No. 08-1555

IN THE
Supreme Court of the United States

MOHAMED ALI SAMANTAR,

Petitioner,

—v.—

BASHE ABDI YOUSUF et. al,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF PROFESSORS OF INTERNATIONAL LITIGATION AND FOREIGN RELATIONS LAW AS *AMICI CURIÆ* IN SUPPORT OF RESPONDENTS

MICHAEL D. RAMSEY
Counsel of Record
University of San Diego
School of Law
5998 Alcala Park
San Diego, CA 92110
619-260-4145

RICHARD M. ZUCKERMAN
ABIGAIL D. LAUER
Sonnenschein Nath &
Rosenthal LLP
1221 Ave. of the Americas
New York, NY 10020-1089
212-398-5213

WILLIAM S. DODGE
University of California,
Hastings College of the
Law
200 McAllister Street
San Francisco, CA 94102
415-565-4830

Attorneys for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTEREST OF *AMICI CURIÆ*

This brief of *amici curiae* is respectfully submitted in support of respondents by law professors with expertise in International Litigation and Foreign Relations Law of the United States.[1] Many of the *amici* have been honored to appear as *amici* in other cases before this Court. *Amici* submit this brief because they believe the present case raises issues critical to the proper interpretation of the Foreign Sovereign Immunities Act (FSIA) and the federal common law of official immunities, areas to which they have devoted extensive scholarly attention. In particular, *amici* believe that the arguments of petitioner in this case profoundly misunderstand the FSIA and its relationship to federal common law. *Amici* further believe that the court below properly read the FSIA in accordance with its text not to extend to former foreign officials such as petitioner, and that the court below properly did not address the question of petitioner's possible immunities under federal common law.

A list of the *amici* appears as Appendix A.

SUMMARY OF ARGUMENT

Expanding the scope of the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1602 *et seq.,* to

---

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission. The parties' written consents to the filing of this brief have been filed with the Clerk of the Court.

apply to individual foreign government officials finds no support in the text, structure, or history of the Act—and would raise a host of legal problems beyond those set forth by respondents. Such an expansive reading would create a conflict with the Torture Victim Protection Act (TVPA), Pub. L. No. 102-256, 106 Stat. 73 (1992) (reproduced at 28 U.S.C. § 1350 note), potentially immunize foreign officials from criminal prosecution, abolish head-of-state immunity, abolish any immunity for former foreign officials, and require the courts to develop a non-textual definition of what constitute official acts.

The issue before this Court is not whether, or under what circumstances, foreign officials should or should not have immunity. The issue is whether, when Congress enacted the FSIA to govern immunity claims of foreign states, it also displaced the pre-existing common law immunities of foreign officials.

The text, structure, and history of the FSIA demonstrate that it does not, and was not intended to, apply to the immunities of foreign officials. Rather, in enacting the FSIA, Congress left the immunity claims of foreign officials to be governed by federal common law, as they had been prior to the FSIA's enactment.[2]

---

[2] Although best understood as a matter of federal common law, judicial application of foreign official immunities has been disciplined by reference to customary international law, *see, e.g.*, *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 137-46 (1812); *Berizzi Bros. Co. v. The Pesaro*, 271 U.S. 562, 575-76 (1926), and the views of the Executive Branch. *See, e.g.*, *Republic of Mexico v. Hoffman*, 324 U.S. 30 (1945); *Ex*

(cont'd)

As a textual matter, neither of the theories advanced by petitioner has merit. First, the FSIA governs only the immunity of "foreign state[s]." 28 U.S.C. § 1604. Although § 1603(a) defines this phrase to include "an agency or instrumentality of a foreign state," this expanded definition applies only to "legal person[s]," not to individuals. Second, contrary to petitioner's suggestions, a foreign official acting in an official capacity is not otherwise included in the ordinary meaning of the phrase "foreign state." The operative sections of the FSIA repeatedly distinguish between foreign states, on one hand, and officers and employees acting in an official capacity, on the other. *See id.* §§ 1605(a), 1605A(c), 1610.

The FSIA's history also does not support the idea that it includes foreign officials. Prior to the FSIA, the immunities of foreign officials were applied as a matter of federal common law, and there is no non-speculative reason to suppose that Congress intended to alter that practice. In enacting the FSIA, Congress was primarily concerned with problems that had arisen in the common-law regime governing the commercial activities of foreign states themselves. *See Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486-89 (1983). Official

---

parte Peru, 318 U.S. 578 (1943). This Court has never directly held that non-statutory foreign immunity decisions are a matter of federal rather than state common law, but that conclusion follows from *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 421-27 (1964), holding that the closely analogous act of state doctrine must be applied as a matter of federal common law.

immunity cases were rare and had not attracted substantial attention as of 1976. Moreover, Congress was legislating against a domestic background in which the immunities of State officials were treated differently from the Eleventh Amendment immunities of States themselves. *See, e.g., Alden v. Maine*, 527 U.S. 706, 756-57 (1999); *Scheuer v. Rhodes*, 416 U.S. 232, 237-238 (1974). Congress would not have assumed that a suit against an individual for an official act would be treated the same as a suit against the sovereign itself. If Congress had intended such an equivalence, it would have said so directly.

Most importantly, reading the FSIA to cover individuals would raise a host of problems.

First, it would create a conflict with the TVPA. In extending liability for torture and extrajudicial killing to "[a]n individual [acting] under *actual* or apparent authority, or color of law, of any foreign nation," 28 U.S.C. § 1350 note, § 2(a) (emphasis added), Congress plainly intended to reach foreign officials acting in their official capacities.

