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

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QUESTION PRESENTED

The Foreign Sovereign Immunities Act, 28 U.S.C. §1602 *et seq.*, provides that a "foreign state" shall be immune from the jurisdiction of federal and state courts unless the case falls within one of the statutorily specified exceptions, 28 U.S.C. § 1604.

The question presented is:

Whether the Foreign Sovereign Immunities Act also immunizes from suit a former government official who is sued personally for money damages for acts committed in his official capacity.

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STATEMENT OF THE CASE

A. Legal Framework

1. The Constitution empowers Congress to "define and punish * * * Offenses against the Law of Nations." U.S. Const. Art. I, § 8, cl. 10.

2. The Foreign Sovereign Immunities Act (FSIA) provides generally that a "foreign state" is "immune from the jurisdiction" of federal and state courts, unless the claim falls within one of the statute's specified exceptions, 28 U.S.C. § 1604. Congress defined "foreign state" to "include[] a political subdivision of a foreign state or an agency or instrumentality of a foreign state." 28 U.S.C. § 1603(a). The FSIA defines "agency or instrumentality" to "mean[] any entity":

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

28 U.S.C. § 1603(b).[1]

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[1] Section 1332(c) of Title 28 addresses the citizenship status of corporations and certain legal representatives.

Section 1605 of the FSIA identifies "[g]eneral exceptions" to a state's immunity, such as waivers of immunity and claims arising from a foreign state's commercial activities. 28 U.S.C. §§ 1605(a)(1)-(3). Section 1605 also excepts damages claims filed against a foreign state that arise out of torts in the United States caused by the conduct of either the "foreign state" "or of any official or employee of that foreign state while acting within the scope of his office or employment." 28 U.S.C. § 1605(a)(5). Section 1605A separately denies immunity for damages claims arising from "torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources" for such acts when committed by "an official, employee, or agent" of a foreign state that has been designated a "state sponsor of terrorism." 28 U.S.C. §§ 1605A(a)(1), (a)(2)(A)(i) & (h)(6).

3. The Alien Tort Statute, 28 U.S.C. § 1350, grants federal courts 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." The statute creates jurisdiction for treaty-based or federal common law causes of action enforcing universally accepted and carefully defined "international law norm[s]" "admitting of a judicial remedy." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 715, 732 (2004). Two such norms are the international prohibitions on torture and on extrajudicial killing. *Id.* at 728; *Filartiga v. Pena-Irala*, 630 F.2d 876, 880 (2d Cir. 1980).

4. The Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (reproduced at 28 U.S.C. § 1350 note), creates a federal cause of

action for money damages against "[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation" commits torture or extrajudicial killings, *id.* § 2(a). The claimant, however, must first "exhaust[] adequate and available remedies in the place in which the conduct giving rise to the claim occurred." *Id.* § 2(b).

B. Factual And Procedural Background

1. The Republic of Somalia was formed in 1960 when the former colonies of British Somaliland (in the north) and Italian Somaliland (in the south) combined to form an independent nation. State Dep't, *Background Note: Somalia* (Oct. 2009) ("*State Dep't Note*"), http://www.state.gov/r/pa/ei/bgn/2863.htm. In October 1969, Major General Mohamed Siad Barre overthrew Somalia's democratic government, declared himself President, and held that position by military force until he was driven from power in January 1991. *Ibid.*; J.A. 60.

From January 1980 to December 1986, petitioner served as Barre's First Vice President and Minister of Defense, and from January 1987 until September 1990, he served as Prime Minister. During those times, the Barre regime used its military and national security forces to "violently suppress[] opposition movements and ethnic groups, particularly the Isaaq clan in the northern region." *State Dep't Note*, *supra*. The military forces committed countless atrocities against civilians, including the widespread and systematic use of torture and extrajudicial killing. J.A. 61-63. The Barre regime collapsed in 1991, and petitioner fled to Italy. Six years later, he moved to the United States and now resides in Fairfax, Virginia. J.A. 57, 64.

Since the Barre regime fell, Somalia has disintegrated as a unified nation and lacks a functioning central government. *State Dep't Note*, *supra*. In 1991, former British Somaliland withdrew from the Somali union and formed the independent Republic of Somaliland. *Ibid.* In the meantime, fourteen different transitional governments have attempted to establish themselves in the south(the latest in 2008). The United States has not recognized any government. *See State Dep't Note*, *supra;* State Dep't, *Background Briefing on U.S. Assistance to the Somalia Transitional Fed. Gov't* (June 26, 2009), www.state.gov/r/pa/prs/ps/2009/06a/125448.htm.

2. The plaintiffs are two United States citizens and three Somaliland residents who either were themselves the victims of petitioner's widespread use of torture or are representatives of the estates of his torture and murder victims.

Bashe Abdi Yousuf is a United States citizen. J.A. 58. He was a businessman in the city of Hargeisa (now in Somaliland) when, in November 1981, he was detained and tortured by National Security Service agents and military police. Yousuf was forced to lie on his stomach with his arms and legs tied behind his back, while a heavy rock was placed on his back. That particular form of torture was devised by the Barre regime and was called the "Mig," because the victim's body resembled the swept-back wings of the Air Force's Mig jets. Yousuf was also subjected to electrocution and deprived of food and water. J.A. 65-66. After being convicted of treason at a summary trial, Yousuf spent the next six years in solitary confinement in a windowless six-foot-by-six-foot cell, which was kept in total darkness

fifteen hours a day. When he was released in May 1989, he promptly fled Somalia. J.A 66-67.

Aziz Deria is a United States citizen who fled Somalia in 1983 after suffering political persecution. His family, including his father, Mohamed, and younger brother, Mustafa, remained in Hargeisa. In June 1988, soldiers kicked down the door of the Deria home and announced their intention to kill all the members of the Isaaq clan. The soldiers then dragged Mohamed from the house. Later that afternoon, the soldiers returned, informed the family that Mohamed had been killed, and then dragged Mustafa from the house. The family never saw either man again. J.A. 68-69.

On the night of July 15, 1985, Jane Doe, a secondary school student in Hargeisa, was arrested at her house, accused of being a "subversive leader," and seized. She was held for three months in a small cell with her arms tied behind her back and her leg chained to the floor. Like many Somali girls, Jane Doe had been subjected to a procedure in which much of her vagina was sewn closed. During her detention, a soldier cut her vaginal skin open with a fingernail file and then raped her. She was raped fourteen more times. J.A. 72-73. After a perfunctory trial, she was sentenced to life in prison. Outside the courthouse, she was beaten by soldiers so severely that she could not stand or walk for months. For the next three and a half years, she was imprisoned in solitary confinement in a tiny cell, with her hands bound at all times. After her release, she fled to a refugee camp in Ethiopia. J.A. 74.

In December 1984, soldiers abducted John Doe I and his brothers and took them to a military

installation. They were subjected to the "Mig" torture and held in a small cell with thirteen men. After a summary trial, they were sentenced to death. Doe I and his brothers were then immediately loaded onto military trucks to be driven to the execution site. A local commander allowed John Doe I to escape. As he fled, he heard the gunshots from his brothers' execution. J.A. 69-72.

In the Spring of 1988, John Doe II was serving as a non-commissioned officer in the Somali National Army when he and numerous other Isaaq officers were arrested and detained by the Army because of their clanship. One afternoon, Army soldiers lined up John Doe II and numerous other Isaaq officers along a riverbank and shot them. John Doe II was shot and fell backwards into the riverbed, unconscious but not fatally wounded. When he regained consciousness, he found himself covered by the dead bodies of other victims. He remained there until the mass execution was completed, and then fled. J.A. 74-75.

3. In November 2004, respondents filed suit against petitioner under the Torture Victim Protection Act (TVPA) and the Alien Tort Statute. J.A. 1. The complaint alleged that petitioner "was an active participant in the enforcement of this system of repression and ill-treatment against members of the Isaaq clan" and was responsible for the plaintiffs' torture and the killings of their family members. J.A. 80-81. The complaint seeks only monetary damages from petitioner. J.A. 99.

In January 2005, the district court stayed proceedings pending the State Department's response to Samantar's request for a statement of interest.

J.A. 5. Two years elapsed without any objection by the State Department to the litigation. J.A. 14-18.

In February 2005, a representative of a southern Somali transitional government wrote to the State Department requesting immunity for Samantar. J.A. 50-52. That letter did not claim that any of petitioner's actions were taken in his official capacity or pursuant to the official policies of the Somali government. *Ibid.* Separately, the Foreign Minister of Somaliland, where almost all of the acts of torture and murder occurred, also wrote to the Secretary of State, explaining that "the people and government of Somaliland are in full support of the lawsuit," and that there was no alternative avenue of redress because petitioner resides in the United States. J.A. 54. *See* State Dep't, *Treaties in Force* 244 (2009) (no extradition treaty).

In February 2007, a different southern transitional government requested that the State Department support petitioner's claim of immunity and asserted that the challenged actions "would have been taken by Mr. Samantar in his official capacities." J.A. 104. In June 2007, the Somaliland Foreign Minister repeated the request that the State Department allow the case to proceed to ensure that petitioner could be held accountable. J.A. 109-111. The letter explained that petitioner's actions were "in violation of Somali law and international law" and "do not concern official actions taken by the Somali government but rather serious human rights violations." J.A. 110.

The district court lifted its stay in 2007, and subsequently granted petitioner's motion to dismiss. Pet. App. 30a-63a. The court, held that the FSIA

applies to former government officials, *id.* at 48a-53a. The court also relied heavily on the two letters submitted by different transitional governments, reasoning that the transitional federal governments were "supported and recognized by the United States as the governing body in Somalia." *Id.* at 54a. The court then concluded that "the government of Somalia has ratified the actions of Samantar, thereby shielding his actions under the cloak of immunity provided by the FSIA." *Id.* at 57a; *see id.* at 61a. The court did not address any alternative grounds for immunity or dismissal. Pet. App. 26a.

4. The court of appeals reversed. Pet. App. 1a-27a. Focusing "on the language of the provision at issue," as well as its structure and purpose, *id.* at 17a, the Fourth Circuit stressed the absence of any "explicit mention of individuals or natural persons" as protected by the FSIA, *id.* at 14a, as well as Congress's narrow expansion of the term "foreign state" in terms "laden with corporate connotations," *id.* at 17a. The court further reasoned that "[c]onstruing 'agency or instrumentality' to refer to a political body or corporate entity, but not an individual, is also consistent with the overall statutory scheme of the FSIA." *Id.* at 19a.

The court of appeals separately held that the FSIA does not apply to former officials because the relevant provisions are written entirely in the present tense. Pet. App. 21a-25a (citing *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003)). The court then remanded the case, holding "only that Samantar is not entitled to sovereign immunity under the FSIA; whether he can successfully invoke an immunity doctrine arising under pre-FSIA common law is an

open question which Samantar is free to pursue." Pet. App. 26a.

Judge Duncan concurred, finding it unnecessary to decide whether the FSIA applies to former officials. Pet. App. 26a-27a.

SUMMARY OF ARGUMENT

This is a case about statutory construction in an area of law where deference to congressional line-drawing and to the judgments of the Political Branches is at its apex. The Foreign Sovereign Immunities Act (FSIA) rests on Congress's express constitutional authority to regulate the conduct of the Nation's foreign and diplomatic relations and to define the lower courts' jurisdiction in the manner that best serves the public good. As the plain text and decisions of this Court have repeated, the FSIA governs the sovereign immunity of foreign "states," and their subdivisions, agencies, instrumentalities, and majority-owned corporations.

