its auspices so that such a doctrine would not unduly burden the judicial economy. First, in 1990, the United States Senate ratified the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,²³⁸ an initiative taken in response to the fact that, despite international condemnation, many of the world's governments continue to engage in, condone, or tolerate torture.²³⁹ The Convention obligated signatories to adopt measures that would ensure that torturers be held legally accountable for their acts, such as the provision of a means of civil redress to torture victims.²⁴⁰ Offering a forum in which human rights abusers may be held legally accountable for their actions is particularly valuable because "[j]udicial protections . . . are often least effective in those countries where such abuses are most prevalent."²⁴¹ In the case of *Yousuf v. Samantar*, for example, had plaintiffs not been afforded the opportunity to litigate their case in American courts under the TVPA, it seems unlikely that they would have had access to an alternative forum because, during the very coup that placed Samantar in power, the Somali Supreme Court was abolished.²⁴² The TVPA was designed to address such concerns by providing a cause of action against individuals who, acting under actual or apparent authority, or under color of law, perpetrated acts of torture.²⁴³ Because the TVPA was intended to provide a means of civil redress to victims of torture, as required by the Convention Against Torture, it seems unlikely that Congress would have understood the FSIA as granting individual government officials immunity.²⁴⁴ If the FSIA were read as granting immunity to individual government officials, it would provide immunity to the very

238. Dec. 10, 1984, 1465 U.N.T.S. 85.

239. H.R. REP. NO. 102-367, at 3 (1991).

240. *Id.*

241. *Id.*

242. See *Yousuf v. Samantar*, No. 1:04cv1360, 2007 WL 2220579, at *1 (E.D. Va. Aug. 1 2007) ("The SRC suspended the existing Constitution, closed the National Assembly, abolished the Supreme Court and declared all groups not sponsored by the government . . . to be illegal."), *rev'd*, 552 F.3d 371 (4th Cir. 2009), *cert. granted*, 130 S. Ct. 49 (2009).

243. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, § 2, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note (2006)); S. REP. NO. 102-249, at 3 (1991).

244. See Brief of United States Member of Congress and Law Professors as Amici Curiae in Support of the Plaintiffs-Appellants and Reversal of the District Court's Decision at 3, *Yousuf v. Samantar*, 552 F.3d 371 (4th Cir. 2009) (No. 07-1893) (arguing that construing the FSIA as a jurisdictional bar to a TVPA claim is contrary to congressional intent and will prevent the TVPA from achieving the goals that Congress designed it to achieve).

class of defendants against whom the TVPA provides a cause of action—effectively denying plaintiffs bringing suit under the TVPA an opportunity to seek redress.²⁴⁵

Second, the plain text of the TVPA states that only an *individual* is subject to liability, a word chosen to “make crystal clear” that the bill applies not to foreign states or their entities, but only to individuals.²⁴⁶ The phrase “under actual or apparent authority, or color of law” also indicates that only individuals with some governmental involvement are liable under the statute.²⁴⁷ In other words, those persons liable for suit under the TVPA are precisely those “individual government officials” at issue in the present circuit split. Therefore, if only individuals with “some governmental involvement” are eligible for suit under the TVPA, an interpretation of the FSIA that grants immunity to individual government officials even in human rights cases brought under the TVPA essentially makes the legislation a nullity.²⁴⁸ For the TVPA’s cause of action against individual government officials to have real meaning, those individual government officials must not be able to escape liability by invoking FSIA immunity.²⁴⁹

Third, the congressional record for the TVPA, particularly with respect to how it relates to the FSIA, is informative.²⁵⁰ The Senate

245. See Schwartz, *supra* note 229, at 303 (“[T]he TVPA authorizes only actions against individuals, not states. Thus, the FSIA should be irrelevant and should not make sovereign immunity available [to defendants] in a TVPA case.”).

246. S. REP. NO. 102-249, at 7.

247. H.R. REP. NO. 102-367, at 5 (1991).

248. See Brief of Torture Survivors Support Organizations et al. as Amici Curiae in Support of the Plaintiffs-Appellants and Reversal of the District Court’s Decision at 2, *Yousuf*, 552 F.3d 371 (No. 07-1893) (arguing that an approach that grants immunity to individual government officials would “effectively eviscerate the TVPA”).

249. See Joan Fitzpatrick, *The Claim to Foreign Sovereign Immunity by Individuals Sued for International Human Rights Violations*, 15 WHITTIER L. REV. 465, 466 (1994) (arguing that because the TVPA requires proof that the defendant acted under actual or apparent authority, or color of law, if the FSIA were to be applied to individual government officials, it would serve as a “categorical bar” to suits alleging human rights violations under the TVPA); see also Brief of Professors of International Litigation and Foreign Relations Law as Amici Curiae in Support of the Respondents at 19–20, *Samantar v. Yousuf*, 130 S. Ct. 49 (2009) (No. 08-1555) (arguing that a reading of the FSIA that includes individual officials creates an “unnecessary” conflict between the TVPA and the FSIA); Brief for the Respondents at 28, *Yousuf*, 130 S. Ct. 49 (No. 08-1555) (noting that excluding individual officials from the FSIA would “give[] coherence” to the TVPA).