Second, extending the FSIA to foreign officials might immunize them from criminal prosecutions brought by the United States. The text of § 1604 does not distinguish between civil and criminal jurisdiction, and under *Argentine Republic v. Amerada Hess Shipping Corp.*, "the FSIA provides the sole basis for obtaining jurisdiction over a foreign state in federal court." 488 U.S. 428, 439 (1989). To date, U.S. courts have responded to claims of immunity from foreign officials facing criminal prosecution by reasoning that the FSIA does not apply to such officials and that any common law

immunities may be waived by the Executive Branch. If this Court extends the FSIA to foreign officials, lower courts will either have to hold them immune from criminal prosecution or create a non-textual exception to the language of § 1604 for criminal prosecutions.

Third, extending the FSIA to foreign officials would abolish the absolute immunity currently enjoyed by sitting heads of state and subject them to civil suits on a variety of claims including claims based on commercial activities, *see* 28 U.S.C. § 1605(a)(2), and noncommercial torts. *See id.* § 1605(a)(5). This would work a significant change in federal common law and place the United States in breach of customary international law.

Fourth, extending the FSIA to foreign officials would abolish any common law immunity of former officials. The precise scope of the immunities enjoyed by former officials under federal common law, if any, is not clear and is not before this Court. What is clear is that immunity under the FSIA depends not on the defendant's status at the time of the conduct but on the defendant's status at the time of the suit. *See Republic of Austria v. Altmann,* 541 U.S. 677, 696 (2004); *Dole Food Co. v. Patrickson,* 538 U.S. 468, 478-79 (2003). Thus, to the extent that former officials enjoy any immunities from suit at federal common law, applying the FSIA would remove those immunities.

Finally, extending the FSIA to foreign officials would still leave the question of what constitutes an "official act" unanswered. Petitioner contends that the FSIA applies to foreign officials only when they act in their official capacities. But because Congress

did not expect the FSIA to be applied to foreign officials, the FSIA contains no definition of this concept. Petitioner asks this Court to apply the FSIA to foreign officials despite their omission from the text of the statute and then to create an exception for acts not performed in an official capacity, again without any basis in the text. It would be simpler by far to hold that the FSIA does not apply to foreign officials and leave the scope of federal common law immunities potentially applicable to petitioner to be decided by the district court in the first instance.

ARGUMENT

—

THE FOREIGN SOVEREIGN IMMUNITIES ACT CODIFIED IMMUNITIES OF FOREIGN STATES, BUT LEFT IMMUNITIES OF FOREIGN OFFICIALS GOVERNED BY FEDERAL COMMON LAW

I. THE IMMUNITIES OF FOREIGN OFFICIALS IN THE UNITED STATES ARE GOVERNED BY FEDERAL COMMON LAW UNLESS DISPLACED BY TREATY OR STATUTE

Traditionally, federal and state courts in the United States approached questions of sovereign immunity as a matter of common law, applied with reference to principles of customary international law. *See, e.g.*, *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 137-46 (1812); *Berizzi Bros. Co. v. The Pesaro*, 271 U.S. 562, 575-76 (1926). Beginning in the 1940s, this Court initiated a practice of applying common law immunities with almost complete deference to Executive Branch determinations. *See generally Republic of Mexico v.*

Hoffman, 324 U.S. 30 (1945); *Ex parte Peru*, 318 U.S. 578 (1943).

In 1952, in the so-called Tate Letter, the Executive Branch announced that it would relax the traditional view of absolute immunity for foreign states, expressed in cases such as *Berizzi Bros.*, *supra*, and allow suits based on foreign states' commercial activities. *See* Letter from Jack B. Tate, Acting Legal Adviser, Department of State, to Acting Attorney General Philip B. Perlman (May 19, 1952), *reprinted in* 26 Dep't of State Bull. 984-85 (1952); *Verlinden*, 461 U.S. at 486-88.

As recounted in *Verlinden*, the Tate Letter introduced what proved to be an unsatisfactory situation in which the State Department's determinations of whether a foreign state's activities were commercial (and thus not entitled to immunity) became subject to diplomatic pressure. 461 U.S. at 487. In 1976 Congress responded with the FSIA, which replaced the common law immunity of foreign states with a statutory scheme that incorporated the Tate Letter's commercial activities exception and various others. *Id.* at 488-89.[3]

Prior to the FSIA, the practice of U.S. courts and the U.S. Department of State also treated the

---

[3] Prior to the FSIA, diplomatic and consular immunities, which had previously been matters of common law, had been formalized in two treaties, the Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 96, and the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820, 596 U.N.T.S. 261.

distinct questions of head-of-state immunity and foreign official immunity as matters of federal common law. *See Sovereign Immunity Decisions of the Department of State, May 1952 to January 1977*, 1977 Dig. U.S. Prac. Int'l L. 1017, 1020 (1977); *Restatement (Second) of the Law of Foreign Relations of the United States* § 66 (1965). Thus, the question here is whether, in addition to codifying foreign state immunity, the FSIA *also* codified immunity for foreign officials. If it did, it would displace the common law immunity these officials formerly enjoyed. But if it did not, presumably foreign officials retain whatever immunities they had at common law.[4] As a result, a central premise of petitioner's argument is mistaken. The question is not whether foreign officials should or should not have immunity. The question is whether their immunities are governed by the FSIA or by federal common law.

As set forth below, the FSIA's text, structure, and history demonstrate that the FSIA does not apply to immunity claims of foreign officials. The Fourth Circuit correctly dismissed petitioner's claims under the FSIA and remanded so that the district court could consider his immunities under federal common law. *See Yousuf v. Samantar,* 552 F.3d 371, 383-84 (4th Cir. 2009).

---

[4] This brief expresses no opinion on the scope of common law immunities for foreign officials or former foreign officials.