Petitioner asks this Court to enlarge FSIA immunity beyond the foreign states and their sub-units to reach every former official of every subdivision and majority-owned corporation of every foreign state (extant or not). That the statutory text will not bear. Nowhere does the FSIA expressly address the immunity of individual officials, let alone former officials like petitioner. To the contrary, the few references the statute does make to government officials expressly distinguish them from the state itself.

Petitioner's notably brief discussion of the FSIA's actual language confesses the lack of textual support for his position. Instead, petitioner invites

the Court to read individual officials into the statute for three reasons, none of which is persuasive.

First, petitioner argues that the text does not foreclose equating officials with the state. But courts are not free to supplement an Act of Congress with whatever Congress did not forbid, particularly in an area so laden with foreign policy consequences. The question, instead, is what immunity the Political Branches granted. Here, they limited it to "states."

In any event, folding individual officials, past and present, into the FSIA would require more than just broadly construing the word "state." The Court would also have to divine out of generally silent or inapt statutory text a series of rules governing the nature and operation of individual immunity, such as defining the type and breadth of immunity, eligibility criteria, limitations and conditions on the immunity (such as scope of authority, *ultra vires* constraints), immunity triggers and termination points, and rules governing the immunity of corporate officials in government-owned corporations. Every one of those decisions is laden with diplomatic-relations consequences that should make the Court wary of stepping beyond where the statutory text treads.

Second, petitioner misapprehends the background rules against which the FSIA was enacted. International and domestic law have not woodenly equated the state and its officials, but instead have developed a collection of specialized immunities, each with different terms and tailored to different categories of foreign officials. Petitioner's position thus reduces to the contention that the FSIA secretly displaced all of those well-developed and distinctly contoured doctrines and, without so much

as a word in the text or history, shoehorned every sitting and former official into immunity rules designed for states *qua* states. That revolutionary approach to official immunity lacks any anchor in the FSIA's text, history, or purpose to the breaking point and, given the deference owed to the judgments of the Political Branches, should not be undertaken without direct congressional guidance.

Third, petitioner bemoans the foreign affairs consequences of not immunizing his responsibility for acts of torture and killings. But the decision in this case is not between immunity or no immunity for foreign officials. It is between force fitting individuals into the statutory immunity of states or instead relying on individual immunities long provided by treaties, statutes, and other customary sources of international law.

In any event, the Constitution assigns to the Political Branches the task of assessing the foreign and diplomatic consequences of immunity provisions. Here, the Political Branches have expressly determined that denying foreign officials who engage in torture and killing a safe haven within the United States best serves the United States military and foreign policy interests. Nothing in the FSIA overrules that judgment.

ARGUMENT

Although split by petitioner into two questions, this case presents only the narrow statutory question of whether the Foreign Sovereign Immunities Act cloaks *former* officials with immunity from personal liability for acts of torture committed under color of their official authority. Respondents seek only money damages against petitioner, a United States

resident who has not been a Somali official for almost two decades. The FSIA's plain text confines its coverage to the foreign "state" and forecloses granting petitioner immunity. Petitioner relies heavily on an assertedly sweeping background principle of immunity that does not exist and his personal concerns about the alleged foreign policy consequences of withholding statutory FSIA immunity. The Constitution, however, assigns the Political Branches "the entire control of international relations," *Fong Yue Ting v. United States*, 149 U.S. 698, 711 (1893), leaving this Court to enforce the textual lines and limitations Congress has drawn and to respect the Political Branches' judgments about foreign and diplomatic policy.[2]

THE FOREIGN SOVEREIGN IMMUNITIES ACT GOVERNS THE IMMUNITY ACCORDED TO FOREIGN STATES, NOT THE INDIVIDUAL IMMUNITY OF FORMER OFFICIALS

A. The FSIA's Text Limits Its Immunity To Foreign "States" As Distinct From Government Officials

In construing the FSIA, this Court begins, as it does in all cases of statutory construction, "with the

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[2] Because of those separation-of-powers concerns, courts should decide questions implicating foreign sovereign immunity narrowly and not anticipate the resolution of either statutory or international law questions that are neither squarely presented nor necessary to disposition of the case. *See Fiallo v. Bell*, 430 U.S. 787, 796 (1977) (adopting rule of "narrow" review where the decision "may implicate our relations with foreign powers").

text of the statute." *Permanent Mission of India v. City of New York*, 551 U.S. 193, 197 (2007). That is also where this Court's inquiry should end, because the statutory text repeatedly and explicitly distinguishes government officials from the foreign "state" that the FSIA invests with immunity. *See* Sandler, Vagts & Ristau, *Sovereign Immunity Decisions of the Dep't of State*, Digest of U.S. Practice in Int'l Law 1017, 1020 (1977) ("[T]he Foreign Sovereign Immunities Act does not deal with the immunity of individual officials, but only that of foreign states.").

1. Foreign "State" Means a Political Body

At every turn, the FSIA textually announces that its terms define when a foreign "state" does and does not enjoy immunity from suit within the United States. *See*, *e.g.*, 28 U.S.C. §§ 1602, 1603(a), (b) & (e), 1604, 1605(a)-(d), 1605A(a), 1606, 1607, 1608, 1609, 1610, 1611. Section 1604's conferral of sovereign immunity, in particular, refers only to foreign "state[s]." 28 U.S.C. § 1604.

The ordinary meaning of "state" is a "body politic exercising, through the medium of an organized government, independent sovereignty and control over all persons and things within its boundaries, capable of making war and peace and of entering into international relations with other communities of the globe." *Black's Law Dictionary* 1578 (4th ed. rev. 1968); *see Webster's Third New Int'l Dictionary* 2228 (1976) (defining "state" as a "body politic"). At the time Congress passed the FSIA, the *Restatement (Second) of the Foreign Relations Law of the United States* (1965) likewise defined a "state" as an "entity" – not an individual official – that has

capacities enjoyed only by a collective governmental body, such as having "a defined territory and population under the control of a government," and "engag[ing] in foreign relations." *Id.* § 4; *see Restatement (Third) of the Foreign Relations Law of the United States* § 201 (1987).

None of those definitions even arguably encompasses an individual ministerial official, let alone a former official. And that is no accident. When Congress wishes foreign-relations legislation to address both foreign states and their individual officials, it says so explicitly, rather than silently subsuming the official in broader definitions of the foreign state or governmental entity. In Section 1351 of Title 28, for example, Congress created federal-court jurisdiction over claims against "consuls," "vice consuls," and "members of a mission" separately and distinctly from its jurisdictional provision for "[a]ctions against foreign states," 28 U.S.C. § 1330. Similarly, in the Foreign Intelligence Surveillance Act, 50 U.S.C. § 1801(b), Congress defined the "agent[s] of a foreign power" as distinct from the "foreign government" or "foreign power" itself.[3]

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[3] *See also* Economic Espionage Act, 18 U.S.C. § 1839 ("'foreign instrumentality' means any agency, bureau, ministry, component, institution, association, or any legal, commercial, or business organization, corporation, firm, or entity that is substantially owned * * * or dominated by a foreign government," while "'foreign agent' means any officer, employee, proxy, servant, delegate, or representative of a foreign government"). Notably, Article III of the Constitution also separately addresses the constitutional status of suits

Congress thus knew exactly what it was doing by textually confining the FSIA's grant of sovereign immunity to foreign "state[s]," and this Court "will not override" the legislative choice reflected in that choice of language. *Whitfield v. United States*, 543 U.S. 209, 216-217 (2005). Indeed, to respondents' knowledge, *no* court has held that individual officials (let alone former ones) constitute "states" under the FSIA, and petitioner himself never claimed that he is the "state" until he appeared before this Court.

2. The FSIA's Text Distinguishes Officials

Reinforcing that natural reading, every time the FSIA refers to foreign government officials, it does so separately and in language that distinguishes them from the foreign "state" itself.

Section 1605(a)(5) of the FSIA excepts from the Act's general grant of immunity suits that seek tort damages from the "foreign state" for harms caused by the tortious conduct of "that foreign state *or* of *any official or employee of that foreign state* while acting within the scope of his office or employment." (Emphases added.) Reading foreign "state" to encompass the state's officials, as petitioner proposes (Br. 22-24), would render the separate statutory reference to officials and employees "superfluous," *Dole*, 538 U.S. at 477, impermissibly leaving it "with no job to do," *Doe v. Chao*, 540 U.S. 614, 623 (2004).

Petitioner's reading not only would cast statutory language overboard, but also would defy

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involving "Ambassadors, other public Ministers and Consuls," and suits involving "foreign States." U.S. Const. Art. III, § 2.

Congress's use of the disjunctive "or," which emphasizes that the individual official acting in his official capacity is *not*, in Congress's eye, the same as the foreign state. *See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 229 (1993) ("Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings.").

Similarly, the FSIA's exception for state sponsors of terrorism strips designated foreign states of immunity from money damages for personal injury and death claims arising from torture, extrajudicial killing, aircraft sabotage, hostage taking, or material support for terrorists "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." 28 U.S.C. §1605A(a)(1) (emphasis added). Petitioner's contention that the phrase "foreign state" already encompasses the actions of the state's officials would require the Court to erase three full lines of statutory text.

And the Court's eraser would have to do still more work in subsection 1605A(c), which creates a cause of action against the foreign "state" for harms arising from the terrorist acts "of that foreign state, *or* of an official, employee, or agent of that foreign state." (Emphasis added.) Again, the disjunctive "or" confounds petitioner's claim that his acts of torture and extrajudicial killing were automatically those of the state. Highlighting the point, subsection 1605A(c) authorizes two distinct causes of action – one against the foreign "state" and one against the foreign officials – textually stressing that foreign officials, even when they act within the scope of their

office, are seperate from the states they serve and are individually amenable to suit.

Relatedly, 28 U.S.C. § 1605A(c) provides that the "foreign state" shall be "vicariously liable for the acts of its officials, employees, or agents." Congress thus understood the distinction between lawsuits holding a "foreign state" itself liable and those holding it liable for actions taken by its officials. Petitioner's reading of the FSIA would collapse that distinction. The vicarious liability provision underscores, moreover, that Section 1605A's reference to actions of a foreign state's officials or employees is not a backwards acknowledgment of individual immunity as petitioner posits, but rather is a substantive rule for attributing liability, clarifying that the foreign state cannot avoid either the waiver of immunity or imposition of liability simply by disavowing responsibility for the actions of its officials or employees.

Finally, subsection 1605A(a) limits the abrogation of sovereign immunity to foreign "states" that the Secretary of State has designated to be "state sponsors of terrorism," and further directs that jurisdiction to hear a claim under Section 1605A depends on whether the "foreign state" is a state sponsor of terrorism, 28 U.S.C. § 1605A(a)(2)(A)(i)(I) ("The court shall hear a claim under this section if * * * the foreign state was designated as a state sponsor of terrorism."). If, as petitioner posits, the FSIA includes individual officials within its grant of sovereign immunity, then the cause of action separately created against those officials is a dead letter because individuals cannot be designated *state* sponsors of terrorism, and thus the jurisdictional bar

to claims against them would remain intact. *See* 28 U.S.C. § 1605A(h)(6) ("state sponsor of terrorism" refers to "a country").[4]

Petitioner's argument (Br. 42) that the reference to "official[s]" of "foreign state[s]" in Section 1605A, and its predecessor the now-repealed 28 U.S.C. § 1605(a)(7), supports his claim of immunity by "creating an exception to individual immunity" thus gets the statutory text exactly backwards.[5] Section 1605A expressly limits its "[n]o immunity" clause, 28 U.S.C. § 1605A(a), to "state sponsors of terrorism," which an individual cannot be.[6]

Petitioner also wrongly assumes (Br. 41-42) that Section 1605A's separate creation of a cause of action against individual officials, 28 U.S.C. § 1605A(c), embodied an implicit extinguishment of their individual immunity. But Congress dealt with abrogating state "immunity" in one discrete subsection and then created a "[p]rivate right of action" in a separate subsection, which shows that Congress dealt with the two matters separately and,

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[4] Only Cuba, Iran, Sudan, and Syria are currently designated state sponsors of terrorism. State Dep't, *Country Reports on Terrorism 2008* at 181-186 (April 2009), http://www.state.gov/documents/organization/122599.pdf.