250. In numerous cases involving FSIA interpretation, courts have shown their willingness to defer to the intent of Congress. See G. Michael Ziman, Comment, *Holding Foreign Governments Accountable for Their Human Rights Abuses: A Proposed Amendment to the Foreign Sovereign Immunities Act of 1976*, 21 LOY. L.A. INT’L & COMP. L.J. 185, 208–09 (1999) (surveying cases). A similar deference should exist in cases involving application of both the FSIA and the TVPA such that reviewing the congressional history of the TVPA may be useful in understanding the FSIA. If a human rights exception to the FSIA existed, this analysis

Judiciary Committee Report notes that because the TVPA makes explicit use of the term “individual,” it is not meant to override the FSIA, which Congress read as rendering foreign governments, and not individuals, immune from suit in American courts, subject to limited exceptions.²⁵¹ The House Judiciary Committee Report adds, however, that the TVPA is “subject to restrictions” in the FSIA—a statement that has caused no small amount of confusion.²⁵² Some courts have used that language to justify their conclusion that individual government officials sued under the TVPA may be entitled to immunity.²⁵³ Because the TVPA applies only to individual government officials, and the House Judiciary Committee Report describes the FSIA as providing immunity only to foreign states or their “agencies or instrumentalities,” it is not entirely clear what is meant by “subject to restrictions.” What is clear, however, is that neither the Senate Report nor the House Report indicates that the FSIA is understood as depriving the TVPA of the jurisdiction upon which a viable claim under the statute depends. Rather, the very opposite seems true. Senator Specter, the original sponsor of the TVPA, in discussing that legislation with Senator Grassley, specifically noted that “‘the FSIA would not normally provide a defense to an action’” brought under the TVPA.²⁵⁴ Senator Specter’s statement should be seen as providing particularly compelling insight into the intent of Congress in enacting the TVPA.²⁵⁵

would be substantially simpler. Cf. *id.* at 211 (arguing that if Congress chose to create a human rights exception to the FSIA, the Court would approach it with deference under the political question doctrine).

251. S. REP. NO. 102-249, at 7.

252. H.R. REP. NO. 102-367, at 5; see Joan Fitzpatrick, *The Future of the Alien Tort Claims Act of 1789: Lessons from In re Marcos Human Rights Litigation*, 67 ST. JOHN’S L. REV. 491, 512 (1993) (“The drafters of the TVPA have offered confusing guidance as to how it should be reconciled with the FSIA.”).

253. See, e.g., *Yousuf v. Samantar*, No. 1:04cv1360, 2007 WL 2220579, at *12 (E.D. Va. Aug. 1, 2007) (citing the “subject to restrictions” language as evidence that the legislative history of the TVPA does not necessarily require the court to conclude that the TVPA forecloses granting sovereign immunity to individual government officials under the FSIA (internal quotation marks omitted)), *rev’d*, 552 F.3d 371 (4th Cir. 2009), *cert. granted*, 130 S. Ct. 49 (2009).

254. Tom Lininger, *Overcoming Immunity Defenses to Human Rights Suits in U.S. Courts*, 7 HARV. HUM. RTS. J. 177, 187 (1994) (citing and quoting 138 CONG. REC. S2668 (daily ed. Mar. 3, 1992) (statement of Sen. Specter)). Senator Specter has recently indicated that extension of FSIA immunity to individual government officials would be “contrary to Congress’s intent to provide redress for egregious acts that infringe human rights” through the TVPA, and that “extending FSIA immunity to foreign government officials responsible for torture would effectively nullify the TVPA.” Brief of Senator Arlen Specter et al. as Amici Curiae in Support of Respondents at 6, *Yousuf*, 130 S. Ct. 49 (No. 08-1555).

255. See, e.g., *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526–27 (1982) (“[R]emarks . . . of the sponsor of the language ultimately enacted . . . are an authoritative guide to the statute’s construction.”); WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLA-*

Finally, the TVPA contains five internal limitations that prevent it from gravely burdening judicial economy—a concern that might arise were the FSIA read to include an exception for the immunity of individual government officials in cases where claims are brought under the TVPA. First, a claim may not be brought under the TVPA unless the claimant has “exhausted adequate and available remedies” in the place where the alleged conduct occurred.²⁵⁶ This limitation prevents American courts from interfering in a case that would be “more appropriately handled” by the court in the country in which the alleged conduct occurred, and therefore avoids imposing an unnecessary burden on American courts and encourages the development of meaningful remedies in other countries.²⁵⁷ Second, a ten year statute of limitations balances two interests by simultaneously guaranteeing that federal courts will not have to hear “stale claims” and providing that claims may be equitably tolled in cases in which a defendant has fraudulently concealed his or her location or identification.²⁵⁸ Third, the Senate Judiciary Committee Report emphasizes that TVPA claims may be brought only against those individuals who actually “ordered, abetted, or assisted” the perpetration of torture, and not against leaders for “an isolated act of torture [that] occurred somewhere in that country.”²⁵⁹ Fourth, to prevent American courts from becoming “tribunals for torts having no connection to the United States whatsoever,” the TVPA permits claims only against those defendants over whom the court has personal jurisdiction.²⁶⁰ Finally, because the TVPA is not designed to override traditional diplomatic or head of state immunity, claims against visiting diplomats and heads of state are not governed by its provisions.²⁶¹ Because of these internal limitations, permitting suits against individual government officials accused

TION: STATUTES AND THE CREATION OF PUBLIC POLICY 1000–01 (4th ed. 2007) (“Next to committee reports, the most persuasive legislative materials are explanations of statutory meanings, and compromises reached to achieve enactment, by the sponsors and floor managers of the legislation.”).

256. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, § 2, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note (2006)); *see also supra* text accompanying note 212 (discussing the “adequate and available remedies” requirement).

257. H.R. REP. NO. 102-367, at 5.

258. *Id.*

259. S. REP. NO. 102-249, at 8–9 (1991). The official need not have performed the torture personally or directly ordered its perpetration, but only need to have “authorized, tolerated or knowingly ignored” the abuse. *Id.* at 9.

260. *Id.* at 7; *see supra* note 208 (discussing the personal jurisdiction standard).