II. THE FSIA'S TEXT MAKES CLEAR THAT IT CODIFIES ONLY THE IMMUNITIES OF FOREIGN STATES AND NOT THE IMMUNITIES OF FOREIGN OFFICIALS

Nothing in the FSIA's text directly extends its provisions to foreign officials, let alone to former foreign officials such as Samantar. By its terms, the FSIA grants immunity only to "foreign state[s]." 28 U.S.C. § 1604. A "foreign state" is in turn defined to "include[]" "a political subdivision of a foreign state or an agency or instrumentality of a foreign state." *Id.* § 1603(a). Nonetheless petitioner and some lower courts offer two theories under which officials might be included within the definition of "foreign state." First, an official might be an "agency or instrumentality of a foreign state." Second, the phrase "foreign state" might somehow include foreign officials acting in their official capacities (however defined), even though the statute does not say so directly. Neither suggestion is a plausible interpretation of the FSIA's text.

A. A Foreign Official Is Not an "Agency or Instrumentality of a Foreign State"

The first court of appeals decision to extend the FSIA to foreign officials, fourteen years after the statute's enactment, found that the phrase "agency or instrumentality of a foreign state" might include foreign officials. *See Chuidian v. Philippine Nat. Bank,* 912 F.2d 1095, 1103 (9th Cir. 1990). However, the FSIA's text decisively rejects this reading, as the court below persuasively explained. *See Yousuf,* 552 F.3d at 379-81.

First, § 1603(b)(1) defines "agency or instrumentality" to mean "a separate legal person, corporate or otherwise." "Legal person" is a term of art routinely used to describe legally-created entities, whether "corporate" (*i.e.,* corporations) or "otherwise" (*i.e.,* partnerships, foundations, etc.), in contrast to "natural persons" (meaning individuals). *See, e.g., Nixon v. Missouri Municipal League,* 541 U.S. 125, 134 (2004) ("In customary usage, we speak simply of prohibiting a natural *or* legal person from doing something.") (emphasis added). Indeed, the FSIA itself later uses the phrase "natural person" to mean an individual—presumably in contrast to "legal person." *See* 28 U.S.C. § 1610(f)(1)(B). As the House Report specifically noted,

> [t]he first criterion, that the entity be a separate legal person, is intended to include a corporation, association, foundation or any other entity which, under the law of the foreign state where it was created, can sue or be sued in its own name, contract in its own name or hold property in its own name."

H.R. Rep. No. 94-1487, at 15, 1976 U.S.C.A.A.N. 6604, 6614.

Second, § 1603(b)(2) requires that, to qualify as "an agency or instrumentality of a foreign state," an entity must be "an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof." Obviously the second phrase of this definition is directed toward legally-created entities such as corporations, since individuals do not have "ownership interests"; the word "organ" likewise

indicates a legally-created component such as a ministry rather than an individual.

Third, § 1603(b)(3) requires that, to qualify as "an agency or instrumentality of a foreign state," an entity must not be "a citizen of a State of the United States *as defined in section 1332(c) and (e) of this title,* nor created under the laws of any third country." (Emphasis added). Sections 1332(c) and (e) define how the citizenship of *corporations* is determined. Thus all three prongs of § 1603(b)'s definition of "agency or instrumentality of a foreign state" demonstrate an understanding that it encompasses legally-created entities and not individuals.

Further, the FSIA's provisions for service of process on "an agency or instrumentality of a foreign state" in § 1608(b) mirror Fed. R. Civ. P. 4(h)'s provisions governing service on a corporation, partnership, or association. The principal way service is to be effected, under § 1608(b)(2), is "by delivery of a copy of the summons and complaint . . . to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States"—a provision obviously framed for legally-created entities. In contrast, § 1608(b) contains no reference at all to the most common way of serving process upon individuals present in the United States, personal delivery to the actual person being sued. *See, e.g.,* Fed. R. Civ. P. 4(e) & (f) (service of process on individuals).

Recognizing the weakness of the Ninth Circuit's view in *Chuidian,* Samantar largely abandons it. *See* Pet. Br. at 45-47 (relegating claim that he is an

"agency or instrumentality of a foreign state" to a few pages at the end of the brief). Instead, he advances a distinct argument that FSIA's phrase "foreign state" implicitly includes foreign officials acting in their official capacities, even though § 1603's definitions do not say so directly. As the next section shows, the FSIA's text refutes this argument as well.

B. The FSIA Does Not Include Foreign Officials as Part of the Foreign State Itself

Nothing in the FSIA suggests that the phrase "foreign state" includes foreign officials, and much stands against it. To begin, the ordinary meaning of "foreign state" obviously does not encompass individuals such as Samantar: one would, in common language, say not that Samantar *is* a foreign state, but that he is an individual who *acted on behalf of* a foreign state. If Congress meant to extend the definition of "foreign state" to something that phrase does not obviously encompass, one would expect it to do so in the statutory definitions. The FSIA's definitions section—§ 1603(a)—*does* extend the definition of "foreign state" to things that phrase does not obviously encompass, by declaring that the phrase foreign state "includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state." However, § 1603(a) does not list foreign officials as similarly "include[d]." The strong negative implication of this provision is that people or entities not listed in § 1603(a)—and not otherwise obviously encompassed within the meaning of "foreign state"—are not included within its definition.

To be sure, as petitioner argues, § 1603(a)'s list is not necessarily exhaustive. But natural persons are fundamentally different from "political subdivisions," "agencies," and "instrumentalities." If Congress intended the definition to "include" a category so utterly different from those it enumerated, one would expect Congress to say so explicitly. *See United States v. Williams,* 553 U.S. 285, ___, 128 S. Ct. 1830, 1839 (2008) ("*noscitur a socii* . . . counsels that a word is given more precise content by the neighboring words with which it is associated.")