[5] *See* 28 U.S.C. § 1605(a)(7), *repealed*, Pub. L. No. 110-181, Div. A., Title X, § 1083(b)(1)(A)(iii), 122 Stat. 341 (2008).

[6] Section 1605(a)(7) likewise expressly limited the withdrawal of immunity to a "foreign state" that was "designated as a state sponsor of terrorism." Anti-Terrorism and Effective Death Penalty Act, Pub. L. No. 104-132, Title II, § 221(a), 110 Stat. 1241 (1996).

tellingly, found no distinct need to abrogate the sovereign immunity of individual officials as it did the "foreign state."

3. The FSIA's Supplemental Definition of "Foreign State" Excludes Individuals

The FSIA provides that the phrase "foreign state" "includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state." 28 U.S.C. § 1603(a). Petitioner argues that Section 1603(a) invests him with immunity because (i) the verb "includes" invites expanding the word "state" to former officials, and (ii) a former official is an "agency or instrumentality." Neither argument works.

a. The definition is supplemental, not expansive

Petitioner argues (Br. 22) that all the textual indicia limiting the FSIA to "states" can be cast aside because Congress's use of the verb "includes" in Section 1603(a) invites the Court to sweep former officials into the FSIA. While petitioner is correct (Br. 22-23) that "includes" is sometimes used to introduce a non-exhaustive list, other times it is used only to ensure that a term encompasses a specific item that might otherwise be overlooked. *See Webster's Third, supra,* 1143 (second definition of "include" is "to take in, enfold, or comprise as a discrete or subordinate part or item of a larger aggregate, group, or principle"); *Frame v. Nehls*, 550 N.W.2d 739, 742 (Mich. 1996) ("[T]he word 'includes' can be used as a term of enlargement or of limitation,

and the word in and of itself is not determinative of how it is intended to be used.").

Congress, in fact, often uses "includes" in that more narrow, clarifying way to supplement the meaning of terminology, such as when it provided that "'State' includes the District of Columbia," 3 U.S.C. § 21(a), "'requirement' includes a prohibition," 15 U.S.C. § 7006(10), "'recreational purposes' includes hunting," 7 U.S.C. § 1997(a)(4), "'burial' includes inurnment," 10 U.S.C. § 985(c), "'consolidation' includes a merger," 12 U.S.C. § 36(b)(3), and "'tortious conduct' includes any tortious omission," 42 U.S.C. § 2651(g)(2).

That is also the way Congress used "includes" in the FSIA. The supplementary definition in Section 1603(b) simply extended immunity to carefully defined governmental and corporate entities that had previously – and problematically – been omitted from the term "state." *See Immunities of Foreign States: Hearing on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the H. Comm. on the Judiciary,* 93d Cong., 1st Sess. 39 (1973) (noting that the "traditional view" in foreign sovereign immunity law limited immunity to "the central government of a state," while "other subordinate entities, such as states of a federation, provinces, cantons, counties, and municipalities, are not sovereign and are not entitled to immunity"); *Republic of Austria v. Altmann*, 541 U.S. 677, 712 (2004) (Breyer, J., concurring) ("before the FSIA," "the term 'State' * * * result[ed] in excluding political subdivisions" and some "government corporations").

Furthermore, "a word is known by the company it keeps," *Ali v. Federal Bureau of Prisons*,

552 U.S. 214, 226 (2008), and thus Congress's targeted supplementation of foreign "state" to encompass juridical entities does not invite petitioner's sweeping expansion of foreign "state" to encompass every official or employee, past or present, at every level and subdivision of every foreign state, extant or not. It is telling that the FSIA nowhere focuses on the myriad issues and complications that arise when according immunity to persons, rather than juridical and governmental entities, such as establishing eligibility for immunity, choosing among varying types of individual immunity, varying levels of immunity based on position or function, defining scope of authority and *ultra vires* boundaries, establishing the duration and termination of immunity for transitioning personnel and for extinct states, and explicating what immunity principles apply to corporate officials, 28 U.S.C. § 1603(b). It has taken the Political Branches multiple treaties, conventions, and implementing legislation just to establish the terms of diplomatic and consular immunities. *See* p. 40 & n.12, *infra*. Packing all the details and contours of immunity doctrine for every past and present official at every level of every foreign state (and majority-owned corporation) into the inapposite, state-focused language of the FSIA would strain statutory construction to the breaking point and would launch this Court into a diplomatic-relations decisionmaking enterprise that the Constitution assigns to the Political Branches. "[I]t is the duty of the courts, in a matter so intimately associated with our foreign policy * * * not to enlarge an immunity to an extent which the government * * * has not seen fit to recognize." *Republic of Mexico v. Hoffman*, 324 U.S. 30, 38 (1945).

b. A former official is not an "agency or instrumentality"

Petitioner's alternative argument (Br. 45-47) that former officials qualify as an "agency or instrumentality" fares no better. Subsection 1603(b) defines "agency or instrumentality" as:

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

28 U.S.C. § 1603(b).

That definitional language excludes, rather than embraces, petitioner. First, Congress limited "agency or instrumentality" status to an "entity," a term that, in common parlance, stands in contrast to the word "person." *See*, *e.g.*, *Republic of the Philippines v. Pimentel*, 128 S. Ct. 2180, 2188 (2008) ("*persons or entities* must be joined in a suit") (emphasis added); *Medellin v. Texas*, 128 S. Ct. 1346, 1360 (2008) ("disputes involving particular *persons or entities*") (emphasis added).

Second, the phrase "separate legal person" in subsection 1603(b)(1) connotes a juridical entity, not a human being, and evidences that Congress had

"corporate formalities in mind." *Dole*, 538 U.S. at 474.[7] That formulation, moreover, stands in sharp contrast to Congress's use of "natural person" to refer to individuals elsewhere in the FSIA. 28 U.S.C. § 1610(f)(1)(B). Congress's use of the adjective "separate" further connotes an entity that exists and is created with some significant independence from the state, an inapt characterization of government officials.

The legislative history of the FSIA confirms that the phrase "separate legal person" was "intended to include a corporation, association, foundation, or any other entity which, under the law of the foreign state where it was created, can sue or be sued in its own name, contract in its own name, or hold property in its own name." H.R. Rep. No. 1487, 94th Cong., 2d Sess. 15 (1976). The specific examples of qualifying entities provided, moreover, were limited to legal entities, not natural persons. *See id.* at 16 (listing, *e.g.*, "a state trading corporation, a mining enterprise, * * * a central bank, * * * or a department or ministry which acts and is suable in its own name").

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[7] *See also 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); *First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 625 (1983) ("Separate legal personality has been described as an almost indispensable aspect of the public corporation."); *Enahoro v. Abubakar*, 408 F.3d 877, 881 (7th Cir. 2005) ("separate legal person" has "the ring of the familiar legal concept that corporations are persons," not "natural person[s]").

Third, to respondents' knowledge, there is no precedent in the United States Code (and petitioner cites none) for defining a natural person as "an organ of a foreign state or political subdivision thereof," 28 U.S.C. § 1603(b)(2). Still less can it be said that a foreign state holds an "ownership interest" in or owns "a majority of [the] shares" in one of its officials. *Ibid.*

Fourth, subsection 1603(b)(3) defines an "agency or instrumentality" as an entity that neither has the citizenship status of the purely juridical entities governed by 28 U.S.C. § 1332(c) and § 1332(e), nor was "created under the laws of any third country," 28 U.S.C. § 1603(b)(3). That phraseology, again, undermines petitioner's argument because human beings are not naturally described as "created" under the laws of a nation.

Fifth, even if a human being could conceivably satisfy one of the conditions in subsection 1603(b), that would not suffice because the FSIA conjunctively requires the "agency or instrumentality" to satisfy all three provisions. Given that conjunctive definition, the only way to equate the foreign official as "agent" with an FSIA "agency," as petitioner proposes (Br. 23), would be to perform the "radical surgery" of "substitute[ing] the word 'or' for the word 'and,'" which this Court cannot do. *Chisom v. Roemer*, 501 U.S. 380, 397 (1991).

Petitioner's argument that "agency" includes "agents" also disregards the longstanding distinction, for sovereign immunity purposes, between allowing a suit against an individual government "agent" for money damages, which does not implicate sovereign immunity, and allowing suit against an "agency,"

which does enjoy sovereign immunity. *See FDIC v. Meyer*, 510 U.S. 471, 484 (1994) (*Bivens* damages suits can be brought against "federal *agents*, but [not] federal *agencies*") (emphasis in original).

Finally, the definition of "agency or instrumentality" is repeatedly phrased in the present tense. Thus, even if through some procrustean strain a *current* official were deemed to be an "agency or instrumentality," there is no textual basis for deeming someone who has been out of office for more than a decade to be an agency or instrumentality of a foreign state – especially when, as here, the foreign state itself no longer exists. *See Dole*, 538 U.S. at 478 ("[B]ecause it is expressed in the present tense, [Section 1603(b)(2)] requires that instrumentality status be determined at the time suit is filed.").

B. The Structure Of The FSIA Excludes Former Officials

Just as statutory construction begins with the FSIA's text, "it ends there as well," because the Act's terms are clear in their scope. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999). In any event, the further the Court looks, the worse petitioner's argument gets because the structure of the FSIA confirms that the Act's immunity applies to the foreign state itself, but not to individual officials. *Saudi Arabia v. Nelson*, 507 U.S. 349, 357 (1993) (analyzing FSIA provision in "context").

With respect to petitioner's claim that he is an "agency or instrumentality," the FSIA provision governing service of process on such entities, 28 U.S.C. §1608, speaks exclusively in terms relevant to serving governments, corporations, and business

entities, not individuals. *Compare* 28 U.S.C. §1608(b)(2) (service "by delivery of a copy of the summons and complaint either 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") (emphasis added), *with* Fed. R. Civ. Proc. 4(h)(1)(B) (similar for service on domestic and foreign corporations).

With respect to petitioner's contention that he is the "state," the provisions governing service on the foreign state itself similarly offer an unwieldy and abnormal means of serving an individual defendant, especially a former official like petitioner, who is present in the United States. Section 1608 authorizes service pursuant to an "applicable international convention on service of judicial documents," 28 U.S.C. § 1608(a)(2); service on "the head of the ministry of foreign affairs" of the foreign state, 28 U.S.C. § 1608(a)(3); and service on the United States Secretary of State, 28 U.S.C. § 1608(a)(4). Federal Rule of Civil Procedure 4's well-established procedures for service on individuals are noticeably absent.

Furthermore, if foreign officials were treated as "foreign states," individuals would become personally liable in suits for their state's commercial transactions under 28 U.S.C. §1605(a)(2), and their personal property could be used to satisfy terrorism-related judgments against the foreign state itself, *see* 28 U.S.C. § 1610(g)(1).[8] "It is difficult to believe that

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[8] In addition, deeming individual officials to be agencies or instrumentalities would subject them to punitive damages

Congress intended * * * that the personal property of every official or employee of a state sponsor of terrorism would be available for execution to satisfy a terrorism-related judgment against the state." U.S. Amicus Br. at 7, *Federal Ins. Co. v. Kingdom of Saudi Arabia* (No. 08-640).