261. S. REP. NO. 102-249, at 7–8. *See generally* 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, 475–78 (1999) (outlining the common-law head of state and diplomatic immunity doctrines).

of human rights abuses under the TVPA (without the bar of FSIA immunity) would not dramatically and unduly burden judicial economy.²⁶²

3. *Restricting the TVPA to Cases in Which an Exception to the FSIA Has Been Met Renders the Statute Virtually Useless, Given the Difficulties in Squeezing Claims of Human Rights Abuse into One of the Existing Exceptions to FSIA Immunity*

Some courts have held that in order for the TVPA to apply, a plaintiff's claim must fit into one of the existing exceptions to FSIA immunity.²⁶³ Such a finding is problematic because it is almost impossible for human rights plaintiffs bringing suit under the TVPA to invoke any of the existing FSIA exceptions successfully.²⁶⁴ First, interpretation of the property exceptions indicates that they are likely to be too limited in scope to apply.²⁶⁵ Second, the arbitration exception does not seem to be applicable in human rights cases.²⁶⁶ Third, because the non-commercial torts exception requires that the alleged conduct have occurred in the United States, and the TVPA creates a cause of action for victims of torture perpetrated abroad, that exception is likewise inapplicable.²⁶⁷ Fourth, the terrorism exception, while promising for human rights litigants, is limited to only a small group of states that have been designated "state sponsors of terrorism" by the

262. See Brief for the Respondents at 57–58, *Samantar v. Yousuf*, 130 S. Ct. 49 (2009) (No. 08-1555) (arguing that "no such flood [of cases has occurred] in the two decades since the TVPA was enacted, nor could there be" given the many limitations on bringing suit under the TVPA). But see *Prinz v. Fed. Republic of Germany*, 26 F.3d 1166, 1174 n.1 (D.C. Cir. 1994) (noting that given the "countless human rights cases that might well be brought," such an "expansive reading" of the FSIA would place an "enormous strain" upon federal courts).

263. See, e.g., *Mater v. Dichter*, 500 F. Supp. 2d 284, 293 (S.D.N.Y. 2007) (holding that if a FSIA exception applies, an individual government official acting in his official capacity may be sued under the TVPA; if no such exception applies, U.S. courts lack jurisdiction), *aff'd*, 563 F.3d 9 (2d Cir. 2009); *Belhas v. Ya'alon*, 466 F. Supp. 2d 127, 131 (D.D.C. 2006) (same), *aff'd*, 515 F.3d 1279 (D.C. Cir. 2008).

264. Mathias Reimann, *A Human Rights Exception to Sovereign Immunity: Some Thoughts on Prinz v. Federal Republic of Germany*, 16 MICH. J. INT'L 403, 415 (1995).

265. See 28 U.S.C. § 1605(a)(3)–(4) (2006) (property exceptions); Roger P. Alford, *Arbitrating Human Rights*, 99 AM. SOC'Y INT'L L. PROC. 233, 234 (2005).

266. See 28 U.S.C. § 1605(a)(6) (arbitration exception). But see Alford, *supra* note 265, at 234 (outlining a possible scheme for using the arbitration exception to the FSIA to secure accountability for gross violations of human rights by sovereigns and their agents).

267. See 28 U.S.C. § 1605(a)(5) (non-commercial torts exception); Alford, *supra* note 265, at 234 (noting that "most human rights abuses are extraterritorial").

State Department.²⁶⁸ Fifth, the commercial activities exception normally does not assist a TVPA plaintiff because its “direct effect” requirement is not met by an individual’s continued suffering in the United States.²⁶⁹ Finally, although numerous commentators have argued in favor of using the waiver exception by classifying a violation of a *jus cogens* norm—such as the norm against torture—as an implied waiver of FSIA immunity,²⁷⁰ such a theory has unfortunately not found favor with the courts.²⁷¹ If the case of human rights plaintiffs under the FSIA exceptions is so “hopeless,”²⁷² an interpretation that bars all suits against individual officials that do not fall within a FSIA exception effectively bars *all* suits under the TVPA.

268. See 28 U.S.C.A. § 1605A (West Supp. 2009) (terrorism exception); see also *supra* note 106 (detailing the requirements for going forward under the FSIA’s terrorism exception).

269. See 28 U.S.C. § 1605(a)(2) (commercial activities exception); *Princz v. Fed. Republic of Germany*, 26 F.3d 1166, 1172–73 (D.C. Cir. 1994) (finding no jurisdiction over a suit brought by a Holocaust survivor against the German government because the plaintiff’s continued suffering in the United States did not constitute a “direct effect” for purposes of applying the commercial activities exception); *Martin v. Republic of South Africa*, 836 F.2d 91, 92, 95 (2d Cir. 1987) (finding that although the African-American plaintiff suffered a permanent injury from being refused treatment in a South African hospital, no “direct effect” existed simply because the plaintiff remained affected by the injury upon his return to the United States).

270. See 28 U.S.C. § 1605(a)(1) (waiver exception); Adam C. Belsky et al., *Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law*, 77 CAL. L. REV. 365, 394 (1989) (arguing that the FSIA’s implied waiver provision “provides U.S. [c]ourts with jurisdiction over torts in violation of peremptory norms of international law”); Michelle Fastiggi, Note, *The Doctrine of Sovereign Immunity—A Jurisdictional Shield for Foreign Nations and Their Accountability for Human Rights Violations*, *Saudi Arabia v. Nelson*, 113 S. Ct. 1471 (1993), 12 DICK. J. INT’L L. 387, 395–96 (1994) (commenting that the waiver exception could be a valid means of pursuing human rights claims in American courts); Scott A. Richman, Comment, *Siderman De Blake v. Republic of Argentina: Can the FSIA Grant Immunity for Violations of Jus Cogens Norms?*, 19 BROOK. J. INT’L L. 967, 994 (1993) (“Simply stated, the FSIA should be interpreted to read that a party impliedly waives his sovereign immunity if he commits acts which violate peremptory norms.”); cf. Graham Ogilvy, Note, *Belhas v. Ya’alon: The Case for a Jus Cogens Exception to the Foreign Sovereign Immunities Act*, 8 J. INT’L BUS. & L. 169, 195 (2009) (arguing in favor of recognizing a full *jus cogens* exception to FSIA immunity).

271. See, e.g., *Princz*, 26 F.2d at 1174 (holding that in order for Germany to have been eligible to be sued under the FSIA waiver exception, it would need to have “indicated . . . a willingness to waive immunity for [any] actions arising out of the Nazi” era’s horrors); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 718–19 (9th Cir. 1992) (holding that the FSIA waiver exception does not provide an exception for the implied waiver of immunity by violating *jus cogens* norms). But see *Princz*, 26 F.2d at 1182 (Wald, J., dissenting) (arguing strongly in favor of an implied waiver exception for violations of *jus cogens* norms based on the notion that “when a state thumbs its nose at such a norm, in effect overriding the collective will of the entire international community, the state cannot be performing a sovereign act entitled to immunity”).