Looking beyond § 1603 to the statute as a whole, the FSIA's text makes clear in various ways that the term "foreign state" does not "include" foreign officials. First, the FSIA repeatedly refers to "foreign state[s]" *and* their officials and employees acting in an official capacity. For example, § 1605(a)(5) provides an exception for noncommercial torts "occurring in the United States and caused by the tortious act or omission of that foreign state *or of any official or employee of that foreign state while acting within the scope of his office or employment*." (Emphasis added). If the term "foreign state" included foreign officials, plainly it would not have been necessary to follow the phrase "of that foreign state" with the phrase "or of any official or employee of that foreign state while acting within the scope of his office or employment."[5] Similarly, § 1605A(c)

[5] Section 1606 also provides that in situations where immunity does not apply "a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages." If foreign officials are included within the phrase "foreign state" (but are not "agenc[ies] or instrumentalit[ies] *(cont'd)*

provides a private right of action under certain circumstances against "[a] foreign state that is or was a state sponsor of terrorism . . . *and any official, employee or agent of that foreign state while acting within the scope of his or her office, employment or agency*. . . ." (Emphasis added). And § 1610(a)(5) allows execution of a judgment upon "any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state *or its employees* . . . ." (Emphasis added).

Second, § 1608(a) sets forth comprehensive provisions on the manner of service of process upon a "foreign state." Like § 1608(b), which as discussed above provides for service on "agencies or instrumentalities," § 1608(a) lacks any reference to the usual ways of serving process on an individual. Under § 1608, the principal ways of serving process on a "foreign state" are by "sending a copy of the summons and complaint . . . to the head of the ministry of foreign affairs of the foreign state" (§ 1608(a)(3)) or by sending the summons and complaint to the U.S. Secretary of State, who "shall transmit . . . the papers through diplomatic channels to the foreign state" (§ 1608(a)(4)). These are decidedly odd ways of serving process upon individual officials (especially former foreign officials living in the United States).

---

thereof"), then state-owned corporations would be liable for punitive damages while individual officials would not be. It seems unlikely that Congress would have drawn such a distinction.

Third, under petitioner's argument, "foreign state" apparently includes not just foreign officials but any person or entity that acts on behalf of the foreign state. Among other things, that would include corporations not majority-owned by the foreign state or not incorporated under the laws of the foreign state, contrary to the definition of "agency or instrumentality" in § 1603(b). It would also include individual U.S. citizens who at one point had acted for a foreign state, to whom application of § 1608(a)'s service-of-process provisions would be especially bizarre.

In contrast, petitioner points to nothing in the FSIA's text suggesting that "foreign state" includes officials. Nor does petitioner identify any awkward textual results if the term "foreign state" does not include officials. To the contrary, the FSIA as a whole is internally consistent and fully understandable when read to apply (as its plain text says) to foreign states and their agencies or instrumentalities, and not to individuals.

Petitioner essentially offers three arguments why Congress, in drafting the FSIA, must have thought the phrase foreign state "includes" foreign officials acting in their official capacities, even though it did not say so. Petitioner's broadest proposition is that, if the FSIA does not cover foreign officials, such officials might never be entitled to immunity. As noted in Part I, this proposition is simply incorrect. As the court below recognized, *see Yousuf*, 552 F.3d at 383-84, federal common law would continue to govern the immunities to which foreign officials might be entitled, as it did prior to enactment of the FSIA. *See also Ye v. Zemin*, 383

F.3d 620, 625 (7th Cir. 2004) (reaching a similar conclusion with respect to head-of-state immunity).

Petitioner also argues that Congress in enacting the FSIA would have assumed that the term "foreign state" naturally includes officials acting in their official capacities because suits against such officials are in effect suits against the state. Such an assumption seems unlikely for two reasons. First, the law of foreign official immunity was not well developed in U.S. courts prior to enactment of the FSIA. Relatively few cases raised the issue. *See Sovereign Immunity Decisions*, *supra*, at 1020 (listing only six such cases between 1952 and 1977). Although generally these cases concluded or assumed that some forms of official immunity existed, it was not at all clear that these immunities paralleled the immunity of the state itself, that they applied to all officials or official acts, or that they extended to former officials. If foreign official immunities of the breadth Samantar claims did not clearly exist as part of federal common law prior to the FSIA's enactment, there is no reason to think Congress adopted them in the FSIA *sub silentio*.

Moreover, state immunity and official immunity are *not* treated equivalently in the analogous situations with which Congress would have been most familiar. Under the Eleventh Amendment, States of the United States generally have sovereign immunity from suit. *Alden v. Maine*, 527 U.S. 706, 756 (1999). However, suits against State officials (for example under 42 U.S.C. § 1983), even for acts done officially, have historically not been treated as suits against the State itself under the Eleventh Amendment, so long as recovery is sought against

the individual personally and not against the State. *See, e.g.*, *Scheuer v. Rhodes*, 416 U.S. 232, 237-238 (1974). As this Court has explained:

> Nor does sovereign immunity bar all suits against state officers. . . . Even a suit for money damages may be prosecuted against a state officer in his individual capacity for unconstitutional or wrongful conduct fairly attributable to the officer himself, so long as the relief is sought not from the state treasury but from the officer personally.

Alden, 527 U.S. at 756-57. Rather, State officials are accorded different and more limited types of immunities, such as qualified immunity. *Scheuer*, 416 U.S. at 238-49. Thus it is highly unlikely that Congress assumed state immunity and official immunities were equivalent; rather, Congress legislated against a background in which they represented different types of immunities, with different contents and limitations.

Finally, petitioner contends that Congress wanted a comprehensive solution to all aspects of foreign sovereign immunity in passing the FSIA, and thus would have intended to cover officials as well as foreign states. This proposition is pure speculation.