Finally, Congress's parallel grant of jurisdiction over "[a]ctions against foreign states," 28 U.S.C. § 1330, becomes constitutionally problematic if extended to individuals. Section 1330(b) provides that, when service of process is made under the FSIA's terms, "[p]ersonal jurisdiction over [the] foreign state shall exist as to every claim for relief." Section 1330 thus broadly equates service of process with personal jurisdiction in FSIA cases. That blanket establishment of personal jurisdiction may be fine for a foreign state, because it is dubious that it constitutes a "person" within the meaning of the Due Process Clause's requirement of minimum contacts. *See Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 619 (1992) (reserving the question); *cf. Breard v. Greene*, 523 U.S. 371, 378 (1998) (foreign state is not a "person" under 42 U.S.C. § 1983). But it is not an open question whether an individual haled into a United States court is protected by the Due Process Clause, *see United States v. Verdugo-Urquidez*, 494 U.S. 259, 270-271 (1990). Thus petitioner's reading of "state" as including individuals would raise a serious constitutional question about Congress's displacement of the Fifth Amendment's requirement

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and the attachment of their property on terms not applicable to the foreign state itself. *See* 28 U.S.C. §§ 1606, 1610.

of minimum contacts, *see International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Giving "state" its natural reading avoids that problem. *See Bartlett v. Strickland*, 129 S. Ct. 1231, 1247 (2009) (Court construes statutes to "avoid[] serious constitutional concerns").

C. Reading The FSIA And The Torture Victim Protection Act *In Pari Materia* Reinforces The FSIA's Limitation To States

1. "[I] it is, of course, the most rudimentary rule of statutory construction * * * that courts do not interpret statutes in isolation, but in the context of the *corpus juris* of which they are a part, including later-enacted statutes." *Branch v. Smith*, 538 U.S. 254, 281 (2003) (plurality op. of Scalia, J.). Limiting the FSIA to foreign "state[s]" gives coherence to Congress's related enactments, the Torture Victim Protection Act (TVPA), Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note), and the Alien Tort Statute. Together, those statutes create jurisdiction and authorize causes of action against individual foreign officials who engage in torture and extrajudicial killing under color of their official positions.

By its plain terms, the focal point of the TVPA cause of action is foreign government officials acting "under actual or apparent authority" of a "foreign nation" or "under color of law." 28 U.S.C. § 1350 note, § 2(a). Under U.S. law, that phraseology has long signified the availability of suits holding government officials personally liable for actions taken in their official capacity. *See*, *e.g.*, 42 U.S.C.

§ 1983; *Hafer v. Melo*, 502 U.S. 21, 25 (1991) ("Personal-capacity suits * * * seek to impose individual liability upon a government officer for actions taken under color of state law."). Such officials may be held individually liable in damages for "acts [taken] within their authority and necessary to fulfilling governmental responsibilities," where those actions violate paramount law. *Hafer*, 502 U.S. at 28-29.

Congress intended that same meaning for the TVPA. *See* S. Rep. No. 249, 102d Cong., 1st Sess. 8 (1991) ("Courts should look to principles of liability under U.S. civil rights law, in particular section 1983 of title 42 of the United States Code, in construing 'under color of law' as well as interpretations of 'actual or apparent authority' derived from agency theory in order to give the fullest coverage possible."); H.R. Rep. No. 367, Pt. I, 102d Cong., 1st Sess. 5 (1991) (similar).

Importantly, Congress's use of the term "individual" in the TVPA was deliberate and – directly contrary to petitioner's argument – was specifically designed to distinguish the individual officials amenable to suit under the TVPA from the foreign "states" entitled to immunity under the FSIA.

> 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. Consequently, the TVPA is not meant to override the Foreign Sovereign Immunities Act (FSIA) of 1976, which renders foreign governments immune from suits in U.S. courts, except in certain instances.

S. Rep. No. 249, *supra*, at 7. Likewise, the House Report stressed that "[o]nly 'individuals,' not foreign states, can be sued under the bill." H.R. Rep. No. 367, *supra*, at 4. Thus, while petitioner sees the individual official and foreign state as one and the same, Congress legislated with the exact opposite viewpoint, emphasizing that the "foreign state" in the FSIA does *not* encompass its individual officials even when acting under color of official authority.

Even worse for petitioner, the legislative history emphasized that the traditional immunities provided by treaty to diplomats and consular officials, and the immunity customarily afforded to heads of state, would not "provide *former* officials with a defense to a lawsuit brought under this legislation." S. Rep. No. 249, *supra*, at 8 (emphasis added). Reading the FSIA to immunize the very individuals and conduct that Congress specifically targeted as outside the FSIA's protection would render the TVPA a hollow shell. This Court "cannot accept the novel proposition that th[e] same official authority" that triggers liability under the TVPA simultaneously "insulates [the defendant] from suit." *Hafer*, 502 U.S. at 28.

Rather than put the FSIA and TVPA at cross-purposes, "[t]he correct rule of interpretation is" that "divers statutes relate[d] to the same thing * * * ought all to be taken into consideration in construing any one of them," and when, as here, "it can be gathered from a subsequent statute *in pari materia*, what meaning the legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute." *United States v.*

Freeman, 44 U.S. (3 How.) 556, 564-565 (1845) (quoted in *Branch*, 538 U.S. at 281 (plurality op. of Scalia, J.)).

That rule of deference to the interrelation of legislation is most vital when, as here, the statutes work together to effectuate the foreign policy judgments of the Political Branches. While petitioner is understandably eager to empty the TVPA of force, Congress enacted the law:

- as an exercise of its constitutional authority to "punish * * * Offenses against the Law of Nations," U.S. Const. Art. I, § 8, cl. 10;
- to meet the United States obligations under the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, 1465 U.N.T.S. 85, S. Treaty Doc. 100-20 (1988), which authorizes the United States to provide redress against torturers within its territory, *id.* Arts. 5 & 14; S. Rep. No. 249, *supra*, at 3; H.R. Rep. No. 55, Pt. I, 101st Cong., 1st Sess. 2-3 (1989);
- to protect members of the United States military and prisoners of war, 137 Cong. Rec. S1378-1379 (daily ed. Jan. 31, 1991) (Sen. Specter); and
- to ensure that the United States shores would not become a "safe haven" for torturers, S. Rep. No. 249, *supra*, at 3.

The Court should not interpret the FSIA in a way that renders those sensitive and calibrated foreign policy judgments for naught.

Indeed, the call for deference to the textual lines Congress has drawn is redoubled here, because

the Constitution tasks Congress not just with defining the law of nations, but also with establishing the jurisdiction of the lower federal courts "in the exact degree and character which to Congress may seem proper for the public good." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 433 (1989).

2. The district court relied upon a single statement in the legislative history of the TVPA that, "[t]o avoid liability by invoking the FSIA, a former official would have to prove an agency relationship to a state, which would require that the state 'admit some knowledge or authorization of relevant acts.' 28 U.S.C. 1603(b)." Pet. App. 57a. But that is of no help to petitioner.

First, because of the wholesale national destruction wreaked by petitioner and his colleagues, no foreign state even exists in the former Somalia, let alone has admitted knowledge or authorization of petitioner's acts. The Somaliland government (which controls the area where most of the actions at issue occurred) supports the litigation. Pet. App. 54a, 110a. The current (unrecognized) transitional government has made no objection to the litigation. And the earlier letters from different, now-collapsed, transitional governments never asserted *any* authorization of petitioner's actions, J.A. 50-52, and only one even claimed that petitioner committed the acts "in his official capacities" – that is, under color of law, J.A. 104. Neither has the Executive Branch objected to the litigation. *See generally National City Bank v. Republic of China*, 348 U.S. 356, 360 (1955) (according "significant weight" to State

Department's "failure or refusal to suggest such immunity").

Second, and in any event, the "admit or authorize" language quoted by the district court exists nowhere in the FSIA or even in the United States Code. Only the words enacted into law count. *See Heintz v. Jenkins*, 514 U.S. 291, 298 (1995).

Third, as the rest of the Report makes clear, the type of official authorization and approbation to which the statement might have referred would have required far more than that an official have acted in his official capacity. That is because the Report goes on to confirm the statute's core application to "torture and extrajudicial killings committed by officials both within and outside the scope of their authority." S. Rep. No. 249, *supra*, at 8.

D. International And Domestic Law Have Long Distinguished Between The Immunities Of Foreign Officials And Those Of The Foreign State

Confounded by the FSIA's straightforward text, petitioner gives short shrift to the Act's language (Br. 22-24) and devotes much of his brief to arguing (Br.24-45) that a suit against a former official should be treated like a suit against a "state" "since the state can only act through its officials" (Br. 22). Petitioner further contends (Br. 24-41) that background principles of international law throw a broad and undifferentiated cloak of immunity over all official acts of all former officials, and the FSIA must be construed to codify that (supposed) rule of immunity. That argument fails on two levels. First, petitioner's foundational assumption about the role of

background law in construing the FSIA is wrong in this case. Second, no such blanket rule of official immunity from suit exists.[9]

1. Background Principles Do Not Require Construing the FSIA to Immunize Individuals

Petitioner invokes (Br. 25, 40) the canon that statutes "ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804). But that starting point is all wrong.

First, because the text is clear, resort to petitioner's background canon is unnecessary. *See Connecticut Nat'l Bank v. Germain,* 503 U.S. 249, 254 (1992) ("When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete.").

Second, and in any event, petitioner's argument begs the very question presented in this case: whether Congress intended to address the immunity of individual officials in the FSIA at all, or whether it chose instead to leave those individuals with the distinct and specialized forms of immunity provided by treaties, statutes, or other customary sources of international law. The choice thus is not,

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[9] The court of appeals expressly reserved and remanded the question whether petitioner might enjoy an alternative form of immunity, Pet. App. 26a, and the questions presented in the petition are limited to the narrow question of statutory FSIA immunity, Pet. i, 13; *see* Pet. Br. i.

as petitioner's argument assumes, between FSIA immunity or no immunity. It is between shoehorning individuals into an immunity designed for "states" or leaving officials to the specialized doctrines that have long governed their immunity. Absolutely nothing in the "law of nations" compelled Congress to include foreign officials in the *statutory* FSIA protection it accorded to states, rather than to leave their immunities governed by other rules of law.[10]

Third, international law specifically permits the United States to hold those within its territory accountable, both criminally and civilly, for acts of torture, rape, and extra-judicial killing. *See* Convention Against Torture, *supra*, Arts. 4, 5 & 14. Both the United States and the former Somalia are parties to the Convention Against Torture. *See* United Nations Treaty Collection, *Status of Convention Against Torture* (2010), http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-9.en.pdf**.** Somalia thus long ago disavowed any governmental interest in or authority for petitioner to engage in torture. *See* Convention Against Torture, *supra*, Art. 2(2) ("No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.").

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[10] For the same reason, petitioner's repeated statements (Br. 21, 25) that the FSIA was intended to codify international law at the time of the statute's enactment say nothing about which aspects of international law Congress was codifying.