272. Reimann, *supra* 264, at 416.

B. *Recognizing a Human Rights Exception to the Majority's Interpretation of the FSIA's "Agency or Instrumentality" Language for Cases Brought Under the TVPA Would Remedy Concerns that Present Application of the FSIA by Courts Has Not Adhered to Congress's Separation of Powers Goal*

When Congress created the FSIA, it was with the intent that the statute would codify the existing theory of restrictive immunity and transfer the task of making sovereign immunity determinations from the Executive Branch to the judiciary.²⁷³ This transfer of power to the courts was based on the rationale that the Executive Branch, if vested with immunity decisionmaking power, could be swayed too easily by potentially unrelated political considerations.²⁷⁴ Under the FSIA, therefore, suggestions of immunity from the State Department are not to be used as binding determinations of immunity.²⁷⁵ Present application of the FSIA, particularly in the human rights context, has, however, raised concerns that the Executive Branch continues to wield great influence through its use of suggestions of immunity.²⁷⁶

Yousuf v. Samantar provides two instructive examples of the way in which district courts have continued to defer to the Executive Branch in immunity decisionmaking. First, the district court in *Yousuf* stayed the proceedings for two years to determine whether the State Department intended to provide the court with a statement of interest regarding defendant Samantar's assertion of immunity.²⁷⁷ The length of time that the court waited to hear from the State Department indicates that the court viewed such a statement as dispositive. Second, having never received such a statement from the State Department, the court, in holding that Samantar was eligible for FSIA immunity,

273. See *supra* Part II.B.1.

274. Naomi Roht-Arriaza, *The Foreign Sovereign Immunities Act and Human Rights Violations: One Step Forward, Two Steps Back?*, 16 BERKLEY J. INT'L L. 71, 81 (1998); see also H.R. REP. NO. 94-1487, at 7, 9 (1976) (discussing the importance of ensuring that decisions are made on "purely legal grounds").

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

276. See *supra* note 76; see also H.R. REP. NO. 102-900, at 3 (1992) (noting that in *Nelson v. Saudi Arabia*, 923 F.2d 1528 (11th Cir. 1991), *rev'd*, 507 U.S. 349 (1993), *vacated*, 996 F.2d 270 (11th Cir. 1993), the State Department filed a brief on behalf of Saudi Arabia requesting that the Supreme Court overturn the lower court's decision that had permitted a U.S. citizen to bring suit against Saudi Arabia for human rights violations that allegedly occurred while he was employed by a Saudi Arabian company).

277. *Yousuf v. Samantar*, No. 1:04cv1360, 2007 WL 2220579, at *6 (E.D. Va. Aug. 1, 2007), *rev'd*, 552 F.3d 371 (4th Cir. 2009), *cert. granted*, 130 S. Ct. 49 (2009). Despite the fact that motions were filed by both parties in the two year interim in which the court awaited a State Department statement of interest, no hearings were held for the very reason that the court was awaiting such a statement. *Id.* at *6 n.10.

relied heavily on two letters sent by the Transitional Government of Somalia, each of which argued that because Samantar was acting in the scope of his official capacity, he must be entitled to foreign sovereign immunity.²⁷⁸ In basing its decision, in large part, on the letters sent on behalf of a foreign government, the district court bowed to the very political pressures that the FSIA was designed to prevent and deferred to possible, albeit unannounced, concerns of the Executive Branch.²⁷⁹ Even without filing a statement of interest, the Executive Branch had a seemingly large impact on the district court's decision in *Yousuf*, if only because the court, ostensibly operating against the original intent of the FSIA, was worried about the potential impact of its decision on foreign affairs.²⁸⁰

Recognizing a limited exception in cases in which claims are brought under the TVPA would adhere to the FSIA's original goal of

278. *Id.* at *11. The court found support for placing great weight on the letters of a foreign sovereign from two district court decisions factually similar to *Yousuf*. *Id.* at *10. In *Belhas v. Ya'alon*, suit was brought under the TVPA in the United States District Court for the District of Columbia against an Israeli general (Ya'alon) for war crimes, extrajudicial killing, crimes against humanity, and cruel, inhuman or degrading treatment or punishment. 466 F. Supp. 2d 127, 128 (D.D.C. 2006), *aff'd*, 515 F.3d 1279 (D.C. Cir. 2008). In reaching the conclusion that the defendant's actions were undertaken in his official capacity, and therefore entitled him to immunity, the court placed great weight on letters received from the State of Israel that stated that (1) the State had approved of the defendant's actions, and (2) suing Ya'alon for such conduct would amount to suit against the state itself. *Id.* at 131–32. Similar TVPA claims were made against defendant Dichter, a former director of the Israeli General Security Service, in *Matar v. Dichter*, a case brought before the Southern District of New York. 500 F. Supp. 2d 284, 286 (S.D.N.Y. 2007), *aff'd*, 563 F.3d 9 (2d Cir. 2009). The court in *Matar* placed “great weight” on letters received from the then-Israeli ambassador to the United States urging that the defendant be granted immunity for the acts alleged because they were undertaken in his official capacity. *Id.* at 291. Based on the heavy weight accorded to these letters, the court held that Dichter was entitled to FSIA immunity. *Id.* The Eastern District of Virginia noted in *Yousuf* that perhaps the claim to immunity was even stronger than in *Matar* or *Belhas* because Yousuf was a cabinet-level officer at the time that the alleged acts were undertaken. *Yousuf*, 2007 WL 2220579, at *11.

279. Brief of Torture Survivors Support Organizations et al. as Amici Curiae in Support of the Plaintiffs-Appellants and Reversal of the District Court's Decision at 11–12, *Yousuf v. Samantar*, 552 F.3d 371 (4th Cir. 2009) (No. 07-1893). The district court in *Yousuf* seemed particularly concerned about the foreign affairs implications of its decision despite the absence of commentary from the State Department on the matter. See *Yousuf*, 2007 WL 2220579, at *11 (describing the letters from the Somali government as having a “persuas[ive]” effect on the court's ultimate decision).