Congress enacted the FSIA because it wanted to resolve problems that had arisen under the post-Tate Letter regime. *See Verlinden*, 461 U.S. at 486-88. But those problems related principally to foreign state immunity arising from foreign states' arguably commercial activities. As noted above, very few cases

of official immunities arose in the immediate pre-FSIA period.[6] State Department materials prepared immediately after the FSIA's enactment assumed that the FSIA did *not* cover foreign officials. *See Sovereign Immunity Decisions*, *supra*, at 1020 (stating that "the Foreign Sovereign Immunities Act does not deal with the immunity of individual officials, but only that of foreign states and their political subdivisions, agencies and instrumentalities"). The Department has continued to file suggestions of immunity in suits against foreign officials since 1976. *See, e.g.*, 1978 Dig. U.S. Prac. Int'l L. 641-43 (discussing suggestion of immunity for Charles, Prince of Wales, in *Kilroy v. Windsor*, No. C-78-291 (N.D. Ohio 1978)); *Saltany v. Reagan*, 702 F. Supp. 319, 320 (D.D.C. 1988), *aff'd in part and rev'd in part on other grounds*, 886 F.2d 438 (D.C. Cir. 1989) (suggestion of immunity for British Prime Minister Margaret Thatcher); *Ye*, 383 F.3d at 627 (suggestion of immunity for Chinese President Jiang Zemin).

Thus, the best conclusion from the FSIA's text, structure, and history is that Congress simply was not thinking of foreign officials in passing the FSIA. And if that is so, then the FSIA should be limited to what Congress had in mind—the immunity of foreign states—and the immunities of foreign officials should continue to be governed by federal common law.

---

[6] The FSIA was passed prior to *Filartiga v. Pena-Irala,* 630 F.2d 876 (2d Cir. 1980), which permitted human rights suits against foreign officials under the Alien Tort Statute, 28 U.S.C. § 1350.

III. READING THE FSIA TO DISPLACE THE COMMON LAW IMMUNITIES OF FOREIGN OFFICIALS WOULD RAISE A HOST OF PROBLEMS

Because the FSIA was not designed to cover foreign officials, extending it to do so would create a host of unintended problems—problems that could only be solved by creating a series of non-textual exceptions to § 1604. The simpler solution by far would be to hold that the FSIA does not apply to foreign officials and leave the scope of federal common law immunities potentially applicable to petitioner to be decided by the district court in the first instance.

A. Extending the FSIA to Foreign Officials Would Create a Conflict with the Torture Victim Protection Act

The Torture Victim Protection Act (TVPA), Pub. L. No. 102-256, 106 Stat. 73 (1992) (reproduced at 28 U.S.C. § 1350 note), provides a cause of action to aliens and U.S. citizens against "[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation" engages in torture or extrajudicial killing. 28 U.S.C. § 1350 note, § 2(a). The TVPA's plain language, and in particular its extension to claims for acts done under the "actual" authority of a foreign nation, make clear that Congress believed U.S. courts would have jurisdiction over foreign officials acting in their official capacities.

Extending the FSIA to foreign officials' official acts, as petitioner proposes, would deny U.S. courts jurisdiction for most such TVPA claims (except in

the unlikely event that one of the § 1605 exceptions applied). This conflict could be resolved only by dramatically narrowing the scope of the TVPA contrary to its plain language, creating additional non-textual exceptions to § 1604 of the FSIA, or finding that the TVPA modified the FSIA's jurisdictional limits *sub silentio*. None of these readings is plausible or necessary. There need be no conflict between the TVPA and the FSIA because the TVPA is limited to "individuals," while the FSIA applies only to "foreign states."

B. Extending the FSIA to Foreign Officials Might Immunize Them from Criminal Prosecutions Brought by the United States—a Result Not Intended by Congress

The text of § 1604 does not distinguish between civil and criminal jurisdiction. It provides that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter." 28 U.S.C. § 1604. In *Argentine Republic v. Amerada Hess Shipping Corp.,* 488 U.S. 428, 439 (1989), this Court held that § 1604 overrides other grants of subject matter jurisdiction so that "the FSIA provides the sole basis for obtaining jurisdiction over a foreign state in federal court." Nothing in *Amerada Hess* limits its reasoning to civil cases.

If a foreign official were deemed a "foreign state," then § 1604 might limit subject matter jurisdiction over criminal prosecutions under 18 U.S.C. § 3231 in the same way that it limits subject matter jurisdiction over alien tort suits under 28 U.S.C. § 1350. *See Amerada Hess*, 488 U.S. at 434-39. In

other words, no prosecution for violation of a federal criminal statute could be brought unless one of the exceptions to immunity found in the FSIA applied.

Congress has passed a number of statutes criminalizing offenses in which foreign officials may participate. For example, the Torture Convention Implementation Act, 18 U.S.C. §§ 2340-2340B, provides criminal penalties for torture (and conspiracy to commit torture) outside the United States whenever the offender is present in the United States, irrespective of the nationality of the victim or the alleged offender. *Id.* § 2340A. Since torture is defined to include only acts "committed by a person acting under the color of law," *id.* § 2340, defendants under the Act will often be foreign officials. The Genocide Accountability Act, 18 U.S.C. §§ 1091-93, criminalizes genocide and incitement to genocide if the alleged offender is brought into, or found in, the United States, even if that conduct occurred outside the United States, *see id.* § 1091(e), while the Child Soldiers Accountability Act, 18 U.S.C. § 2442, makes it a federal crime to recruit children under 15 to serve in "an armed force or group," *id.* § 2442(a)(1), if "the alleged offender is present in the United States, irrespective of the nationality of the alleged offender." *Id.* § 2442(c)(3). The Antiterrorism Act, 18 U.S.C. §§ 2331-2339, establishes criminal penalties for a broad range of terrorism-related offenses including providing material support to terrorists, providing material support to terrorist organizations, and financing terrorism. *See id.* §§ 2339A-2339C. And, of course, foreign officials may participate in more run-of-the-mill criminal offenses such as drug trafficking. *See,*

e.g., *United States v. Noriega,* 117 F.3d 1206 (11th Cir. 1997).