Fourth, parts of the FSIA – in particular its expropriation and "state sponsors of terrorism" provisions, 28 U.S.C. §§ 1605(a)(3), 1605A – are deliberate congressional departures from customary international law.[11] Indeed, petitioner himself cannot decide if the FSIA preserves or supersedes customary law. *Compare* Pet. Br. 18, *with* Pet. Br. 20. Congress undisputedly has the power to depart from international law. *See Medellin*, 128 S. Ct. at 1359 n.5. And when legislation does depart from background international law in at least some respects, the statutory text, rather than petitioner's canon, is the proper guide for determining the precise path that Congress forged. *See Pavelic & LeFlore v. Marvel Entertainment Grp.*, 493 U.S. 120, 125 (1989).

2. United States Law Has Long Distinguished Between the Immunities of Individual Officials and Those of the State

In any event, the background principle against which Congress enacted the FSIA is the longstanding tradition in domestic and international law that the individual and the state are not inherently the same for purposes of suit. Indeed, "the principle that an agent is liable for his own torts 'is an ancient one and

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[11] *Foreign Sovereign Immunities Act: Hearing on S. 825 Before the Subcomm. on Courts and Administrative Practice of the Sen. Judiciary Comm.*, 103d Cong., 2d Sess. 12-13 (1994) (Jamison Borek, Deputy Legal Adviser, State Dep't); J. Donoghue, *Taking the "Sovereign" Out of the Foreign Sovereign Immunities Act*, 17 Yale J. Int'l L. 489, 538 n.4 (1992).

applies even to certain acts of public officers or public instrumentalities.'" *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 687 (1949); *see Sloan Shipyards Corp. v. United States Shipping Board Emergency Fleet Corp.*, 258 U.S. 549, 567 ("[B]ut the agent, because he is agent, does not cease to be answerable for his acts."). That rule applies notwithstanding that "the sovereign can act only through agents." *Larson*, 337 U.S. at 688.

The critical factor in determining when a suit against an official can be equated with a suit against the state is not, as petitioner assumes (Pet. i; Pet. Br. 21-24), the capacity in which the official acted (whether "official" or not), but the capacity in which he is sued. "[T]he phrase 'acting in their official capacities' is best understood as a reference to the capacity in which the state officer is sued, not the capacity in which the officer inflicts the alleged injury." *Hafer*, 502 U.S. at 26.

That distinction is far "more than a mere pleading device": it determines when officials "come to court as individuals" and when they come purely as representatives of "the government that employs them." *Hafer*, 502 U.S. at 27. Suits seeking "the payment of damages by the individual defendant" do not trigger sovereign immunity because "[t]he [money] judgment sought will not require action by the sovereign or disturb the sovereign's property." *Larson*, 337 U.S. at 687-688; *see id.* at 688 (suit against official for "compensation for an alleged wrong" is not against the state, but suit seeking injunctive relief is against the state if it results in "compulsion against the sovereign, although nominally directed against the individual officer");

see also Alden v. Maine, 527 U.S. 706, 757 (1999) ("[A] suit for money damages may be prosecuted against a state officer in his individual capacity for unconstitutional or wrongful conduct * * * so long as the relief is sought not from the state treasury but from the officer personally.").

Thus, a suit for personal money damages from an official does not constitute a suit against the state because the damages will be awarded only if the officer's actions exceeded limits on his authority imposed by controlling law. The official's "actions beyond those limitations are considered individual and not sovereign actions." *Larson*, 337 U.S. at 689. By violating the law, "[t]he officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden." *Ibid.*

It is only when the form of relief sought operates against the state – such as suits seeking not money damages against the individual, but relief compelling or restraining the actions of the sovereign itself (*i.e.*, specific or injunctive relief) – that immunity is triggered. And even then, immunity attaches *not* because the individual official is the state, but because the *form of relief* sought by the plaintiff's claims would operate upon the sovereign and thus renders the case "in substance, a suit against the Government." *Ibid.* It is the operative "effect of the judgment" in "restrain[ing] the Government from acting, or compel[ling] it to act" that determines whether the state is the real party in interest and thus triggers sovereign immunity. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 n.11 (1983); *see Altmann*, 541 U.S. at

677, 709 (Breyer, J., concurring) (noting the distinction between the sovereign immunity of a state and the personal immunities of individuals).

For that reason, suits that seek to enforce contractual obligations to which the state would be a party or to adjudicate a sovereign's title to state-owned property are deemed to be suits against the sovereign, regardless of whether an official is the nominal defendant. *See Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 281-287 (1997) (suits that are the functional equivalent of quiet title actions barred by sovereign immunity); *Seminole Tribe v. Florida*, 517 U.S. 44, 74-75 (1996) (suit that would compel the creation of a compact to which the State would be a contracting party barred by sovereign immunity). By contrast, suits seeking money damages from former officials in their personal capacity are suits against the individual, not the state.

3. International Law Similarly Distinguishes Between the Individual and the State

Contrary to petitioner's premise (Br. 22-41), international law has long treated individual officials as distinct from the foreign state for immunity purposes, both by developing distinct immunity doctrines for foreign officials and by generally equating a suit against an official with a suit against the state only when the judgment would operate against the state itself.

a. Specialized individual immunities, not the state's own immunity, apply to officials

Rather than cloak officials in the state's own immunity, international law has developed and long

recognized "specialized immunities" to protect particular foreign officials from suit. *Restatement (Second), supra*, § 66, cmt. b. For example, customary international law has long accorded immunity to diplomats, individuals on official missions, and other foreign representatives. *See, e.g., Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 138-139 (1812). Those immunities are now governed by treaties and statutes.[12] In addition, customary international law recognizes other immunities, like "head of state" immunity for the sitting head of a Nation. *See, e.g.*, *id.* at 136; *Altmann*, 541 U.S. at 709 (Breyer, J., concurring).[13]

This Court has also developed the "act of state" doctrine that, although not an immunity from suit, enforces the separation of powers by limiting the federal courts' examination of actions taken "within its own territory by a foreign sovereign government,

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[12] *See* Vienna Convention on Diplomatic Relations, April 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 92 (diplomatic immunity); Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 691 (consular immunity); NATO Status of Forces Agreement, June 19, 1951, 4 U.S.T. 1792; 199 U.N.T.S. 67 (immunity of NATO military and civilian personnel); Diplomatic Relations Act, 22 U.S.C. § 254a *et seq.*; United Nations Headquarters Act, Pub. L. No. 80-357, 61 Stat. 767; International Organizations Immunities Act, 22 U.S.C. § 288 *et seq.; see also* Foreign Missions Act, 22 U.S.C. § 4301 *et seq*.

[13] That is of no help to petitioner, because the Somali Constitution designated the President, not the Prime Minister, the head of state. Constitution of the Somali Democratic Republic, Art. 79 (reproduced at Pltfs. Opp. To Motion to Dismiss, Exh. 2.).

extant and recognized by this country at the time of suit." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964). The doctrine focuses not on the identity of the defendant, but on "the relief sought or the defense interposed." *W. S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, 493 U.S. 400, 405 (1990). The act of state doctrine has been applied in resolving on the merits actions against individual foreign officials who were acting in their official capacity. *See Underhill v. Hernandez*, 168 U.S. 250, 254 (1897). "[T]he FSIA in no way affects application of the act of state doctrine." *Altmann*, 541 U.S. at 701.

The fact that international law has created specialized immunities for certain foreign officials that are separate and apart from the immunity accorded to the state itself takes the legs out from under petitioner's argument. International law, both generally and as implemented by the Political Branches, plainly does not and has not automatically equated the individual official and the state; it has developed separate and distinct immunity doctrines for each. *See Amerada Hess*, 488 U.S. at 436 n.4 (noting that, even if foreign state were immune under Alien Tort Statute, a foreign official could be sued). As the *Restatement* explains, "a distinction must be made between" the state and its officials. *Restatement (Second), supra*, cmt. b. That is exactly what Congress did in the FSIA.

b. International law focuses on the operation of judgments

For purposes of determining whether and when a suit against an official is, in the eyes of the law, a suit against the foreign state, international

law generally focuses on the effect of the judgment on the foreign state, not whether the official acted in his official capacity.

(i) The *Restatement (Second)*, which was in effect at the time the FSIA was enacted, was explicit that the immunity of a foreign state would extend to the official-capacity acts of a "public minister, official, or agent of the state" only "if the effect of exercising jurisdiction would be to enforce a rule of law against the state," *id.* § 66.[14] Thus, like domestic law, the *Restatement* hinged sovereign immunity not on whether the individual acted in his official capacity as petitioner posits, but the compulsive effect of the judgment on the state.

The *Restatement*'s accompanying illustrations confirmed the point, explaining that a suit seeking to enforce a contract for military supplies entered into by the government constitutes a suit against the sovereign notwithstanding the naming of the contracting official as the defendant. *Restatement (Second), supra* (Illustration 2). That is because, regardless of who the nominal defendant is, the judgment in that case would contractually obligate the state itself either to perform the contract or to pay contract damages from its treasury. *See also Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1097, 1100, 1103 (9th Cir. 1990) (suit against official for official-capacity actions deemed a suit against the foreign state because it sought damages for breach of a contractual letter of credit between the state and

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[14] The Second Circuit in *Matar v. Dichter*, 563 F.3d 9, 14 (2009), omitted that critical qualification.

the plaintiff); *El-Fadl v. Central Bank of Jordan*, 75 F.3d 668, 670-671 (D.C. Cir. 1996) (employment contract with government); *cf. Seminole Tribe, supra; Department of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 262-264 (1999) (sovereign immunity attaches to actions seeking to force the payment of contract damages from "funds in the Treasury").

Similar to domestic law, the *Restatement* contrasted such claims with those seeking to hold individual officials personally responsible for acts they took in an official capacity. For such claims, individual officials "do not have immunity from personal liability even for acts carried out in their official capacity." *Restatement (Second), supra*, cmt. b; *see also* Vienna Convention on Consular Relations, Art. 43, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 (consular officials subject to suit for "damage arising from an accident in the receiving State caused by a vehicle, vessel or aircraft" when performing consular functions). The modern *Restatement (Third)*, *supra*, is even worse for petitioner, omitting any provision for extending the immunity of the state to individual officials, *id.* §§ 461-466, and specifically providing that, "[e]ven if a suit against the sovereign is barred, there may be a remedy by suit against a responsible official." *Id.* § 907, cmt. c (1987).

(ii) The foreign court decisions on which petitioner relies largely mirror the *Restatement*'s framework. In so doing, they greatly undermine petitioner's assertion that there is such a well-established and sweeping doctrine of official immunity that the Court must graft officials onto the FSIA's text. In *Grunfeld v. United States*, 3 N.S.W.R. 36 (N.S.W. Sup. Ct. 1968), for example, the

Australian court afforded immunity to a United States official because the claim sought an injunction to enforce a contract to which the United States was a party, and thus "the interests or property of the State are to be the subject of adjudication," *id.* at ¶ 50**.** *See also Syquia v. Almeda Lopez* (Phil. Sup. Ct. 1949) (suit to enforce contractual lease agreements on which the United States was the lessee, and so the "real party in interest * * * is the United States of America"); *Holland v. Lampen-Wolfe*, 1 W.L.R. 1573 (U.K. H.L. 2000) (act of state doctrine; to activity by military official on U.S. military base is part of "the performance of traditional sovereign functions regarding a state's armed forces"); *Church of Scientology Case*, 65 I.L.R. 193 (Germany Fed. Sup. Ct. 1978) (suit seeking injunction against Scotland Yard investigative report barred; acts were "so intrinsic a part of state authority"); *Jaffe v. Miller*, 13 O.R.3d 745 (C.A. 1993) (immunity accorded for prosecution in the name of the State of Florida); *cf. Jones v. Ministry of Saudi Arabia*, 1 A.C. 270 (H.L. 2006) (while granting immunity to an official, court specifically notes that United States law under the TVPA and Alien Tort Statute might be different).