280. Cf. Curtis A. Bradley & Jack L. Goldsmith, *Foreign Sovereign Immunity, Individual Officials, and Human Rights Litigation*, 13 GREEN BAG 2d 9, 19 (2009) (“In our view, *Matar* marks an unfortunate return to the pre-FSIA common law regime of executive discretion in determining foreign sovereign immunity—a regime characterized by unprincipled conferrals of immunity based on the political preferences of the presidential administration and case-by-case diplomatic pressures.”). A similar thing could be said for the district court's approach in *Yousuf*.

transferring immunity decisionmaking power from the political branches to the judiciary. Such an exception would allow courts, faced with allegations of human rights abuse, to determine whether a viable claim against an individual government official exists under the TVPA, and as such, whether FSIA immunity should be denied to the defendant.²⁸¹ Under this scheme, in which the judiciary makes immunity determinations independently, the Executive Branch is freed both from the political pressures it would encounter were it required to make such a decision and from any potentially adverse consequences that could result if it refused to support the immunity claim of the pressuring state.²⁸² Private litigants would also be assured that their claims were being addressed on purely legal grounds by the courts—neutral, non-politically motivated arbiters—and not subject to diplomatic pressures.²⁸³

This exception would also advance the FSIA's original purpose by sparing the State Department from some of the pressures inherent in handling human rights litigation. Because obtaining a judicial remedy abroad is often impossible given the uncooperativeness of the foreign state, American citizens seeking redress for human rights violations enlist the assistance of the State Department to obtain a remedy through diplomatic channels.²⁸⁴ In such a circumstance, the State Department must play two roles—operating, on the one hand, as the defender of the human rights of American citizens, and on the other hand, in its traditional role as a “conciliator” tasked with maintaining positive foreign relations.²⁸⁵ This places the State Department in the uncomfortable position of potentially being forced to choose between supporting an American citizen wishing to challenge human rights violations in court and protecting sensitive matters of foreign policy and ensuring positive foreign relations.²⁸⁶ “Rather than hiding behind the shield of diluted, convoluted statutory schemes,” the United States must develop a “consistent foreign-policy framework for

281. See generally *supra* text accompanying notes 206–14 (outlining the requirements for causes of action under the TVPA).

282. Brief of United States Member of Congress and Law Professors as Amici Curiae in Support of the Plaintiffs-Appellants and Reversal of the District Court's Decision at 15, *Yousuf*, 552 F.3d 371 (No. 07-1893).

283. See H.R. REP. NO. 94-1487, at 9 (1976) (noting that the FSIA was intended to address that precise concern).

284. See *Re*, *supra* note 1, at 588 (noting that it is often difficult to obtain a “[j]udicial remed[y] . . . in countries where torture is prevalent” (citation and internal quotation marks omitted)).

285. *Id.* at 588 (internal quotation marks omitted).

286. Jacobson, *supra* note 221, at 802.

dealing” with human rights litigation in federal courts.²⁸⁷ Determining that all individual government officials accused of perpetrating serious human rights violations under the TVPA would be excepted from the general presumption of immunity for individual government officials would establish such a framework. Because it eliminates immunity for the subset of individual government officials accused of human rights abuses, such a doctrine removes the State Department from the uncomfortable position it faces when presented with human rights concerns.²⁸⁸ It also provides a judicial remedy to citizens harmed by human rights violations, rendering resort to diplomatic remedies unnecessary.²⁸⁹

C. *Recognizing an Exception for Litigation Brought Under the TVPA Would Acknowledge that Fundamentally Different Values Are at Stake in Cases Where Human Rights Litigation Is Barred by a Defendant’s Invocation of FSIA Immunity and in Cases in Which Immunity Is Granted as a Matter of Reciprocity and Comity*

By removing the FSIA as a potential barrier to litigation, this Comment’s proposed exception recognizes the unique nature of the values at stake in human rights litigation. As such, the proposed exception (1) tips the balance between foreign affairs interests and the individual interests of human rights litigants in TVPA cases in favor of the latter,²⁹⁰ and (2) guarantees that the basic values underlying the majority of claims in human rights litigation are protected.²⁹¹

1. *The Proposed Exception Tips the Balance Sought in Litigation Involving Foreign Sovereigns in Favor of the Interests of Human Rights Litigants*

Human rights cases are based on the most basic and essential of human liberties—“freedom of thought, liberty of conscience, freedom of speech, and freedom from arbitrary arrest and detention.”²⁹² Human rights litigation represents, therefore, “not merely . . . ideals, or goals” about the way that the world should be, but rather “rights . . . to be vindicated by an effective remedy.”²⁹³ When a defendant in a

287. *Id.*

288. *See supra* text accompanying note 285.

289. *See supra* text accompanying note 283.

290. *See infra* Part III.C.1.

291. *See infra* Part III.C.2.

292. Schwartz, *supra* note 229, at 275 (discussing the unique nature of human rights claims).

293. *Re, supra* note 1, at 592.

TVPA suit argues that he is entitled to FSIA immunity, the ability of a human rights plaintiff to seek such a remedy is called into question.²⁹⁴ When a defendant in a suit outside of the human rights context argues that he is entitled to FSIA immunity, other interests are primarily at stake—namely, those of international reciprocity and comity.²⁹⁵ To be sure, plaintiffs in other kinds of suits have individual interests at stake, but those claims are likely to be weighed against a heavy interest in fostering the foreign affairs norms of reciprocity and comity.²⁹⁶ In the context of human rights litigation, however, the balance between comity and individual interests ought to shift in favor of the interests of human rights litigants.²⁹⁷ Such a balance could be achieved by recognizing an exception to the immunity of individual government officials in cases in which claims are brought under the TVPA—an interpretation of the FSIA that would prevent it from barring all TVPA claims. Because the FSIA was designed, in part, to codify common-law principles of comity and reciprocity,²⁹⁸ the proposed exception for claims brought under the TVPA shifts the balance in favor of the in-

294. If FSIA immunity is granted, the plaintiff's claim must be dismissed for lack of jurisdiction. See *supra* text accompanying notes 40, 61. Dismissal of the claim denies the plaintiff an opportunity for remedy.