To date, U.S. courts have responded to claims of immunity from foreign officials facing prosecution by reasoning that the FSIA does not apply to such officials, that their immunity is therefore governed by common law, and that such immunity is waivable by the Executive Branch. In *Noriega*, the defendant claimed head-of-state immunity as the *de facto* leader of Panama.[7] "Because the FSIA addresses neither head-of-state immunity, nor foreign sovereign immunity in the criminal context," the Eleventh Circuit reasoned, the Act had not displaced the pre-existing law governing such immunity. *Id.* at 1212. "As a result, this court must look to the Executive Branch for direction on the propriety of Noriega's immunity claim." *Id.* The court concluded that "by pursuing Noriega's capture and this prosecution, the Executive Branch has manifested its clear sentiment that Noriega should be denied head-of-state immunity." *Id.*

In *United States v. Emmanuel*, No. 06-20758-CR, 2007 WL 2002452 (S.D. Fla. July 5, 2007), the defendant Charles Emmanuel (a.k.a. Chuckie Taylor) was indicted for violating the Torture Convention Implementation Act and raised the FSIA as a defense based on his position as a commander of the Antiterrorism Unit of the Liberian Armed Security Force. The district court rejected the claim of immunity on two grounds. First, it held the

---

[7] Head-of-state immunity is further discussed below in Part III.C.

defendant had not acted as a foreign sovereign despite having acted under color of state law. *See id.* at *14. Second, it held that the FSIA does not apply in criminal cases against foreign officials where a prosecution has been initiated by the Executive Branch. *See id.*

While the common law immunities of foreign officials have generally been understood to be waivable by the Executive Branch, at least in the context of criminal prosecutions, the immunity of foreign states under the FSIA is not. This Court's decision in *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), is not to the contrary. In *Altmann*, this Court observed that "nothing in our holding prevents the State Department from filing statements of interest suggesting that courts decline to exercise jurisdiction in particular cases implicating foreign sovereign immunity." *Id.* at 701. But the import of that observation is unclear. Responding to Justice Kennedy's objection that inviting case-by-case intervention by the Executive "does serious harm to the constitutional balance between the political branches," *id.* at 733 (Kennedy, J., dissenting),[8] the Court clarified that it was not holding "that executive intervention could or would trump considered application of the FSIA's more neutral principles . . . ." *Id.* at 702 n.23. Whatever the precise effect of this language from *Altmann*, it applies only

[8] Justice Kennedy noted that case-by-case intervention in cases governed by federal common law rather than by the FSIA did not raise the same concerns, since "[t]he law that governed before the FSIA's enactment allowed unilateral Executive authority in that regard." *Id.* at 734 (Kennedy, J., dissenting).

where the State Department suggests "that courts *decline* to exercise jurisdiction." *Id.* at 701 (emphasis added). A statement of interest suggesting that a court waive the immunity of a foreign state under the FSIA and *exercise* jurisdiction would appear to be ineffective under any reading of *Altmann*.

Not only does the text of the FSIA contain no exception allowing the Executive Branch to waive the immunity of a "foreign state," the exceptions to immunity that the FSIA does contain are a poor fit for criminal cases. Most of them are limited to cases where rights in property are at issue, *see, e.g.*, 28 U.S.C. § 1605(a)(3) (expropriation); *id.* § 1605(a)(4) (property in the United States), where money damages are sought, *see, e.g., id.* § 1605(a)(5) (noncommercial torts); *id.* § 1605A (terrorism), or where for other reasons a criminal prosecution would not be involved. *See, e.g., id.* § 1605(a)(6) (enforcement of arbitral agreements or awards); *id.* § 1605(b) (maritime liens); *id.* § 1607 (counterclaims). The only exceptions that might permit criminal prosecutions are § 1605(a)(1), which applies when a foreign state has waived its immunity, and § 1605(a)(2), which applies when "the action is based upon a commercial activity." But when the Executive Branch has made a decision to prosecute a foreign official under a criminal statute passed by Congress, whether the prosecution may proceed should not have to depend on whether the foreign state has waived immunity or whether it involves a "commercial activity."

It seems clear that Congress was not thinking about criminal prosecutions when it passed the FSIA. But that is because it was not thinking about

individuals. Rather Congress was concerned about the immunity of foreign states, which cannot be criminally prosecuted in U.S. courts.[9] If, contrary to Congress's intention, this Court extends the FSIA to cover foreign officials, the lower courts will face an unpalatable choice. They will either have to hold that foreign officials are immune from prosecution under acts of Congress that were plainly meant to reach them, or they will have to create a non-textual exception to the language of § 1604 for criminal prosecutions.

C. Extending the FSIA to Foreign Officials Would Abolish Head-of-State Immunity

Petitioner contends that the FSIA is a "comprehensive codification" of the immunities of both foreign states and foreign officials. Pet. Br. 16. If the FSIA applies comprehensively to foreign officials, there is no basis in the text for distinguishing former officials like Samantar from current officials, including sitting heads of state. At common law, and under customary international law, sitting heads of state have enjoyed absolute immunity from civil suits and criminal prosecutions. If this Court extends the FSIA to cover foreign officials, that immunity would be removed and

---

[9] Corporations can be criminally prosecuted in U.S. courts, and some corporations are agencies or instrumentalities of a foreign state under 28 U.S.C. § 1603(b). *Amici* are not aware of any pre-FSIA cases in which state-owned corporations were criminally prosecuted for violations of U.S. law, and most such prosecutions (*e.g.* for violations of antitrust or securities law) would today fall within the "commercial activities" exception. *Id.* § 1605(a)(2).

sitting heads of state would be subject to civil suits under the exceptions contained in the FSIA.