The domestic authorities that petitioner cites follow a similar track. *Underhill*, for example, is an act of state case that affirmed a judgment in the defendant's favor on the merits, not a jurisdiction-barring grant of immunity. 168 U.S. at 252, 254; *see Alfred Dunhill v. Republic of Cuba*, 425 U.S. 682, 705 n.18 (1976) (act of state doctrine and sovereign immunity may "point to different results in certain cases"). In addition, while this Court held in *Underhill* that "acts of legitimate warfare" cannot be

the basis for liability, *id.* at 253, the Court noted that caselaw dictated a different outcome in "[c]ases respecting arrests by military authority in the absence of the prevalence of war," or acts by "revolutionary bodies" "vex[ing] the commerce of the world on its common highway," *id.* at 254. Rather than help petitioner, *Underhill* thus confirms that actions in violation of the law of nations like torture offer individual officials no immunity from suit.[15] *See also Ricaud v. American Metal Co.,* 246 U.S. 304, 305-306 (1918) (act of state case; injunctive relief in dispute over title to property)*; Oetjen v. Central Leather Co.*, 246 U.S. 297, 303 (1918) (act of state doctrine applied to replevin action concerning "title to property"); *Heaney v. Government of Spain*, 445 F.2d 501, 504-505 (2d Cir. 1971) (suit against consular representative implicating the Vienna Convention; effort to enforce a contract; sovereign immunity applied because "the effect of exercising jurisdiction would be to enforce a rule of law against the state"); *Bradford v. Director Gen. of R.R.s of Mexico*, 278 S.W. 251, 251-252 (Tex. Civ. App. 1925) (effort to enforce a contract to which the government of Mexico was a party and to obtain contract damages from the Mexican treasury); *Oliner v. Canadian Pac. Ry. Co.*, 311 N.Y.S.2d 429, 434 (N.Y. App. Div. 1970)

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[15] *Underhill*'s sweeping description of the act of state doctrine, 168 U.S. at 252, was subsequently refined by this Court in *Sabbatino,* 376 U.S. 398. Of particular relevance here, the Court stressed that the act of state doctrine only applies to a foreign government "extant and recognized by this country at the time of suit." *Id.* at 428. There is no such government in the former Somalia.

(applying act of state doctrine; adjudicating Canadian government's ownership of property).[16]

At bottom, where petitioner desires a wide blanket of immunity, international and domestic law provide only patch squares of specialized immunities, and where petitioner desires a rule reflexively equating suits against officials with suits against the state, international and domestic law offer a far narrower focus on the nature of the judgment sought and its operation against the state. Given the FSIA's silence about immunizing individuals, the lack of any well-documented (let alone settled) international rule of "official acts" immunity, and the foreign-relations consequences of courts signaling that former officials will automatically be swaddled in absolute immunity for all of their official actions, the Court should wait "for legislative guidance before exercising innovative authority" in this area. *Sosa*, 542 U.S. at 726.

(iii) To be sure, the distinction drawn in immunity doctrines between the state and state officials reflected in the *Restatement* and

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[16] The Attorney General opinion on which petitioner relies (Br. 27) actually cuts the other way because no immunity was asserted by the United States. Instead, perhaps anticipating the act of state doctrine, the Attorney General expressed his view that the court would accord proper respect to the defendant's actions "in pursuance of his commission." 1 Op. Att'y Gen. 81 (1797). *Greenspan v. Crosbie*, No. 74 Civ. 4734, 1976 WL 841 (S.D.N.Y. Nov. 23, 1976), simply dismissed the individual defendants without elaboration based on an assertion of immunity by the United States, tellingly granting them an immunity that was *different* from that accorded the foreign state.

international law is not constitutionally compelled as it is under the Eleventh Amendment and the Constitution's separation of powers. Foreign sovereign immunity is the product of comity, not constitutional compulsion, *Altmann*, 541 U.S. at 696, and thus is subject to modification at the Political Branches' direction. But that simply makes petitioner more, not less, amenable to suit than his domestic counterparts, and makes it more, not less, appropriate to enforce the limitations on sovereign immunity reflected in the text of both the FSIA and the TVPA. Furthermore, in enacting the TVPA, both the House and Senate Reports stated that domestic-law principles would provide the proper framework for defining the amenability to suit of foreign officials for acts of torture and extrajudicial killing. *See* S. Rep. No. 249, *supra,* at 8; H.R. Rep. No. 367, Pt. I, *supra,* at 5.[17]

Most importantly, the central point of comity is to afford the foreign government the "same consequent immunity from suit" – not better immunity – as the sovereign "enjoys itself within its own dominions." *Long v. The Tampico & Progresso,* 16 F. 491, 495 (1883); *see Schooner Exchange*, 11 U.S. (7 Cranch) at 137 (international comity promotes the "perfect equality" of nations); *Restatement (Third),*

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[17] *See also Velasco v. Government of Indonesia*, 370 F.3d 392, 399 (4th Cir. 2004) (noting domestic and international law parallels); *Lyders v. Lund*, 32 F.2d 308, 309 (N.D. Cal. 1929) (whether foreign state immunity applies to official "should be similar to that used in determining whether or no[t] a suit against a state officer [is] an action against a state within the meaning of the Eleventh Amendment").

supra, § 907, cmt. c (liability of foreign officials may parallel liability of "a United States official on the ground that his action was unconstitutional or contrary to law or treaty"); Civil Liability for Acts of State Sponsored Terrorism of 1996, Pub. L. No. 104-208, Div. A, Title I, § 101(c), 110 Stat. 3009-172 (codified at 28 U.S.C. § 1605 note) (action permitted only where domestic liability is equivalent).

(iv) Finally, petitioner's argument (Br. 22) that "state" should be construed broadly because "there is a presumption *in favor* of preserving sovereign immunity" fails on two levels. First, the question here is not whether traditional forms of individual official immunity are preserved, but whether they were statutorily supplanted by the FSIA. The presumption says nothing about that. Second, statutory grants of foreign sovereign immunity should be construed circumspectly because the court does not lightly choose "to create a privileged class, free from liability for wrongs inflicted" or to put government agents "above the law." *Hopkins v. Clemson Agricultural College*, 221 U.S. 636, 643 (1911). That is particularly true when, as here, Congress designed a statute specifically to ensure that a "privileged class" would be held accountable in court. *See Butz v. Economou*, 438 U.S. 478, 501 (1978) (common law immunity principles cannot leave an Act of Congress "drained of meaning").

4. Former Officials Are Not the State

Petitioner's quest for FSIA immunity fails for yet another reason. His task is to prove that the FSIA equates *former*, officials with the "state," even when that foreign state no longer exists at the time of

suit and even when the former official has chosen to take up residence in this Country. In other words, petitioner asks this Court to hold, in the absence of any textual guidance, that federal law compels that he be granted absolute immunity from suit in his *home court*, against the laws of his chosen home country, based on his work nearly two decades ago for a foreign state that he helped drive to extinction – an immunity, moreover, that is *greater* than what U.S. law would afford to *sitting* (let alone former) U.S. officials in U.S. courts.

That makes no practical sense, and nothing in the FSIA, international law, or comity principles requires it. Throughout the FSIA, references to the foreign state and to its agencies or instrumentalities are expressed in the present tense. For example, an entity can be characterized as an "agency or instrumentality of a foreign state" only if it "*is* a separate legal person," "*is* an organ of a foreign state or political subdivision thereof" or "is owned by a foreign state," and "*is* neither a citizen of a State of the United States * * * nor created under the laws of any third country." 28 U.S.C. §1603(b) (emphases added); *see Dole,* 538 U.S. at 478 ("[T]he plain text" of Section 1603(b)(2), "because it is expressed in the present tense, requires that instrumentality status be determined at the time suit is filed."). Congress's use of the present "verb tense is significant in construing" the FSIA. *United States v. Wilson*, 503 U.S. 329, 333 (1992); *see Stafford v. Briggs*, 444 U.S. 527, 535-536 (1980) ("[L]anguage, cast by Congress in the present tense, can reasonably be read as describing the character of the defendant at the time of the suit.").

Tellingly, when Congress wanted the FSIA to apply to an entity's status at the time of the underlying events, rather than at the time of filing suit, it said so. *See* 28 U.S.C. § 1605A(a)(2)(A)(i)(I) (no immunity if "the foreign state was designated a state sponsor of terrorism at the time the act * * * occurred"). Congress's selective inclusion and exclusion of the present verb tense must be given full effect. *See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 63 n.4 (1987) ("The fact that Congress consciously chose the past tense to describe the Administrator's new authority to assess civil penalties suggests that Congress knows how to target past violations when it wants to do so."); *Barrett v. United States*, 423 U.S. 212, 217 (1976) ("Congress * * * used the present perfect tense elsewhere in the same section * * * in contrast to its use of the present tense" in the provision at issue.).[18]

That textual focus on the present status of the purported sovereign accords with the "longstanding principle" that "the jurisdiction of the Court depends upon the state of things at the time of the action brought." *Dole*, 538 U.S. at 478 (citing additional

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[18] Petitioner contends (Br. 48) that *Dole Food*'s focus on Congress's verb tense should be limited to the majority-ownership prong of 28 U.S.C. § 1603(b)(2). But petitioner nowhere explains how the Court could, with any faithfulness to statutory text, conclude that the same word, "is" should be given different meanings within the same statutory section. *See Mills Music, Inc. v. Snyder*, 469 U.S. 153, 164-165 (1985) ("It is logical to assume that the same word has the same meaning when it is twice used earlier in the same sentence.").

cases). In addition, it is a "classic principle" of international law that "sovereign immunity" is "about a defendant's *status* at the time of suit, not about a defendant's *conduct* before the suit." *Altmann*, 541 U.S. at 708 (Breyer, J., concurring) (citing, *inter alia*, *Ex-King Farouk of Egypt v. Christian Dior*, 84 Clunet 717, 24 I.L.R. 228, 229 (CA Paris 1957) (former king not entitled to head of state immunity)); *see also The Sapphire*, 78 U.S. 164, 168 (1870) ("[S]overeignty does not change, but merely the person or persons in whom it resides.").[19]

E. Torture And Extra-Judicial Killing Cannot Be Within The Lawful Scope Of An Official's Authority

Because "of the universal condemnation of torture in numerous international agreements, and the renunciation of torture as an instrument of official policy by virtually all of the nations of the world," *Filartiga*, 630 F.2d at 880, whatever immunity could be granted to officials for legitimate governmental acts, international law *denies* torturers immunization for their actions and precludes foreign states from cloaking such actions with official authorization. *See Larson*, 337 U.S. at 702. That leaves no immunity for the FSIA to enforce. "[T]he

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[19] Even were the FSIA applicable to former officials, this Court would have to remand for a determination of whether a failed former state with no recognized government constitutes a "foreign state" under the FSIA and thus whether there is any FSIA immunity for petitioner to share. *See* Pet. App. 11a n.3 (reserving question); *see also Ungar v. Palestine Liberation Org.*, 402 F.3d 274, 288 (1st Cir. 2005); *Restatement (Second), supra* § 4; *Restatement (Third), supra,* § 201.

torturer has become – like the pirate and slave trader before him – *hostis humani generis*, an enemy of all mankind." *Filartiga*, 630 F.2d at 890.[20]

Here, petitioner's actions violated Somali law, J.A. 110, remain "wholly unratified" by any current government (recognized or not) in the former Somalia, and transgressed "clear and unambiguous" universal prohibitions on torture and killing. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 819-820 (D.C. Cir. 1984) (Bork, J., concurring). Congress's enactment of the TVPA, with the clear textual expectation that individual officials would be held liable for official acts of torture and extra-judicial killing, likewise reflects the shared judgment of the Political Branches that such conduct cannot be

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[20] *See Prosecutor v. Anto Furundzijia*, 1998 WL 34310018, Case No. IT-95-17/1-T, ¶ 155 (Int'l Crim. Tribunal for the Former Yugoslavia Dec. 10, 1998) ("The fact that torture is prohibited by a peremptory norm of international law * * * serves to internationally delegitimise any legislative, administrative or judicial act authorising torture"); *Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte* (No. 3), [2000] 1. A. C. 147, 205 (U.K. House of Lords) (Lord Browne-Wilkinson) ("[T]he notion of continued immunity for ex-heads of state is inconsistent with the provisions of the Torture Convention."); *id.* at 261-262 (Lord Hutton) (acts of torture "cannot be regarded as functions of a head of state under international law when international law expressly prohibits torture as a measure which a state can employ in any circumstances whatsoever"); U.S. Amicus Br., *Filartiga*, *supra*, at 16 n.34 ("In exchanges between United States embassies and all foreign states with which the United States maintains relations, it has been the Department of State's general experience that no government has asserted a right to torture its own nationals.").

immunized from judicial inquiry by the "fiat" of foreign governments, *Scheuer v. Rhodes*, 416 U.S. 232, 248 (1974), because, as a matter of United States law, such acts cannot be within the scope of authority of any foreign official.[21] The FSIA should not be construed to grant an immunity that would confound the congressional judgment on which enactment of the TVPA was predicated.