295. See *supra* note 36 (defining comity). Reciprocity, as a concept in international law, is the "mutual concession of advantages or privileges for purposes of commercial or diplomatic relations." BLACK'S LAW DICTIONARY 1298 (8th ed. 2004). *The Schooner Exchange* noted that at the very heart of foreign sovereign immunity are notions of international grace and comity, doctrines that dictate the way that foreign sovereigns interact with each other. See *supra* Part II.A.1.

296. See *supra* text accompanying note 232 (outlining claims asserted by plaintiffs in the majority's cases); see also Thomas R. Sutcliffe, Note, "The Nile Reconstituted": *Executive State-ments, International Human Rights Litigation, and the Political Question Doctrine*, 89 B.U. L. REV. 295, 325–26 (2009) (noting that international comity is structured as a balancing test, in which the interests of foreign affairs are weighed against individual remedy interests).

297. Michael C. Small, Note, *Enforcing International Human Rights Law in Federal Courts: The Alien Tort Statute and the Separation of Powers*, 74 GEO. L.J. 163, 186 (1985) ("In the human rights context . . . invoking a desire for comity as a justification for judicial abstention survives neither practical nor moral analysis."). Such a practice seems to have taken root. See Ronald C. Slye, *The Legitimacy of Amnesties Under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible?*, 43 VA. J. INT'L L. 173, 214 (2002) (noting that courts are reluctant to apply comity in cases in which gross violations of human rights are alleged); see also Brief of Former United States Diplomats as Amici Curiae in Support of Respondents at 11, *Samantar v. Yousuf*, 130 S. Ct. 49 (2009) (No. 08-1555) (arguing that "comity among nations does not require that former foreign officials be shielded by sovereign immunity from suit for alleged torture and extrajudicial executions").

298. See *supra* Part II.B.1 (noting that the FSIA was designed to codify existing common-law principles); see also *supra* note 36 (discussing the extent to which comity was a key principle of the common-law understanding of immunity).

terests of human rights litigants.²⁹⁹ Shifting the balance in this way is appropriate if not necessary because the present doctrine seems to reflect “perverse priorities” about which plaintiffs are entitled to remedy³⁰⁰ and because although victims of human rights are accorded a unique status in international law, present legal doctrines, by and large, prevent their suits from going forward.

First, the present doctrine as to the immunity of individual government officials reflects unacceptable priorities.³⁰¹ As the FSIA is currently understood by the majority of courts, an individual is only able to bring suit against an individual government official for alleged acts of torture or extrajudicial killing if those acts are perpetrated in a country covered by the terrorism exception.³⁰² If the events took place outside of a country designated as a “state sponsor of terrorism,” under the majority understanding of the FSIA, the plaintiff is out of luck. An exception exists, however, for many commercial grievances, regardless of the location in which the alleged conduct occurred.³⁰³ Under the majority’s current approach to the FSIA, the statute seems to reflect “perverse priorities” because it allows individuals with commercial grievances against an individual foreign government official to litigate their claims, but denies that opportunity to individuals who have been subjected to torture or extrajudicial killing.³⁰⁴ In debating proposals to amend the FSIA to include a human rights exception, the House Judiciary Committee illustrated its belief that the right of an American citizen to be compensated by a foreign sovereign for torture is at least as important as the right to sue a foreign government for breach of contract.³⁰⁵ At present, unfortunately, that is not the law in the majority of circuits. Recognizing a doctrine that exempts individual government officials accused of human rights violations under

299. At present, the FSIA “serves as both a shield . . . and as a sword, destroying any opportunity for human rights victims to obtain the recognition of the inherent dignity owed to all members of the human family.” Fastiggi, *supra* note 270, at 399.

300. Jennifer A. Gergen, Note, *Human Rights and the Foreign Sovereign Immunities Act*, 36 VA. J. INT’L L. 765, 791 (1996).

301. *Id.*

302. See Elizabeth Defeis, *The Foreign Sovereign Immunities Act and the Human Rights Violations*, 8 ILSA J. INT’L & COMP. L. 363, 371 (2002) (noting that under the FSIA terrorism exception, the United States has made clear that it “do[es] not accept state-sponsored terrorism,” and arguing that “we ought not accept other serious violations of human rights”).

303. See 28 U.S.C. § 1605(a)(2) (2006) (commercial activities exception); see also *supra* note 269 and accompanying text (detailing the difficulties in fitting human rights allegations into the scheme outlined by the commercial activities exception to the FSIA).

304. Gergen, *supra* note 300, at 791.

305. H.R. REP. NO. 102-900, at 4 (1992).

the TVPA from FSIA immunity would enable the Committee's belief to become a reality.

Assuredly, not everyone will agree that shifting the balance in favor of human rights litigants is appropriate.³⁰⁶ Several additional comments are therefore useful. First, the only parties likely to complain about such an exception would be the "offending governments themselves."³⁰⁷ Moreover, a country accused of perpetrating or condoning human rights abuses "could hardly claim the defense of comity," given that the majority of the "responsible world community" condemns such abuses.³⁰⁸ Second, foreign governments may base suits against the United States on the FSIA and on the principle of international reciprocity.³⁰⁹ This should pose no concern to the United States so long as it adheres to both its own laws and international standards.³¹⁰ Finally, rather than viewing such a shift as moving away from international comity, it may be appropriate to view it as "an act of international moral leadership on the part of the United States."³¹¹ Providing an exception to the immunity of individual government officials in cases in which human rights abuses are alleged under the TVPA sends a signal to the world that the United States will not tolerate international torture—and may encourage other nations to similarly disavow the use of torture.³¹²

306. See, e.g., Brief of the Kingdom of Saudi Arabia as Amicus Curiae in Support of Petitioner at 6, *Samantar v. Yousuf*, 130 S. Ct. 49 (2009) (No. 08-1555) (arguing that "sovereign immunity remains critically important to the amicable relations among nations and such immunity must extend to" individuals); Ismael Diaz, Comment, *A Critique of Proposals to Amend the Foreign Sovereign Immunities Act to Allow Suits Against Foreign Sovereigns for Human Rights Violations*, 32 U. MIAMI INTER-AM. L. REV. 137, 140 (2001) (arguing that a FSIA human rights exception would be imprudent in light of key foreign policy considerations).