Between 1952 and 1976, issues of head of state immunity arose rarely in U.S. courts but were subject to the same procedures of executive suggestion as issues of foreign state immunity. *See Sovereign Immunity Decisions*, *supra*, 1020, 1053-54, 1077. In testimony on the proposed FSIA, Bruno Ristau, Chief of the Department of Justice's Office of Foreign Litigation, explained that the Act would not affect head of state immunity: "Now we are not talking, Congressman, in terms of permitting suit against the Chancellor of the Federal Republic [of Germany]. . . . That is an altogether different question." Immunities of Foreign States: Hearing on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the House Comm. on the Judiciary, 93d Cong., 1st Sess. 16 (1973) (testimony of Bruno Ristau).[10]

After passage of the FSIA, the Department of State continued to file suggestions of immunity in cases involving foreign heads of state. U.S. courts held that the FSIA did not govern head-of-state immunity, that pre-1976 procedures continued to apply, and that the Executive's determinations of immunity were conclusive.[11]

---

[10] Ristau's testimony was on a prior version of the bill, but as the House Report on the FSIA noted, the FSIA "is essentially the same bill as was introduced in 1973, except for technical improvements that have been made in the interim." H.R. Rep. No. 94-1487, at 10, 1976 U.S.C.A.A.N. 6604, 6608.

[11] *See, e.g.*, *Ye,* 383 F.3d at 625-27; *Noriega*, 117 F.3d at 1212; *First Am. Corp. v. Al-Nahyan,* 948 F. Supp. 1107, 1119 (D.D.C.

(cont'd)

At common law, the immunity of sitting heads of state from the jurisdiction of U.S. courts was generally deemed to be absolute.[12] This is consistent with customary international law as articulated most recently by the International Court of Justice (ICJ) in the *Arrest Warrant Case*. *See Case Concerning Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.),* 2002 I.C.J. 3 (Feb. 14, 2002). The ICJ observed that "in international law it is firmly established that . . . holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal." *Id.* at 20-21. On the facts of that

---

1996); *Lafontant v. Aristide*, 844 F. Supp. 128, 137 (E.D.N.Y. 1994); *Saltany*, 702 F. Supp. at 320. Courts have similarly held that the Executive's determinations of diplomatic status are conclusive for purposes of diplomatic immunity. *See, e.g.*, *Abdulaziz v. Metro. Dade County*, 741 F.2d 1328, 1331 (11th Cir.1984); *Carrera v. Carrera*, 174 F.2d 496, 497 (D.C. Cir. 1949). It is a separate question what weight courts should give to suggestions of immunity that do not depend on the Executive's recognition of an individual's status as a current head of state or diplomatic agent, and that question is not before this Court.

[12] *See, e.g.*, *Sovereign Immunity Decisions*, *supra*, at 1054 (excerpting State Department letter in *Kendall v. Kingdom of Saudi Arabia*, 65 Adm. 885 (S.D.N.Y. 1965)) ("King Faisal Bin Adull Aziz Al-Saud is the Head of State of The Kingdom of Saudi Arabia and as Head of State is not subject to the jurisdiction of any foreign Court without his consent."); *Lafontant*, 844 F. Supp. at 131-32 ("A head-of-state recognized by the United States government is absolutely immune from personal jurisdiction in United States courts unless that immunity has been waived by statute or by the foreign government recognized by the United States.").

case, the Court found that a sitting foreign minister was entitled to "full immunity" from the criminal jurisdiction of another state while in office. *Id.* at 22. Such immunity applied to acts performed in a private as well as a public capacity, *see id.*, and even to acts alleged to constitute war crimes and crimes against humanity. *See id.* at 24.

Extending the FSIA to foreign officials, by contrast, would make sitting heads of state prone to civil suits in U.S. courts on a variety of claims, including claims based on commercial activities, *see* 28 U.S.C. § 1605(a)(2), and noncommercial torts. *See id.* § 1605(a)(5). Abolishing the absolute immunity enjoyed by sitting heads of state would work a significant change in federal common law and place the United States in breach of customary international law. This Court has long held that "[t]he common law . . . ought not to be deemed to be repealed, unless the language of a statute be clear and explicit for this purpose." *Fairfax's Devisee v. Hunter's Lessee,* 11 U.S. (7 Cranch) 603, 623 (1812). Moreover, "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. The Schooner Charming Betsy,* 6 U.S. (2 Cranch) 64, 118 (1804). The language of the FSIA does not apply clearly enough to foreign officials to overcome these presumptions. To the contrary, as explained above in Part II, the plain language of the Act indicates that Congress did not intend to displace the common law immunities of foreign officials.

Petitioner might avoid this result by conceding that Congress did not intend to reach sitting heads of state, but that concession would be at odds with

his contention that the FSIA comprehensively codified common law immunities. In any event, since there is no textual basis for distinguishing heads of state from other foreign officials, petitioner's argument would require the courts to create a non-textual exception for foreign heads of state in order to avoid substantial changes in the common law and a violation of customary international law.

D. Extending the FSIA to Foreign Officials Would Abolish Any Common Law Immunities of Former Officials

The precise scope of the immunities enjoyed by former officials under federal common law and under international law is not clear and is not before this Court. To the extent such immunities exist, however, applying the FSIA to foreign officials would remove them. This Court has repeatedly held that immunity under the FSIA depends not on the defendant's status at the time of the conduct but on the defendant's status at the time of the suit. *See Altmann,* 541 U.S. at 696; *Dole Food*, 538 U.S. at 478-79. As Justice Breyer explained, concurring in *Altmann*, "the legal concept of sovereign immunity, as traditionally applied, is about a defendant's *status* at the time of suit, not about a defendant's *conduct* before the suit." 541 U.S. at 708 (Breyer, J., concurring).

In *Dole Food*, this Court unanimously rejected the argument that the FSIA should be administered like domestic official immunities "that are based on the status of an officer at the time of the conduct giving rise to the suit." 538 U.S. at 478-79. The Court explained:

> Foreign sovereign immunity, by contrast, is not meant to avoid chilling foreign states or their instrumentalities in the conduct of their business but to give foreign states and their instrumentalities some protection from the inconvenience of suit as a gesture of comity between the United States and other sovereigns.

Id. at 479. Petitioner asks this Court to adopt an argument that it expressly and unanimously rejected in *Dole Food*.

Contrary to petitioner's suggestion, *see* Pet. Br. 47-52, *Altmann* and *Dole Food* cannot be limited to suits against agencies and instrumentalities. *Dole Food* did not simply construe the word "is" in § 1603(b). It also noted "the longstanding principle that the jurisdiction of the Court depends upon the state of things at the time of the action brought," 538 U.S. at 478 (quotations omitted), a principle it deemed to apply to § 1603(a)'s definition of "foreign state" as incorporated in both 28 U.S.C. § 1332(a)(4) and § 1441(d).[13]

In describing the purpose of foreign sovereign immunity—and distinguishing the purpose of official immunities—*Dole Food* did not limit itself to the "agency or instrumentality" prong of § 1603(b) but

---

[13] The Court wrote: "The Dead Sea Companies do not dispute that the time suit is filed is determinative under § 1332(a)(4), which provides for suits between 'a foreign state, defined in section 1603(a) . . . , as plaintiff and citizens of a State or of different States.' It would be anomalous to read § 1441(d)'s words, 'foreign state as defined in section 1603(a),' differently." 538 U.S. at 478.

expressly referred to both "foreign states and their instrumentalities." 538 U.S. at 479. Finally, *Altmann*, which reaffirmed that "the principal purpose 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 in United States courts" but rather to reflect "current political realities and relationships," 541 U.S. at 696, involved a suit not just against an agency or instrumentality of a foreign state but against the foreign state itself. *See id.* at 681 (describing the defendants as "the Republic of Austria and the Austrian Gallery . . . , an instrumentality of the Republic").

In sum, this Court has consistently construed immunity under the FSIA to turn on the defendant's status at the time of suit. If foreign officials are deemed "foreign states" for the purposes of the Act, any immunity they might have—even for acts unquestionably within their official capacities—would vanish once they left office.

E. Extending the FSIA to Foreign Officials Acting in an Official Capacity Would Require This Court to Create a Non-Textual Definition of Official Acts

Recognizing that it would create absurd results if foreign officials were always considered foreign states, petitioner contends that foreign officials are covered by the FSIA only when they act in an official capacity. Pet. Br. 21. Because Congress did not expect the FSIA to be applied to foreign officials, it is

not surprising that the text of the Act contains no definition of this concept.[14]

The determination of whether a suit is based on an official act might turn on a variety of factors including the nature of the act, the lawfulness of the act under foreign and international law, the views of the foreign government, and the views of the Department of State. Those questions were not decided by the district court or the court of appeals and are not before this Court. For present purposes, the critical point is that applying the FSIA to foreign officials will do nothing to help the courts answer those questions.

Petitioner asks this Court to depart from the text of the FSIA not once but twice. He first asks this Court to apply the FSIA to foreign officials despite their omission from the text of the statute. He then asks this Court to create an exception for acts that were not performed in an official capacity, again without any basis in the text. And in the end, all petitioner hopes to achieve is to render foreign

---

[14] The FSIA mentions the concept of official capacity only in the context of attributing certain conduct of foreign officials and employees to the state. *See* 28 U.S.C. § 1605(a)(5) (exception for noncommercial torts "caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment"); *id.* § 1605A(a)(1) (exception for terrorism "engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency"). As discussed above in Part II, the separate treatment of foreign officials in these provisions supports the proposition that foreign officials are not "foreign states."

officials immune from suit under the FSIA to the same extent as under pre-existing common law. It would be much simpler to hold that the FSIA does not apply to foreign officials, leaving those immunities to be governed by federal common law.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Dated: January 26, 2010

MICHAEL D. RAMSEY
Counsel of Record
University of San Diego
School of Law
5998 Alcala Park
San Diego, CA 92110
619-260-4145

RICHARD M. ZUCKERMAN
ABIGAIL D. LAUER
Sonnenschein Nath &
Rosenthal LLP
1221 Ave. of the Americas
New York, NY 10020-1089
212-398-5213

WILLIAM S. DODGE
University of California,
Hastings College of the
Law
200 McAllister Street
San Francisco, CA 94102
415-565-4830

Attorneys for Amici Curiae

APPENDIX A

—

LIST OF *AMICI CURIÆ*

The following *amici curiae* join this brief. Positions and institutions are for identification only.

Stephen B. Burbank is the David Berger Professor for the Administration of Justice, University of Pennsylvania Law School.

Richard M. Buxbaum is the Jackson H. Ralston Professor of International Law, University of California at Berkeley, School of Law and formerly Editor-in-Chief of the American Journal of Comparative Law.

David D. Caron is the C. William Maxeiner Distinguished Professor of Law, University of California at Berkeley, School of Law and author (with Lee Caplan and Matti Pellonpää) of *The UNCITRAL Arbitration Rules: A Commentary* (Oxford Univ. Press 2006).

Kevin M. Clermont is the Robert D. Ziff Professor of Law, Cornell Law School and author (with Richard H. Field and Benjamin Kaplan) of *Civil Procedure: Materials for a Basic Course* (9th ed. Foundation Press 2007).

William S. Dodge is Professor of Law, University of California, Hastings College of the Law and author (with Detlev F. Vagts and Harold Hongju Koh) of *Transnational Business Problems* (4th ed. Foundation Press 2008).

Thomas H. Lee is Leitner Family Professor of Law and Director of International Studies, Fordham University School of Law.

Michael D. Ramsey is Professor of Law, University of San Diego School of Law and author of *The Constitution's Text in Foreign Affairs* (Harvard Univ. Press 2007).

Edward T. Swaine is Associate Professor of Law at the George Washington University Law School and formerly Counselor on International Law at the United States Department of State.