F. Foreign Policy Judgments Are For The Political Branches

Petitioner protests at length (Br. 34-41) that excluding foreign officials from the FSIA will have adverse foreign policy and national security implications for the United States. That makes no sense. Non-FSIA sources of immunity remain intact. Those same doctrines served the United States' foreign-policy interests for the first two centuries of its existence without the cataclysmic consequences petitioner and his amici predict.

To be sure, those specialized immunities may offer no refuge in U.S. courts to petitioner, a U.S. resident and former official of a failed state, when sued by U.S. citizens under a U.S. law for acts of

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[21] *See also Enahoro v. Abubakar*, 408 F.3d 877, 893 (7th Cir. 2005) ("[O]fficials receive no immunity for acts that violate international *jus cogens* human rights norms (which by definition are not legally authorized acts)."); *Kadic v. Karadzic*, 70 F.3d 232, 250 (2d Cir. 1995) ("[W]e doubt that the acts of even a state official, taken in violation of a nation's fundamental law and wholly unratified by that nation's government, could properly be characterized as an act of state."); *Hilao v. Estate of Marcos*, 25 F.3d 1467, 1472 (9th Cir. 1994).

torture and murder. But that would be because the Political Branches made the judgment to permit such suits. The Constitution assigns them, and not former foreign officials like petitioner, the task of defining the law of nations and assessing the foreign-relations and diplomatic repercussions of Acts of Congress. *See Boos v. Barry*, 485 U.S. 312, 323-324 (1988) (Constitution charges Congress with deciding what measures are needed to protect diplomats and to promote diplomatic relations).

Here, the Political Branches have concluded that the law of nations supports holding former foreign officials who choose to come to the United States accountable – not immunized – for their acts of torture. 28 U.S.C. § 1350 note; S. Rep. No. 249, *supra*, at 7-8. While the TVPA was pending before Congress, the Reagan Administration expressed the United States' view that "torture, like hijacking, sabotage, hostage-taking, and attacks on internationally protected persons, is an offense of special international concern, and should have similarly broad, universal recognition as a crime against humanity, with appropriate jurisdictional consequences," including being held responsible "by any State in which the alleged offender is found." *Message from the President of the United States Transmitting the Convention Against Torture*, S. Treaty Doc. No. 100-20, at 9 (1988); *see Sosa*, 542 U.S. at 762 (Breyer, J., concurring) (international law reflects "procedural agreement that universal jurisdiction exists to prosecute" certain crimes, including torture).

Congress stressed, in particular, that enforcing liability would promote the United States' national

security, diplomatic, and international interests both by warning those who would torture or murder American soldiers, diplomats, and prisoners of war that they will be held accountable. *See* 137 Cong. Rec. S1378-1379 (daily ed. Jan. 31, 1991) (Sen. Specter). The TVPA also deters those who commit torture, rape, and murder from coming to the United States in the first place, given the foreign-relations problems their presence can cause. *See ibid.* (law will "serve notice * * * that the United States will not shelter human rights violators."); S. Rep. No. 249, *supra*, at 3 ("[T]orturers and death squads will no longer have a safe haven in the United States").

Petitioner's second-guessing of that judgment "belongs in the halls of Congress," *Powerex Corp. v. Reliant Energy Servs.,* 551 U.S. 224, 237 (2007), not here, because "[t]he judiciary is not well-positioned to shoulder primary responsibility for assessing the likelihood and importance of such diplomatic repercussions," *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999). Importantly, the Executive Branch concurs with respondents that the FSIA does not extend its immunity to foreign officials. U.S. Amicus Br., *Federal Ins. Co., supra.* "[C]ourts ought to be especially wary of overriding apparent statutory text supported by executive interpretation in favor of speculation" about a law's impact on the "vast external realm" of foreign affairs. *Republic of Iraq v. Beaty*, 129 S. Ct. 2183, 2191 (2009).[22]

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[22] Petitioner's concern about lawsuits against United States officials is misplaced because the laws to which he refers permitted suits against the "United States" (Pet. Br. 39), not its

While petitioner and his amici protest that permitting suit will chill foreign officials' decisionmaking, "'[f]oreign sovereign immunity' is not about 'chilling' or not chilling 'foreign states or their instrumentalities in the conduct of their business.'" *Altmann*, 541 U.S. at 709 (Breyer, J., concurring) (quoting *Dole*, 538 U.S. at 479). Instead, foreign sovereign immunity in the FSIA "reflects current political realities and relationships, and aims to give foreign states and their instrumentalities some *present* 'protection from the inconvenience of suit as a gesture of comity.'" *Altmann*, 541 U.S. at 696 (quoting *Dole*, 538 U.S. at 479).[23]

Furthermore, "actual reliance" on FSIA immunity by foreign officials in the course of their decisionmaking "could not possibly exist in fact." *Altmann*, 541 U.S. at 710 (Breyer, J., concurring). Surely petitioner cannot claim that he superintended the torture, rape, and killing of plaintiffs and their family members in specific reliance on FSIA immunity. Nor could reasonable reliance exist as a matter of law, because "foreign sovereign immunity 'reflects current political realities and relationships,' and its availability (or lack thereof) generally is not

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officials, and the litigation he cites involves *criminal* prosecutions by foreign governments, not civil litigation (Pet. Br. 39-40). Moreover, exhaustion requirements would prevent civil suits abroad for acts committed in nations that, like the United States, provide a fair and stable domestic judicial system. *See Sosa*, 542 U.S. at 733 & n.21; *id.* at 761 (Breyer, J., concurring).

[23] *See also In re Doe*, 860 F.2d 40 (2d Cir. 1988) (absolute immunity for heads of state ends upon leaving office).

something on which parties can rely in shaping their primary conduct." *Beaty*, 129 S. Ct. at 2194 (quoting *Altmann*, 541 U.S. at 696).

In any event, the TVPA and the Alien Tort Statute authorize the application of U.S. law only to those officials, like petitioner, who have chosen to come to the United States. Thus, at most, federal law would chill foreign officials not in the making of legitimate governmental decisions, but in making their vacation or residency plans. And that is precisely the deterrence that Congress wanted in the TVPA. *See, e.g.,* S. Rep. No. 249, *supra*, at 3.

Finally, petitioner professes concern (Br. 34) that the FSIA is the only thing standing between United States courts and a flood of litigation against foreign officials. The reality is otherwise. There has been no such flood in the two decades since the TVPA was enacted, nor could there be given the continued existence of longstanding specialized immunities for foreign officials. *See Matar v Dichter*, 563 F.3d 9, 13 (2d Cir. 2009) ("If (as may be) the FSIA does not apply to former foreign officials, it does not follow that these officials lack immunity."). And there are other substantial barriers to such suits, including (i) the requirement that the individual official establish sufficient contacts with the United States to permit personal jurisdiction, *Altmann*, 541 U.S. at 713 (Breyer, J., concurring); (ii) the express exhaustion requirement in the TVPA, 28 U.S.C. 1350 note, § 2(b), and perhaps in the Alien Tort Statute, *see Sosa*, 542 U.S. at 733 & n.21; (iii) the *forum non conveniens* doctrine; (iv) dismissals compelled by inability to join an indispensable party, *see Pimentel*, 128 S. Ct. at 2194; (v) the political question doctrine

and "case-specific deference to the political branches," *Sosa*, 542 U.S. at 733 n.21; *see Altmann*, 541 U.S. at 714 (Breyer, J., concurring); (vi) the act of state doctrine; (vii) the requirement that plaintiffs show their entitlement to relief, *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009); and (viii) the substantive limitations placed on causes of action, such as the TVPA's limitation to torture and extrajudicial killing, and the Alien Tort Statute's limitation to "a handful of" "universal" norms with such "definite content" that they give rise to a federal common law cause of action under *Sosa*, 542 U.S. at 714, 732. *See also* Anti-Defamation League Amicus Br. 10-24.

In short, it is up to the Political Branches to define the immunity (if any) accorded foreign officials by the law of nations and to assess the foreign policy consequences of allowing causes of actions against them. In this case, the Political Branches have expressly determined that holding torturers within the jurisdiction of U.S. courts accountable for actions taken under color of official authority is consistent with both international law and the United States' foreign-policy interests. Because "[s]uch decisions are wholly confided by our Constitution to the political departments of the government," the "Judiciary has neither aptitude, facilities nor responsibility" to re-define the law of nations as immunizing the very actions for which the Political Branches created liability and to graft a new body of individual immunity law onto FSIA text that will not support it. *Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948).

CONCLUSION

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

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January 20, 2009

ADDENDUM

TABLE OF CONTENTS

United States Constitution

Art. I, § 8, cl. 10.

The Congress shall have Power * * * [t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.

THE FOREIGN SOVEREIGN IMMUNITIES ACT

28 U.S.C. § 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

28 U.S.C. § 1603. Definitions

For purposes of this chapter—

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

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

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

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by

reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

28 U.S.C. § 1604. Immunity of a foreign state from jurisdiction

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

28 U.S.C. § 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United

States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; or

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made

pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

(7) Repealed. Pub. L. 110-181, Div. A, § 1083(b)(1)(A)(iii), Jan. 28, 2008, 122 Stat. 341

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: *Provided*, That—

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or

cargo of a foreign state was involved; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

(c) Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained. A decree against the foreign state may include costs of the suit and, if the decree is for a money judgment, interest as ordered by the court, except that the court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose. Such value shall be determined as of the time notice is served under subsection (b)(1). Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. Nothing shall preclude the plaintiff in any proper case from seeking relief in personam in the same action brought to enforce a maritime lien as provided in this section.

(d) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought to foreclose a preferred mortgage, as

defined in section 31301 of title 46. Such action shall be brought, heard, and determined in accordance with the provisions of chapter 313 of title 46 and in accordance with the principles of law and rules of practice of suits in rem, whenever it appears that had the vessel been privately owned and possessed a suit in rem might have been maintained.