307. Ziman, *supra* note 250, at 205.

308. *Id.* (analogizing this situation to the equitable doctrine of "unclean hands").

309. See Jacobson, *supra* note 221, at 757 (briefly describing how the FSIA impacts international relations).

310. See generally Jennifer Moore, *Practicing What We Preach: Humane Treatment for Detainees in the War on Terror*, 34 DENV. J. INT'L L. & POL'Y 33, 35 (2006) (detailing anti-torture arguments under domestic and international standards). In fact, if the United States were engaging in acts that would make it eligible for suit under a statute similar to the TVPA in another country, its objection to this exception would carry little weight, as it would seem to be operating only as "an offending government," complaining because the law inhibits application of desired policies. See *supra* text accompanying note 307.

311. Alexander J. Mueller, *Nelson v. Saudi Arabia and the Need for a Human Rights Exception to the Foreign Sovereign Immunities Act*, 13 N.Y. INT'L L. REV. 87, 119 (2000); see also Gergen, *supra* note 300, at 790–91 (discussing the likelihood that the conduct of a foreign country may be influenced by the possibility that it will be held accountable for it in U.S. courts).

312. See Beth Ann Isenberg, Comment, *Genocide, Rape, and Crimes Against Humanity: An Affirmation of Individual Accountability in the Former Yugoslavia in the Karadžić Actions*, 60 ALB. L. REV. 1051, 1052 (1997) ("The United States has the opportunity to make a positive,

Furthermore, victims of human rights abuse are accorded a unique status in international law.³¹³ Given, however, the absence of an explicit human rights exception in the FSIA and the difficulties of fitting human rights claims into an existing exception,³¹⁴ the majority's current approach to the FSIA effectively "close[s] the court doors" to human rights litigants whose claims do not fit into the FSIA terrorism exception.³¹⁵ This denial of access to justice is particularly troubling in the case of human rights abuse for several reasons. First, from a purely moral standpoint, human rights cases seem to "cry out for legal remedies" more than any other because "[t]he injuries inflicted by torture [and] extrajudicial killing are the gravest imaginable."³¹⁶ Second, denial of access to the courts denies plaintiffs of their only opportunity to seek compensation for the wrongs done to them,³¹⁷ creating an unfortunate exception to the principle that victims of wrongs are entitled to their day in court.³¹⁸ The exception

definitive, and necessary statement in the realm of fundamental human rights law."); *cf.* Beth Stephens, *Taking Pride in International Human Rights Litigation*, 2 CHL. J. INT'L L. 485, 490 (2001) ("I believe that a human rights oriented foreign policy would greatly benefit the United States, as well as the rest of the world.").

313. *See* Correale, *supra* note 218, at 197 ("Almost every nation is willing to agree, as an abstract principle, that the rights of human beings are entitled to some level of respect and protection."); *cf.* Jamie O'Connell, *Gambling with the Psyche: Does Prosecuting Human Rights Violators Console Their Victims?*, 46 HARV. INT'L L.J. 295, 303-04 (2005) (discussing the unique effect that human rights abuse has on its victims, in contrast to the after-effects experienced by victims of ordinary violence).

314. *See supra* Part III.A.3 (discussing difficulties in pursuing human rights claims through existing FSIA exceptions).

315. Reimann, *supra* note 264, at 419.

316. *Id.* Take for example, the case of plaintiff Abiola in *Enahoro v. Abubakar*, representing the estate of her father, who died in prison as a result of the inhuman conditions in which he was kept, his subjection to torture, and the repeated denial of medical treatment. 408 F.3d 877, 879 (7th Cir. 2005). Another example is the case of anonymous plaintiff Jane Doe in *Yousuf v. Samantar*, who, over a period of three and a half years, was held in solitary confinement and repeatedly raped and beaten. 552 F.3d 71, 374 (4th Cir. 2009), *cert. granted*, 130 S. Ct. 49 (2009). *See generally* Linda Piwowarczyk, *Seeking Asylum: A Mental Health Perspective*, 16 GEO. IMMIGR. L.J. 155, 157-60 (2005) (listing "common psychological responses" to torture, and noting that torture may devastate a variety of "human capacities").

317. *See* Brief of the Foreign Minister for Republic of Somaliland, Abdillahi Mohamed Duale, as Amicus Curiae Supporting Respondents at 2, *Samantar v. Yousuf*, 130 S. Ct. 49 (2009) (No. 08-1555) (highlighting that the "flagrant crimes of the Siad Barre regime" have never "been addressed in a court of law," and that because there is "no mechanism for the victims of his human-rights abuses to obtain a civil remedy" in Somalia, if these victims "do not receive a measure of justice in the United States courts, they will receive no justice at all").

318. Reimann, *supra* note 264, at 419. *But see* Amicus Curiae Brief of the American Jewish Congress in Support of Petitioner at 42, *Yousuf*, 130 S. Ct. 49 (No. 08-1555) (arguing that there are "ample international remedies apart from civil suits" for human rights victims); Brief of Amici Curiae Former Attorneys General of the United States in Support of

proposed by this Comment would re-open court doors to human rights litigants by preventing the FSIA from operating as a barrier to their TVPA suits.

2. *An Exception to the Immunity of Individual Government Officials for Cases Brought Under the TVPA Would Ensure that the Basic Values at Issue in Human Rights Litigation Are Protected*

The proposed exception to the FSIA immunity doctrine would help to ensure that the values at stake in human rights litigation³¹⁹ are protected by (1) insisting that perpetrators of human rights violations are held accountable for their actions, and (2) preventing human rights violators from seeking safe haven in the United States. First, civil litigation can be an important part of “the search for accountability for human rights violations.”³²⁰ Successful litigation resulting in an enforceable monetary judgment serves compensatory and punitive purposes and may deter future human rights abuses.³²¹ Even if the enforcement of a monetary judgment is not feasible, the litigation, by “produc[ing] a full factual investigation,” may “lead[] to public recognition of [the] victim’s injuries and the defendant’s culpability.”³²² Revealing the culpability of the defendant to the general public may also have future legal repercussions, such as deportation or visa denial.³²³ Finally, civil litigation helps the human rights movements in the countries where the abuse occurred by providing a case around which human rights education and organization may focus.³²⁴

Second, by denying FSIA immunity to individual government officials in cases in which allegations of human rights abuse are brought

Petitioner at 17, *Yousuf*, 130 S. Ct. 49 (No. 08-1555) (arguing that “application of the FSIA to foreign officials does not foreclose other accountability mechanisms” for victims); Bradley & Goldsmith, *supra* note 280, at 22 (listing other “legitimate mechanisms of human rights accountability” that a state could employ in lieu of denying foreign sovereign immunity to individual government officials).

319. See *supra* text accompanying notes 292–93 (detailing the values at stake in such litigation).

320. Beth Stephens, *Accountability Without Hypocrisy: Consistent Standards, Honest History*, 36 NEW ENG. L. REV. 919, 926 (2002). The TVPA only provides for a civil remedy, not a criminal one.

321. *Id.*

322. *Id.* at 926–27.

323. *Id.* at 927; see also Simona Agnolucci, *Deportation of Human Rights Abusers: Towards Achieving Accountability, Not Fostering Impunity*, 30 HASTINGS INT’L & COMP. L. REV. 347, 382 (2007) (noting that although deportation “does not by itself constitute adequate punishment,” it may “[u]nder certain circumstances . . . become a means, albeit an imperfect means, of achieving accountability” for human rights abuses).

324. Stephens, *supra* note 320, at 927.

under the TVPA, the proposed exception prevents such individuals from using the United States as a safe haven. The Center for Justice and Accountability estimates that, as of 2005, several hundred individuals accused of violating human rights live in this country, and several dozen more visit each year.³²⁵ Denying FSIA immunity to individual government officials accused of violating human rights will make them eligible for suit under the TVPA. If these individuals are eligible for suit and eventually tried, it seems likely that other similarly situated individuals will be deterred from coming to the United States.³²⁶ Preventing these foreign officials from finding safe haven in the United States is a valuable goal that goes hand in hand with efforts to bring them to justice in our court system.

This Comment does not suggest that the United States can remedy all of the world's human rights problems.³²⁷ It does suggest, however, that the TVPA, as written, provides a workable standard under which individual government officials may be tried by a neutral court for allegations of human rights abuse. The exception to the FSIA doctrine that this Comment proposes would simply allow the TVPA to do so.

IV. CONCLUSION

Resolution of the circuit split as to whether an individual government official constitutes a "foreign state" for purposes of FSIA immunity could be meaningfully achieved by accepting the majority viewpoint in all cases except those which involve allegations of human rights abuse brought under the TVPA. This Comment has shown that recognizing a limited exception to the majority's interpretation of the "agency or instrumentality" language of Section 1603(b) for human rights cases brought under the TVPA would create consistency between the present FSIA doctrine and the motivations behind congressional enactment of the TVPA,³²⁸ place interpretation of the FSIA in

325. Sandra Coliver et al., *Holding Human Rights Violators Accountable by Using International Law in U.S. Courts: Advocacy Efforts and Complementary Strategies*, 19 EMORY INT'L L. REV. 169, 175 (2005). For example, the defendant in the case of *Yousuf v. Samantar*, who is accused of perpetrating serious human rights violations in Somalia in the 1970s, was found residing in Fairfax, Virginia. No. 1:04cv1360, 2007 WL 2220579, at *6 (E.D. Va. Aug. 1, 2007), *rev'd*, 552 F.3d 371 (4th Cir. 2009), *cert. granted*, 130 S. Ct. 49 (2009).

326. Coliver et al., *supra* note 325, at 176; *see also* Brief for the Respondents at 57, *Samantar v. Yousuf*, 130 S. Ct. 49 (2009) (No. 08-1555) (arguing that effective use of the TVPA "would chill foreign officials not in the making of legitimate governmental decisions, but in making their vacation or residency plans").

327. In fact, it would be "hopelessly idealistic to expect that we could and presumptuous to assume that it is our place to do so." Schwartz, *supra* note 229, at 337.

328. *See supra* Part III.A.

line with congressional motivations for its creation in 1976,³²⁹ and acknowledge that a fundamental difference exists between the values at stake in human rights litigation brought under the TVPA and the values at stake in other kinds of litigation.³³⁰ If Judge Re is correct, and the courts “cannot isolate themselves from the great moral issues of the day,”³³¹ resolving the tension between the TVPA and the FSIA exposed by the existing circuit split might be a good place to start. This Comment’s proposed exception would resolve that tension, while providing a remedy for victims of human rights violations in American courts. Ensuring that justice is afforded to such victims is undoubtedly one of the “great moral issues of the day,”³³² and one from which the courts should not shy away. The present inability of human rights litigants to seek relief in United States courts represents not just a disservice to those litigants, but the endurance of a doctrine that facilitates the moral isolationist policy that Judge Re warned against, a policy that runs counter to the admirable traditions of our democratic society.³³³

329. *See supra* Part III.B.

330. *See supra* Part III.C.

331. *Re, supra* note 1, at 591.

332. *Id.*; *see also* Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1749 (2005) (“The most important issue about torture remains the moral issue of the deliberate infliction of pain, the suffering that results, the insult to dignity, and the demoralization and depravity that is . . . associated with [the] enterprise . . .”).

333. Stephens, *supra* note 312, at 493.