(e), (f) Repealed. Pub.L. 110-181, Div. A, Title X, § 1083(b)(1)(B), Jan. 28, 2008, 122 Stat. 341

(g) Limitation on discovery.—

(1) In general.—(A) Subject to paragraph (2), if an action is filed that would otherwise be barred by section 1604, but for section 1605A, the court, upon request of the Attorney General, shall stay any request, demand, or order for discovery on the United States that the Attorney General certifies would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action, until such time as the Attorney General advises the court that such request, demand, or order will no longer so interfere.

(B) A stay under this paragraph shall be in effect during the 12-month period beginning on the date on which the court issues the order to stay discovery. The court shall renew the order to stay discovery for additional 12-month periods upon motion by the United States if the Attorney General certifies that discovery would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident

that gave rise to the cause of action.

(2) Sunset.—(A) Subject to subparagraph (B), no stay shall be granted or continued in effect under paragraph (1) after the date that is 10 years after the date on which the incident that gave rise to the cause of action occurred.

(B) After the period referred to in subparagraph (A), the court, upon request of the Attorney General, may stay any request, demand, or order for discovery on the United States that the court finds a substantial likelihood would—

(i) create a serious threat of death or serious bodily injury to any person;

(ii) adversely affect the ability of the United States to work in cooperation with foreign and international law enforcement agencies in investigating violations of United States law; or

(iii) obstruct the criminal case related to the incident that gave rise to the cause of action or undermine the potential for a conviction in such case.

(3) Evaluation of evidence.—The court's evaluation of any request for a stay under this subsection filed by the Attorney General shall be conducted ex parte and in camera.

(4) Bar on motions to dismiss.—A stay of discovery under this subsection shall constitute a bar to the granting of a motion to dismiss under

rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.

(5) Construction.—Nothing in this subsection shall prevent the United States from seeking protective orders or asserting privileges ordinarily available to the United States.

28 U.S.C. § 1605A. Terrorism exception to the jurisdictional immunity of a foreign state

(a) In general.—

(1) No immunity.—A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is 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.

(2) Claim heard.—The court shall hear a claim under this section if—

(A)(i)(I) the foreign state was designated as a state sponsor of terrorism at the time the act described in paragraph (1) occurred, or was so designated as a result of such act, and, subject to subclause (II), either remains so designated when the claim is filed under this section or was so designated within the 6-month period before the claim is filed under this section; or

(II) in the case of an action that is refiled under this section by reason of section 1083(c)(2)(A) of the National Defense Authorization Act for Fiscal

Year 2008 or is filed under this section by reason of section 1083(c)(3) of that Act, the foreign state was designated as a state sponsor of terrorism when the original action or the related action under section 1605(a)(7) (as in effect before the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) was filed;

(ii) the claimant or the victim was, at the time the act described in paragraph (1) occurred—

(I) a national of the United States;

(II) a member of the armed forces; or

(III) otherwise an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment; and

(iii) in a case in which the act occurred in the foreign state against which the claim has been brought, the claimant has afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration; or

(B) the act described in paragraph (1) is related to Case Number 1:00CV03110 (EGS) in the United States District Court for the District of Columbia.

(b) Limitations.—An action may be brought or maintained under this section if the action is commenced, or a related action was commenced under section 1605(a)(7) (before the date of the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) not later than the latter of—

(1) 10 years after April 24, 1996; or

(2) 10 years after the date on which the cause of action arose.

(c) Private right of action.—A foreign state that is or was a state sponsor of terrorism as described in subsection (a)(2)(A)(i), and any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, shall be liable to—

(1) a national of the United States,

(2) a member of the armed forces,

(3) an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment, or

(4) the legal representative of a person described in paragraph (1), (2), or (3),

for personal injury or death caused by acts described

in subsection (a) (1) of that foreign state, or of an official, employee, or agent of that foreign state, for which the courts of the United States may maintain jurisdiction under this section for money damages. In any such action, damages may include economic damages, solatium, pain and suffering, and punitive damages. In any such action, a foreign state shall be vicariously liable for the acts of its officials, employees, or agents.

(d) Additional damages.—After an action has been brought under subsection (c), actions may also be brought for reasonably foreseeable property loss, whether insured or uninsured, third party liability, and loss claims under life and property insurance policies, by reason of the same acts on which the action under subsection (c) is based.

(e) Special masters.—

(1) In general.—The courts of the United States may appoint special masters to hear damage claims brought under this section.

(2) Transfer of funds.—The Attorney General shall transfer, from funds available for the program under section 1404C of the Victims of Crime Act of 1984 (42 U.S.C. 10603c), to the Administrator of the United States district court in which any case is pending which has been brought or maintained under this section such funds as may be required to cover the costs of special masters appointed under paragraph (1). Any amount paid in compensation to any such special master shall constitute an item of court costs.

(f) Appeal.—In an action brought under this section, appeals from orders not conclusively ending the litigation may only be taken pursuant to section 1292(b) of this title.

(g) Property disposition.—

(1) In general.—In every action filed in a United States district court in which jurisdiction is alleged under this section, the filing of a notice of pending action pursuant to this section, to which is attached a copy of the complaint filed in the action, shall have the effect of establishing a lien of lis pendens upon any real property or tangible personal property that is—

(A) subject to attachment in aid of execution, or execution, under section 1610;

(B) located within that judicial district; and

(C) titled in the name of any defendant, or titled in the name of any entity controlled by any defendant if such notice contains a statement listing such controlled entity.

(2) Notice.—A notice of pending action pursuant to this section shall be filed by the clerk of the district court in the same manner as any pending action and shall be indexed by listing as defendants all named defendants and all entities listed as controlled by any defendant.

(3) Enforceability.—Liens established by reason

of this subsection shall be enforceable as provided in chapter 111 of this title.

(h) Definitions.—For purposes of this section—

(1) the term "aircraft sabotage" has the meaning given that term in Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation;

(2) the term "hostage taking" has the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages;

(3) the term "material support or resources" has the meaning given that term in section 2339A of title 18;

(4) the term "armed forces" has the meaning given that term in section 101 of title 10;

(5) the term "national of the United States" has the meaning given that term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22));

(6) the term "state sponsor of terrorism" means a country the government of which the Secretary of State has determined, for purposes of section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)), section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371), section 40 of the Arms Export Control Act (22 U.S.C. 2780), or any other provision of law, is a government that has repeatedly provided support for acts of international

terrorism; and

(7) the terms "torture" and "extrajudicial killing" have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991 (28 U.S.C. 1350 note).

28 U.S.C. § 1606. Extent of liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

28 U.S.C. § 1607. Counterclaims

In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim—

(a) for which a foreign state would not be entitled to immunity under section 1605 or 1605A of this chapter had such claim been brought in a separate action against the foreign state; or

(b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or

(c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.

28 U.S.C. § 1608. Service; time to answer; default

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the

attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either 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; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state—

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

(c) Service shall be deemed to have been made—

(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless

the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

28 U.S.C. § 1609. Immunity from attachment and execution of property of a foreign state

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

28 U.S.C. § 1610. Exceptions to the immunity from attachment or execution

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property—

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the

United States: *Provided*, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment, or

(6) the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement, or

(7) the judgment relates to a claim for which the foreign state is not immune under section 1605A, regardless of whether the property is or was involved with the act upon which the claim is based.

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the

agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a) (2), (3), or (5), 1605(b), or 1605A of this chapter, regardless of whether the property is or was involved in the act upon which the claim is based.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if—

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may

ultimately be entered against the foreign state, and not to obtain jurisdiction.

(e) The vessels of a foreign state shall not be immune from arrest in rem, interlocutory sale, and execution in actions brought to foreclose a preferred mortgage as provided in section 1605(d).

(f)(1)(A) Notwithstanding any other provision of law, including but not limited to section 208(f) of the Foreign Missions Act (22 U.S.C. 4308(f)), and except as provided in subparagraph (B), any property with respect to which financial transactions are prohibited or regulated pursuant to section 5(b) of the Trading with the Enemy Act (50 U.S.C. App. 5(b)), section 620(a) of the Foreign Assistance Act of 1961 (22 U.S.C. 2370(a)), sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701-1702), or any other proclamation, order, regulation, or license issued pursuant thereto, shall be subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state (including any agency or instrumentality or such state) claiming such property is not immune under section 1605(a)(7) (as in effect before the enactment of section 1605A) or section 1605A.

(B) Subparagraph (A) shall not apply if, at the time the property is expropriated or seized by the foreign state, the property has been held in title by a natural person or, if held in trust, has been held for the benefit of a natural person or persons.

(2)(A) At the request of any party in whose favor a

judgment has been issued with respect to a claim for which the foreign state is not immune under section 1605(a)(7) (as in effect before the enactment of section 1605A) or section 1605A, the Secretary of the Treasury and the Secretary of State should make every effort to fully, promptly, and effectively assist any judgment creditor or any court that has issued any such judgment in identifying, locating, and executing against the property of that foreign state or any agency or instrumentality of such state.

(B) In providing such assistance, the Secretaries—

(i) may provide such information to the court under seal; and

(ii) should make every effort to provide the information in a manner sufficient to allow the court to direct the United States Marshall's office to promptly and effectively execute against that property.

(3) Waiver.—The President may waive any provision of paragraph (1) in the interest of national security.

(g) Property in certain actions.—

(1) In general.—Subject to paragraph (3), the property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that

judgment as provided in this section, regardless of—

(A) the level of economic control over the property by the government of the foreign state;

(B) whether the profits of the property go to that government;

(C) the degree to which officials of that government manage the property or otherwise control its daily affairs;

(D) whether that government is the sole beneficiary in interest of the property; or

(E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

(2) United States sovereign immunity inapplicable.—Any property of a foreign state, or agency or instrumentality of a foreign state, to which paragraph (1) applies shall not be immune from attachment in aid of execution, or execution, upon a judgment entered under section 1605A because the property is regulated by the United States Government by reason of action taken against that foreign state under the Trading With the Enemy Act or the International Emergency Economic Powers Act.

(3) Third-party joint property holders.—Nothing in this subsection shall be construed to

supersede the authority of a court to prevent appropriately the impairment of an interest held by a person who is not liable in the action giving rise to a judgment in property subject to attachment in aid of execution, or execution, upon such judgment.

28 U.S.C. § 1611. Certain types of property immune from execution

(a) Notwithstanding the provisions of section 1610 of this chapter, the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States.

(b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if—

(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver; or

(2) the property is, or is intended to be, used in connection with a military activity and

(A) is of a military character, or

(B) is under the control of a military authority or defense agency.

(c) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution in an action brought under section 302 of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 to the extent that the property is a facility or installation used by an accredited diplomatic mission for official purposes.

28 U.S.C. § 1330. Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605-1607 of this title.

ALIEN TORT STATUTE

28 U.S.C. § 1350. Alien's action for tort

The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

TORTURE VICTIM PROTECTION ACT OF 1991, Pub. L. No. 102-256, 106 Stat. 73 (reproduced at 28 U.S.C. § 1350 note)

Section 1. Short Title.

This Act may be cited as the "Torture Victim Protection Act of 1991."

Sec. 2. Establishment of civil action.

(a) Liability.—An individual who, under actual or apparent authority, or color of law, of any foreign nation—

(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or

(2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

(b) Exhaustion of remedies.—A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.

(c) Statute of limitations.—No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose.

Sec. 3. Definitions.

(a) Extrajudicial killing.—For the purposes of this Act, the term "extrajudicial killing" means 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. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.

(b) Torture.—For the purposes of this Act—

(1) the term "torture" means any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind; and

(2) mental pain or suffering refers to prolonged mental harm caused by or resulting from—

(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

(B) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(C) the threat of imminent death; or

(D) the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality."