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"The purpose of sovereign immunity in modern international law is not to protect the sensitivities of 19th-century monarchs or the prerogatives of the 20th-century state."[1]

INTRODUCTION

The United States State Department made this declaration almost two decades ago as it advocated a statute to govern foreign sovereign immunity law.[2] The resulting statute, the Foreign Sovereign Immunities Act of 1976 ("FSIA"),[3] limits the prerogatives of the twentieth-century state by enumerating specific exceptions to a foreign state's right to immunity.[4] As a whole, the FSIA embodies a restrictive theory of immunity which mandates that "immunity would attach only to inherently governmental or 'public' acts of a state."[5]

Although the FSIA covers sovereign immunity, the statute is silent regarding head-of-state immunity, which is derived from sovereign immunity. Having originally also protected the sensitivities of nineteenth-century monarchs, sovereign immunity separated from head-of-state immunity as twentieth-century states developed identities distinct from their heads-of-state. Although heads-of-state are no longer equated with the state itself, head-of-state immunity and sovereign immunity share a common tradition and similar goals. In the United States courts, however, head-of-state immunity is still mired in practices that sovereign immunity has long since abandoned.

The United States courts have recently seen a pronounced increase in litigation involving heads-of-state.[6] These cases generally involve

1. *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Admin. Law, and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. 24, 27 (1976) [hereinafter *States Hearings*] (statement of Monroe Leigh, Legal Advisor, Dep't of State).

2. At that time, foreign sovereign immunity for states and heads-of-state were considered one and the same. *See infra* notes 40-43 and accompanying text.

3. 28 U.S.C. §§ 1330, 1602-1611 (1988).

4. *See infra* note 63 and accompanying text for a list of the specific exceptions to immunity.

5. Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095, 1099 (9th Cir. 1990). For a further discussion of restrictive immunity, see *infra* notes 44-50 and accompanying text.

6. *See* Joseph W. Dellapenna, Case Note, 88 Am. J. Int'l L. 528, 531 & nn.16 & 18 (1994) (citing, among others, Saltany v. Reagan, 886 F.2d 438 (D.C. Cir. 1989), *cert. denied*, 495 U.S. 932 (1990); Kline v. Kaneko, 535 N.Y.S.2d 303 (Sup. Ct. 1988), *aff'd mem., sub nom.* Kline v. Cordero De La Madrid, 546 N.Y.S.2d 506 (App. Div. 1989); Doe v. United States (*In re* Doe), 860 F.2d 40 (2d Cir. 1988)).

heads-of-state accused of violating the law in either private or commercial acts outside the scope of their official duties.[7] In the absence of clear statutory guidance, courts have deferred to State Department "suggestions" of immunity, or, in the absence of such determinations, solved the problem under existing statutory or case law.[8]

Two recent examples show the courts' adoption of divergent approaches to head-of-state immunity claims, which have led commentators to speculate that this immunity is currently "at best [an] amorphous legal doctrine whose very existence is not entirely settled in U.S. law and whose reach is almost completely uncertain."[9] *Lafontant v. Aristide*[10] was a suit in a New York district court by the widow of an imprisoned political opponent killed by Haitian soldiers allegedly acting on the orders of then-President of Haiti, Jean-Bertrande Aristide.[11] Aristide was living in exile in the United States at the time of the suit.[12] The State Department, intervening on behalf of Aristide, issued a letter to the court suggesting immunity.[13] The court found the State Department's suggestion of immunity binding and dismissed the case against Aristide.[14]

The court reasoned that the FSIA does not apply to head-of-state immunity because the statute was "crafted primarily to allow state-owned companies . . . to be sued in United States courts in connection

7. *See, e.g.*, Republic of the Phil. v. Marcos, 806 F.2d 344 (2d Cir. 1986) (involving an injunction against former president of the Philippines, Marcos, and his wife to prevent them from transferring or encumbering property in New York), *cert. dismissed, sub nom.* Ancor Holdings, N.V. v. Republic of the Phil., 480 U.S. 942 (1987); Alicog v. Kingdom of Saudi Arabia, No. CIV.A.H-93-4169, 1994 WL 447620 (S.D. Tex. Aug. 10, 1994) (involving a suit against the King of Saudi Arabia, among others, for false imprisonment); Kline v. Kaneko, 535 N.Y.S.2d 303 (Sup. Ct. 1988) (involving a suit against the wife of the President of Mexico for false imprisonment), *aff'd mem., sub nom.* Kline v. Cordero De La Madrid, 546 N.Y.S.2d 506 (App. Div. 1989).

8. *See infra* part II.

9. Dellapenna, *supra* note 6, at 531.

10. 844 F. Supp. 128 (E.D.N.Y. 1994).

11. *Aristide*, 844 F. Supp. at 130-31.

12. *Id.* at 130. During this time, the U.S. government continued to recognize Aristide as the legitimate leader of Haiti. *Id.* "[D]espite having been in exile for more than two years before the decision . . . [t]he court was bound by the continuing recognition by the executive branch of the defendant as the President of Haiti; the nonrecognition of the military government in Haiti precluded giving effect to any purported waiver of Aristide's immunity by that government." Dellapenna, *supra* note 6, at 528-29.

13. *Aristide*, 844 F. Supp. at 131. Suggesting immunity means the State Department has assessed the situation and has filed a determination favoring immunity in the court where the case is pending. *See* Kline v. Kaneko, 535 N.Y.S.2d 303, 304 (Sup. Ct.), *aff'd mem., sub nom.* Kline v. Cordero De La Madrid, 546 N.Y.S.2d 506 (App. Div. 1989); *see also infra* note 51 and accompanying text.

14. *Aristide*, 844 F. Supp. at 139. Even though the U.S. government still recognized Aristide as the legitimate head-of-state of Haiti and may have had a political interest in granting Aristide immunity, this fact does not alter the basic premise of this Note that heads-of-state should not be immunized for acts outside the scope of their authority.

with their commercial activities."[15] Therefore, the court held that common law head-of-state immunity and the State Department's procedure of issuing "suggestions" of immunity are still in effect.[16] The pre-FSIA approach to foreign sovereign immunity for states as well as heads-of-state required the courts to defer to executive determinations of immunity because the executive branch has exclusive authority in conducting foreign affairs.[17]

Hilao v. Marcos (In re *Estate of Marcos*)[18] similarly involved a claim against a foreign head-of-state who was exiled to the United States after having fallen from grace in his home country.[19] The families of people who had been tortured and executed in the Philippines allegedly under the authority of then-President of the Philippines, Ferdinand Marcos, brought suit against him in California.[20] Unlike the *Aristide* court, the *Marcos* court did not even specifically address head-of-state immunity, rather analyzing this case against a former head-of-state under the rubric of sovereign immunity.[21] In the absence of any State Department recommendation, the court asserted jurisdiction and held Marcos' estate liable for the human rights violations.[22]

The court's reasoning followed an earlier line of cases in which the Ninth Circuit had determined that acts of individual officials could be considered that of an "agency or instrumentality of a foreign state within the meaning of FSIA."[23] In a previous case, the Ninth Circuit had applied the FSIA term to both individuals and organizations acting in their official capacity as employees of a foreign sovereign because the statute did not explicitly prohibit their inclusion.[24] The *Marcos* court reasoned that because Marcos's alleged human rights violations were not official acts, they did not receive immunity under the FSIA.[25]

The *Aristide* court and the Ninth Circuit, therefore, have different perspectives regarding not only the extent to which immunity should be granted, but also the comprehensiveness of the FSIA. The *Aristide* court, determined that the FSIA applies only to sovereign immunity and that the pre-FSIA approach of absolute immunity at the behest of the executive branch still applies to head-of-state immunity. This

15. *Id.* at 137.
16. *Id.* at 139.
17. *Id.* at 132-33.
18. 25 F.3d 1467 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 934 (1995).
19. *Id.* at 1469.
20. *Id.*
21. *See id.* at 1468-72.
22. *Id.* at 1472. Although Marcos had died a few years previously, the court concluded the plaintiffs' claim survived his death. *Id.* at 1476.
23. *Id.* at 1470 (citation omitted).
24. Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095, 1100 (9th Cir. 1990).
25. *In re* Estate of Marcos, 25 F.3d at 1472.

method involving executive discretion, however, greatly politicizes grants of immunity. In addition, a coherent body of case law concerning head-of-state immunity cannot form through ad hoc determinations by both the executive and judicial branches. The Ninth Circuit, on the other hand, has determined that the FSIA applies to individuals and, consequently, heads-of-state. Although the Ninth Circuit is correct in restricting head-of-state immunity and State Department discretion, applying the FSIA as written to heads-of-state deviates from the plain language of the statute as well as congressional intent.

This Note argues that implementing a restrictive immunity for a foreign head-of-state's public acts through an amendment to the FSIA would resolve the current confusion regarding head-of-state immunity. The FSIA has established comprehensive rules governing sovereign immunity[26] and is the sole basis for obtaining jurisdiction in the United States courts over a foreign state in the specifically enumerated instances[27] where immunity is not granted.[28] The amendment this Note proposes would consist primarily of including a definitional provision for the term "heads-of-state." The established statutory framework of the FSIA would then encompass head-of-state immunity.[29]

Although this Note concludes that neither private nor commercial acts of a current or former head of state should receive immunity, the application of this immunity will primarily focus on the commercial context.[30] Consequently, the focus of the immunity's inquiry will shift from whether the head-of-state is in power to the nature of the disputed act.[31]

Part I of this Note surveys the history of head-of-state immunity. Although head-of-state immunity and sovereign immunity were historically the same, sovereign immunity diverged from head-of-state immunity after the enactment of the FSIA and became a clear, statutorily-defined phenomenon.

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26. Verlinden B.V. v. Central Bank of Nig., 461 U.S. 480, 495 n.22 (1983).

27. The FSIA does not grant immunity in specifically enumerated instances such as where the foreign actor is involved in commercial activities. See 28 U.S.C. §§ 1605(a)(1)-(4), (b) (1988).

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

29. For example, the federal courts would have sole jurisdiction over head-of-state immunity and the immunity would be subject to the exceptions enumerated in the FSIA.

30. Private acts generally mean either human rights violations or criminal acts. The application of head-of-state immunity to such acts has already been discussed in other articles. For examples of such articles, see Tom Lininger, *Overcoming Immunity Defenses to Human Rights Suits in U.S. Courts*, 7 Harv. Hum. Rts. J. 177 (1994) and Charles E. Hickey, Note, *The Dictator, Drugs and Diplomacy by Indictment: Head-of-State Immunity in* United States v. Noriega, 4 Conn. J. Int'l L. 729 (1989).

31. Currently, former heads-of-state usually do not receive immunity for either their public or private acts. *See infra* notes 85-89 and accompanying text.

Part II of this Note presents the case law reflecting the current split in authority indicated by the *Aristide*[32] and *Marcos*[33] decisions. Furthermore, it presents judicial and scholarly critiques of both approaches.

Part III of this Note suggests that the United States should implement restrictive immunity for heads-of-state similar to that governing sovereign immunity under the FSIA. Restrictive immunity will be applied in the increasingly international commercial context. This Note also argues that restrictive immunity should be implemented through an amendment to the FSIA that clearly includes heads-of-states as determined by a head-of-state list created in accordance with the statute. Finally, this part demonstrates through hypothetical examples the method by which the proposed system will operate in practice. This Note concludes that head-of-state immunity would be better served by statutory clarification than by the current common law approach.

I. The History and Doctrine of Head-of-State Immunity

Head-of-state immunity in the United States is a recent phenomenon. Although the specifics of this immunity are not yet established, courts and scholars have discussed the immunity's rationale and scope.

A. *The History of Head-of-State Immunity*

The history of foreign sovereign immunity for states and heads-of-state are linked in customary international law. Indeed, both immunities were considered one and the same before the enactment of the FSIA. Consequently, any discussion of head-of-state immunity necessarily implicates a basic understanding of sovereign state immunity and the FSIA.

1. Both Sovereign Immunity for States and Heads-of-State Originated in Customary International Law

Head-of-state immunity is a principle of customary international law,[34] requiring that a "head of state [be] immune from the jurisdiction of a foreign state's courts, at least as to authorized official acts taken while the ruler is in power."[35] Along with the doctrines of sov-

32. 844 F. Supp. 128 (E.D.N.Y. 1994).

33. 25 F.3d 1467 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 934 (1995).

34. United States v. Noriega, 746 F. Supp. 1506, 1519 (S.D. Fla. 1990); *see generally* Jerrold L. Mallory, Note, *Resolving The Confusion Over Head of State Immunity: The Defined Right of Kings*, 86 Colum. L. Rev. 169, 170 (1986) (tracing the historical development of head-of-state immunity).

35. *In re* Grand Jury Proceedings, Doe #700, 817 F.2d 1108, 1110 (4th Cir.) (citations omitted), *cert. denied*, 484 U.S. 890 (1987); *see also Noriega*, 746 F. Supp. at 1519 (stating that a head-of-state is not subject to the jurisdiction of foreign courts for "acts taken during the ruler's term of office" (citation omitted)).

ereign immunity,[36] diplomatic immunity,[37] and the Act of State doctrine,[38] the United States courts recognize head-of-state immunity as immunizing a foreign actor's actions.[39]

Historically, sovereign immunity for states and heads-of-state immunity were considered one and the same[40] because the head-of-state was considered to be the equivalent of the state.[41] Following the enactment of the FSIA, a substantive immunity for foreign heads-of-state separate from the doctrine of sovereign immunity came into existence.[42] Since the plain language of the FSIA did not cover sovereign immunity for heads-of-state, the courts fashioned a separate immunity to cover this concept. Currently, the doctrines are generally treated as separate.[43]

2. Pre-FSIA Executive "Suggestions" of Immunity

In another twentieth century development, the United States changed from applying an absolute theory of foreign sovereign immunity to a restrictive view of immunity.[44] Under an absolute theory of

36. Under sovereign immunity, "a foreign state is presumptively immune from the jurisdiction of United States courts . . . ." Saudi Arabia v. Nelson, 113 S.Ct. 1471, 1476 (1993) (discussing sovereign immunity as defined by the FSIA).

37. Diplomatic immunity grants immunity from lawsuits to diplomats in host countries. *See* Vienna Convention on Diplomatic Relations and Optional Protocol on Disputes, Apr. 18, 1961, art. 31, 23 U.S.T. 3227, 3240, 500 U.N.T.S. 95 [hereinafter Vienna Convention].

Although heads-of-state in the United States may invoke diplomatic immunity, they have traditionally preferred to rely on "suggestions" of immunity from the State Department. Peter E. Bass, Note, *Ex-Head of State Immunity: A Proposed Statutory Tool of Foreign Policy*, 97 Yale L. J. 299, 302 n.14 (1987). For an explanation of the State Department procedure involved in "suggestions" of immunity see *infra* note 51.

38. The Act of State Doctrine bars U.S. courts from reviewing the official acts of a foreign government. Restatement (Third) of the Foreign Relations Law of the United States § 443 (1987). Courts have decided head-of-state cases based on the Act of State Doctrine. *See* Guinto v. Marcos, 654 F. Supp. 276, 280 (S.D. Cal. 1986) (finding that the Act of State Doctrine precluded an action against ex-President Marcos who was acting in his official capacity as head-of-state). The Act of State Doctrine usually affords little protection to heads-of-state since the courts have limited its application. *See* Lininger, *supra* note 30, at 188-89 nn.75-79. The Act of State Doctrine and sovereign/head-of-state immunity have developed separately and remain distinct.

39. *See generally* Lininger, *supra* note 30, at 182, 185-86 (listing sovereign immunity, Act of State doctrine, head-of-state immunity, and diplomatic immunity).

40. *See* Mallory, *supra* note 34, at 170.

41. *See* Dellapenna, *supra* note 6, at 529-30. "Historically, . . . the head of a state was thought to be the state, a perspective summarized in the famous quip of King Louis XIV of France, 'L'etat, c'est moi.' " *Id.*

42. *Id.* at 529. "There was no precedent for a doctrine of substantive immunity for foreign heads of state (as distinct from the doctrine of foreign sovereign immunity generally) until after the enactment of the Foreign Sovereign Immunities Act in 1976." *Id.*

43. Republic of the Phil. v. Marcos, 665 F. Supp. 793, 797-98 (N.D. Cal. 1987).

44. *See Ex parte* Peru, 318 U.S. 578, 588 (1943).

The basis for the absolute theory of immunity in this country is also the earliest U.S. case involving a request for foreign immunity, The Schooner Exchange v. McFaddon,

immunity, foreign states are exempt from all suits in federal court.[45] Following a trend in international law recognizing the increased importance of international commerce,[46] the United States, through the "Tate Letter," instituted a policy favoring a restrictive theory of immunity.[47] The Tate Letter was a statement, issued by Jack Tate, the Acting Legal Advisor for the Secretary of State, limiting immunity to official non-commercial acts of a foreign sovereign.[48] Under this new theory, the United States granted immunity to a foreign sovereign only for disputed acts that were inherently governmental or public in nature.[49] The United States would no longer grant immunity for non-governmental or "private" activities, such as a state's commercial enterprises.[50]

Under the Tate Letter, which arguably is still the current practice for head-of-state immunity, the State Department issued "sugges-

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11 U.S. (7 Cranch) 116, 135-47 (1812) (Marshall, C.J.) (granting immunity from jurisdiction to a French military vessel forced by bad weather to dock in Philadelphia because the ship was the property of a foreign sovereign). *See* Verlinden B.V. v. Central Bank of Nig., 461 U.S. 480, 486 (1983).

The Court, however, specifically recognized the difference between a head-of-state's private acts and the authority of the state itself. *The Schooner Exchange*, 11 U.S. (7 Cranch) at 144-45. The opinion stated that "[w]ithout indicating any opinion on this question . . . there is a manifest distinction between the private property of the person who happens to be a prince, and that military force which supports the sovereign power, and maintains the dignity and the independence of a nation." *Id.*

45. Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095, 1099 (9th Cir. 1990).

46. Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 701-02 & n.15 (1976) (listing various countries who had adopted the restrictive theory of foreign immunity). The Supreme Court's reasoning included "the enormous increase in the extent to which foreign sovereigns had become involved in international trade [had] made essential 'a practice which will enable persons doing business with them to have their rights determined in the courts.' " *Id.* at 702 (citation omitted).

47. *See* Letter From Jack B. Tate, May 19, 1952, *reprinted in* 26 Dep't. St. Bull., June 23, 1952, at 984-85.

48. *Id.* The Tate Letter did not mention the personal immunity of foreign sovereigns. *Id.*

49. Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095, 1099 (9th Cir. 1990).

50. *Id.* Public acts that are granted immunity (*jure imperii*) are distinguishable from private acts without immunity (*jure gestionis*). Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 711 (1976) (app. 2). *Jure imperii* are limited to (1) internal administrative acts, (2) legislative acts, (3) acts concerning the armed forces, (4) acts concerning diplomatic activity, and (5) acts involving public loans. *See* Victory Transp., Inc. v. Comisaria Gen. de Abastecimientos y Transportes, 336 F.2d 354, 360 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965).

If a foreign state would be immune because the alleged violation is an act *de jure imperii*, naming and/or suing the head-of-state can not make the claim viable. *See* Saltany v. Reagan, 702 F. Supp. 319, 320 (D.D.C. 1988) (dismissing a suit against Prime Minister Thatcher for allowing U.S. planes to take off from British military bases in order to bomb Libya), *aff'd in part, rev'd on other grounds*, 886 F.2d 438 (D.C. Cir. 1989), *cert. denied*, 495 U.S. 932 (1990). Therefore, if the state may not receive immunity for an act, conversely neither should the head-of-state for a similar violation.

tions" of immunity,[51] for foreign immunity on a case-by-case basis.[52] The Supreme Court held that these State Department determinations were binding on the judiciary for claims involving foreign sovereign immunity.[53]

This method, however, was flawed because judicial reliance on State Department "suggestions" led to inconsistent, and often politically-motivated results.[54] First, the courts often reached contrary results in similar situations depending on whether or not the State Department had issued a suggestion.[55] The courts also expressed their concern that sovereign immunity decisions were frequently dic-

51. The court in Kline v. Kaneko, 535 N.Y.S.2d 303, 304 (Sup. Ct. 1988), *aff'd mem., sub nom.* Kline v. Cordero De La Madrid, 546 N.Y.S.2d 506 (App. Div. 1989), described the mechanics of issuing a suggestion of immunity:

> There is no prescribed statutory procedure for such filing. The process is typically initiated by a request to the Department of State (State Department) from a foreign government whose head of state or immediate family member has been sued in this country, that the United States file a Suggestion of Immunity in the appropriate court. After weighing the relevant factors and determining that immunity is appropriate, the Legal Advisor to the State Department forwards a letter request to the Department of Justice (Justice) that a Suggestion of Immunity be filed by the appropriate United States Attorney in the court where the case is pending.

Id. (citations omitted). With the weight that is given to "suggestions" of immunity, the term "suggestion" may be a misnomer.

52. *See, e.g.*, Republic of Mex. v. Hoffman, 324 U.S. 30, 32-35 (1945) (asserting jurisdiction over a steamship owned by the Republic of Mexico because "[i]n the absence of recognition of the claimed immunity by the political branch of the government, the courts may decide for themselves whether all the requisites of immunity exist."); *Ex parte* Peru, 318 U.S. 578, 589 (1943) (granting immunity based upon an executive branch determination to a steamship owned by the Republic of Peru).

53. *See Ex parte* Peru, 318 U.S. at 586. The Court reasoned that (1) the case involved the dignity and rights of a friendly sovereign state, (2) such claims are usually settled by the Executive Branch as a part of conducting foreign affairs, (3) the Executive Branch would be embarrassed if the courts assumed an "antagonistic jurisdiction," and (4) the national interest would be better served if issues of foreign affairs were settled through diplomatic negotiation rather than judicial compulsion. *Id.* at 587-89 (citation omitted); *see* Isbrandtsen Tankers, Inc. v. President of India, 446 F.2d 1198, 1201 (2d Cir.), *cert. denied*, 404 U.S. 985 (1971); Spacil v. Crowe, 489 F.2d 614, 617 (5th Cir. 1974); United States of Mex. v. Schmuck, 56 N.E.2d 577, 580 (N.Y. 1944).

54. Gerhard von Glahn, Law Among Nations 147 (6th ed. 1992).

55. *Id. Compare* Victory Transp., Inc. v. Comisaria Gen. de Abastecimientos y Transportes, 336 F.2d 354 (2d Cir. 1964) (denying immunity in the absence of an executive determination because the contract dispute for the carriage of grain was not a public act), *cert. denied*, 381 U.S. 934 (1965) *with* Isbrandtsen Tankers, Inc. v. President of India, 446 F.2d 1198, 1201 (2d Cir.) (granting immunity due to the presence of a State Department "suggestion" of immunity in a contract dispute for the carriage of grain because of "no alternative but to accept the recommendation of the State Department"), *cert denied*, 404 U.S. 985 (1971). As this example shows, executive determinations of sovereign immunity frequently lead to results which were inconsistent not only with each other but also with the restrictive theory of immunity as well. *See* Jet Line Servs., Inc. v. M/V Marsa El Hariga, 462 F. Supp. 1165, 1169 (D. Md. 1978) (citing to pre-FSIA cases inconsistent with the restrictive theory of immunity).

tated by foreign policy concerns rather than legal criteria.[56] Judicial hostility to pre-FSIA State Department "suggestions" was recounted by a post-FSIA case:

> Sovereign immunity is a stumbling block in the path of good neighborly relations between nations, it is a sour note in the symphony of international concord, it is a skeleton in the parliament of progress, it encourages government toward chicanery, deception and dishonesty. Sovereign immunity is a colossal effrontery, a brazen repudiation of international moral principles, it is a shameless fraud.[57]

Further, if the State Department declined to make a suggestion in a particular case, the court would be left to grapple with the complexities of granting immunity without any guidance.[58]

3. The Codification of Sovereign Immunity

During the 1970s, Congress also became concerned that the State Department "suggestion" approach was "leaving immunity decisions subject to diplomatic pressures rather than to the rule of law."[59] In 1976 Congress enacted the FSIA to govern sovereign immunity.[60] The FSIA codified as federal law the restrictive theory of foreign sovereign immunity,[61] and granted immunity from jurisdiction for foreign states subject to certain enumerated exceptions.[62] Sovereign immunity under the FSIA is not granted in instances where there is: (1) an express or implied waiver of immunity; (2) involvement in commercial activities; (3) a taking of property that is currently present in the United States; (4) an acquisition by gift or succession of property that is currently in the United States or (5) involvement in certain maritime activities.[63] The FSIA created jurisdiction in the federal courts for all cases involving a foreign sovereign if immunity was not granted.[64]

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56. *See* Jet Line Servs., 462 F. Supp. at 1169.
57. *Id.* at n.2 (citations omitted).
58. *See id.*
59. Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095, 1100 (9th Cir. 1990).
60. *See* 28 U.S.C. § 1604 (1988).
61. Verlinden B.V. v. Central Bank of Nig., 461 U.S. 480, 488-89 (1983).
62. 28 U.S.C. § 1604 (1988).
63. *Id.* at § 1605(a)(1)-(4), (b).
64. *Id.* at § 1605(a) (1988 & Supp. V 1993). Furthermore, the FSIA is not intended to affect the substantive law of liability. Michael W. Gordon, Foreign State Immunity in Commercial Transactions § 6.05 (1991). By way of comparison, head-of-state immunity cases may still be brought in state courts as was done by some pre-FSIA sovereign immunity cases. *Compare* Kline v. Kaneko, 535 N.Y.S.2d 303, 304 (Sup. Ct. 1988) (granting immunity at the behest of the State Department to the wife of the Mexican President), *aff'd mem., sub nom.* Kline v. Cordero De La Madrid, 546 N.Y.S.2d 506 (App. Div. 1989) *with* United States of Mex. v. Schmuck, 56 N.E.2d 577, 580 (N.Y. 1944) (involving pre-FSIA State Department "suggestion" of immunity); *see also* Anonymous v. Anonymous, 581 N.Y.S.2d 776, 777 (App. Div. 1992) (concluding that the "suggestion" of immunity filed on behalf of a head-of-state by the State Department entitled him to immunity in a matrimonial action).

Congress intended that the FSIA remove the State Department from the politically-charged business of issuing "suggestions" of immunity in cases involving sovereign immunity.[65] As stated in the declaration of purpose of the statute, Congress clearly intended that the courts should determine the amenability of foreign states to suit in the United States in order to "serve the interests of justice and . . . protect the rights of both foreign states and litigants in United States courts."[66] Consequently, the Supreme Court has held that the FSIA is "the sole basis for obtaining jurisdiction over a foreign state in our [the United States] courts"[67] because the statute's "purpose is to set forth 'comprehensive rules governing sovereign immunity.' "[68] Furthermore, some federal courts have decided that the FSIA superseded the State Department's role in "suggesting" sovereign immunity[69] de-

65. *See* H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 7 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6606; *cf. Kline*, 535 N.Y.S.2d at 305 (concluding Congress enacted the FSIA to remove sovereign immunity suits from the political process but not necessarily head-of-state immunity suits).

Congress had heard testimony about the politicization of the immunity process as the statute was being drafted. A Dep't of Justice official called for the depoliticization of immunity questions so that foreign governments could not pressure the executive branch into making grants of immunity. *See States Hearings*, *supra* note 1, at 34 (testimony of Bruno A. Ristau, Chief, Foreign Litigation Section, Civil Div., Dep't of Justice).

In fact, one commentator states:

> The State Department sponsored the [FSIA] in large measure because it found the politicization of sovereign immunity decisions by the Department to be a considerable embarrassment and thought that moving those decisions into the courts would prove less embarrassing than leaving them in the Department. The Department, however, has never quite been able to act upon this perceptive assessment of the situation. It continues to act as an amicus to advise courts ranging from the lowest trial court up to the Supreme Court on the correct interpretation and application of the [FSIA] to the facts of particular cases.

Dellapenna, *supra* note 6, at 529. For a post-FSIA sovereign immunity case in which the State Department has suggested its opinion see Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095, 1100 (9th Cir. 1990).

66. 28 U.S.C. § 1602 (1988). The legislative history supports this conclusion as well. *See* H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 7-8 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6605-06 (indicating three purposes for the FSIA: (1) to codify the restrictive principle of sovereign immunity; (2) to apply the statute through judicial determinations so as to preclude further executive determinations; and (3) to provide procedures for both plaintiffs and defendants in order to regularize judicial administration).

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

68. Verlinden B.V. v. Central Bank of Nig., 461 U.S. 480, 495 n.22 (1983) (citation omitted).

69. *See, e.g.*, Lafontant v. Aristide, 844 F. Supp. 128, 136 (E.D.N.Y. 1994) ("Because the FSIA is the sole basis for obtaining jurisdiction over a foreign sovereign, courts have found that the FSIA superseded the State Department's role in 'suggesting' sovereign immunity."); Republic of the Phil. v. Marcos, 665 F. Supp. 793, 797 (N.D. Cal. 1987) ("The power of the executive to determine when courts may exercise jurisdiction over foreign sovereigns has been abolished, and those cases inconsistent with the FSIA are obviously no longer persuasive.").

spite the State Department attempts to continue asserting its opinions before the courts.

Although the enactment of the FSIA solved many problems for sovereign immunity, the statute created new issues regarding head-of-state immunity because the FSIA does not specifically mention heads-of-state or contain any references to individuals.[70] This omission has been the subject of speculation and divergent opinions.[71] One conclusion that has been drawn is that the FSIA is ambiguous regarding the immunity of foreign officials, and therefore the statute's application should not be limited.[72] Another possible construction is that the FSIA simply does not apply to heads-of-state.[73] General agreement exists, however, that the creation of the FSIA, which splintered head-of-state immunity from sovereign immunity, created the current confusion plaguing head-of-state immunity.[74]

B. *The Rationale and Scope of Head-of-State Immunity*

The courts often cite to the doctrine of comity as the rationale for head-of-state immunity.[75] According to this doctrine, "each state protects the immunity concept so that its own head-of-state will be protected when he or she is abroad."[76] Comity is also closely related to such policies as protecting the dignity of foreign governments and safeguarding mutual respect among nations.[77]

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70. *See* 28 U.S.C. §§ 1330, 1602-1611 (1988 & Supp. V 1993).

71. As one person stated, "Frankly, we forgot about it [head-of-state immunity], or didn't know enough about it at the time, during those two or three critical years when the statute was being formulated." *Foreign Governments in United States Courts*, Proceedings of the Eighty-Fifth Annual Meeting of the American Society of International Law (Apr. 19, 1991), *in* 85 Am. Soc'y Int'l L. 251, 276 (1991) [hereinafter *Foreign Governments*] (remarks of Mark Feldman).

72. *See* Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095, 1101 (9th Cir. 1990).

73. *See Aristide*, 844 F. Supp. at 135-37.

74. *See, e.g.*, Doe v. United States (*In re* Doe), 860 F.2d 40, 45 (2d. Cir. 1988) (indicating the absence of any mention of heads-of-state in the FSIA leaves their legal status uncertain); *Aristide*, 844 F. Supp. at 135 ("Any uncertainty as to the current scope of head-of-state immunity is due to passage of the [FSIA] in 1976.").

75. *See, e.g.*, *In re* Doe, 860 F.2d at 45 (indicating the immunity is "founded on the need for mutual respect and comity among foreign states"); *In re* Grand Jury Proceedings, Doe #700, 817 F.2d 1108, 1110 (4th Cir.) (stating that "the rationale of head-of-state immunity is to promote comity among nations"), *cert. denied*, 484 U.S. 890 (1987); *Aristide*, 844 F. Supp. at 132 ("Head-of-state immunity is also supported by the doctrine of comity . . . .").

76. *See Aristide*, 844 F. Supp. at 132. Comity ensures that "leaders can perform their duties without being subject to detention, arrest or embarrassment in a foreign country's legal system." *In re* Grand Jury Proceedings, 817 F.2d at 1110.

77. *Aristide*, 844 F. Supp. at 132.

Courts have conveniently explained grants and refusals of immunity in terms of the purposes of head-of-state immunity. *See, e.g.*, Doe v. United States (*In re* Doe), 860 F.2d 40, 45-56 (2d Cir. 1988) (permitting waiver of Marcos's immunity because to do otherwise "would serve simply to embarrass the current Philippine government by allowing its former rulers who allegedly embezzled huge sums of money from [them] to add insult to injury by claiming immunity in the name of that government"); *In re*

Although a universally accepted scope of head-of-state immunity does not exist,[78] a narrow category of persons definitively qualify as "heads-of-state" for the purposes of immunity. The immunity usually covers heads-of-state, their families, and heads of governments.[79] The privilege of immunity does not, however, extend to all high-level government officials.[80]

Head-of-state immunity may be refused by either the United States or waived by the individual's home country. By refusing to recognize the government official as a head-of-state,[81] the United States may

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Grand Jury Proceedings, 817 F.2d 1108, 1111 (4th Cir.) (denying immunity to Marcos because the alternative "would clearly offend the present Philippine government"), *cert. denied*, 484 U.S. 890 (1987); Lafontant v. Aristide, 844 F. Supp. 128, 135 (E.D.N.Y. 1994) (granting Aristide immunity to further the goals of comity).

The purposes of sovereign immunity are similar to the purposes usually given for head-of-state immunity. *See In re* Doe, 860 F.2d at 45 (comparing the two doctrines and stating that "each . . . doctrine is founded on the need for mutual respect and comity among foreign states"). Similarly, the Fourth Circuit found "[l]ike the related doctrine of sovereign immunity, the rationale of head-of-state immunity is to promote comity among nations." *In re* Grand Jury Proceedings, 817 F.2d at 1110.

78. *See* Bass, *supra* note 37, at 299 n.1; *see also In re* Grand Jury Proceedings, 817 F.2d at 1110 ("The exact contours of head-of-state immunity, however, are still unsettled.").

79. Gerhard von Glahn, *Law Among Nations: An Introduction to Public International Law*, 136-37 (6th ed. 1992).

Immunity in the past has been requested by a variety of leaders in different situations. For examples in which immunity was granted, see Saltany v. Reagan, 702 F. Supp. 319, 320 (D.D.C. 1988) (dismissing a suit against Prime Minister Thatcher), *aff'd*, 886 F.2d 438 (D.C. Cir. 1989), *cert. denied*, 495 U.S. 932 (1990); O'Hair v. Wojtyla, Civ. No. 79-2463 (D.D.C. Oct. 3, 1979), *quoted in* Sovereign Immunity, 1979 Digest § 7, at 897 (dismissing a suit to enjoin the Pope from celebrating the mass on the Mall in Washington, D.C. following a "suggestion" of immunity); Kilroy v. Windsor, Civ. No. C78-291 (N.D. Ohio 1978), *quoted in* Special Missions and Trade Delegations, 1978 Digest § 3, at 641-43 (dismissing a suit against the Prince of Wales); Kendall v. Saudi Arabia, 65 Adm. 885 (S.D.N.Y. 1965), *quoted in* Sovereign Immunity Decisions, 1977 Digest app., at 1053-54 (dismissing an attachment of King Faisal's assets in New York following the State Department's suggestion of immunity); Richard B. Bilder et al., *Contemporary Practice of the United States Relating to International Law*, 58 Am. J. Int'l L. 165, 186-87 (1964) (discussing the dismissal of a suit against Kim Yong Shik, the Korean Foreign Minister). *But see* Republic of the Phil. v. Marcos, 665 F. Supp. 793, 796-98 (N.D. Cal. 1987) (rejecting both the defendant's and United States' recommendation of immunity for the Solicitor General of the Philippines under the FSIA).

80. *See Republic of the Phil.*, 665 F. Supp. at 797.

As the litigant's relation to the actual head-of-state or head-of-government in that particular country grows more tenuous, the claim for immunity becomes weaker.

> "The foreign minister—someone who is a cabinet member, perhaps, and enjoys top status in the government—generally seems to be accorded the same status as the head of state. Problems arise when you get down to the next level of government officials, though, because they are not really heads of state in any traditional sense."

Foreign Governments, *supra* note 71, at 275 (remarks of David A. Jones, Jr.).

81. *See* United States v. Noriega, 746 F. Supp. 1506, 1519 (S.D. Fla. 1990) ("In order to assert head of state immunity, a government official must be recognized as a head of state.").

withhold this immunity from any claimant.[82] Because "recognition of foreign governments and their leaders is a discretionary foreign policy decision committed to the Executive Branch,"[83] the judiciary must accept this decision as binding.[84]

In addition, this immunity is not an individual's right,[85] but a privilege belonging to the individual's state, which may bestow or retract this benefit.[86] Consequently, a former head-of-state may lose immunity for acts committed while in office if the current government waives such immunity.[87] Under the current practice, the courts usually assert jurisdiction over former heads-of-state who do not receive State Department "suggestions" of immunity but are given waivers of immunity from their home countries.[88] Although the wisdom of holding former heads-of-state liable for acts committed while in office has

82. *Id.* at 1520. Indeed, the United States may grant immunity to one official and withhold immunity from another person of equal or similar rank. "Since . . . head of state immunity is a privilege bestowed within the Executive's discretion, the government is not bound to a position it has taken on another foreign official in an entirely different context." *Id.* at n.14.

83. *Id.* at 1519.

84. *Id.*

For example, Panamanian dictator Manuel Noriega was not granted head-of-state immunity because he was not the recognized head-of-state either under the Panamanian Constitution or by the United States. *Id.* Officially, Noriega was the Commandante of the Panamanian Defense Forces and the United States had continued to recognize President Eric Arturo Delvalle as the legitimate leader of Panama. *Id.* Having accepted the U.S. government's decision, the court rejected Noriega's argument that head-of-state immunity should be granted to him "regardless of the source of his power or the nature of his rule." *Id.* at 1520.

Alternatively, although Haitian President Aristide had been ousted from power by a military coup in 1991, the court granted him immunity as the head-of-state recognized by the U.S. government. *See* Lafontant v. Aristide, 844 F. Supp. 128, 130 (E.D.N.Y. 1994). The court concluded that "[w]hether the recognized head-of-state has *de facto* control of the government is irrelevant; the courts must defer to the Executive determination." *Id.* at 132 (citation omitted).

85. *In re* Grand Jury Proceedings, Doe #700, 817 F.2d 1108, 1111 (4th Cir.) (concluding that the immunity is "primarily an attribute of state sovereignty, not an individual right"), *cert. denied*, 484 U.S. 890 (1987).

86. Doe v. United States (*In re* Doe), 860 F.2d 40, 45 (2d Cir. 1988). "Because it is the state that gives the power to lead and the ensuing trappings of power—including immunity—the state may therefore take back that which it bestowed upon its erstwhile leaders." *Id.*

87. *Id.* The court rejected the Marcoses' argument that "the doctrine must also serve a 'protective function' of 'shield[ing] human decision-makers from the chilling effect of future liability . . . .' " *Id.* at 46 (citation omitted). Another court also rejected the Marcoses' argument that allowing waiver would "degrade ex-rulers who happen to fall out of favor with their former constituents or political successors." *In re* Grand Jury Proceedings, 817 F.2d at 1111. The Fourth Circuit reasoned that "a fundamental characteristic of state sovereignty is the right to determine which individuals may raise the flag of the ship of state and which may not." *Id.*

88. *See, e.g., In re* Doe, 860 F.2d at 45-50 (asserting jurisdiction over the former Philippine President in the absence of immunity from either the home government or the State Department); *In re* Grand Jury Proceedings, 817 F.2d at 1110-11 (same); Paul v. Avril, 812 F. Supp. 207 (S.D. Fla. 1993) (same for the Haitian military leader).

been questioned, the issue should not be resolved by the judicial branch.[89]

In summary, head-of-state immunity and sovereign immunity have evolved from common origins in international customary law into separate doctrines. The pre-FSIA confusion surrounding the application of sovereign immunity has largely been resolved by judicial application of the FSIA.[90] In the case of sovereign immunity, the enactment of the FSIA has (1) codified the restrictive theory of immunity, (2) granted federal jurisdiction, (3) become the sole basis of jurisdiction for suits against foreign states, (4) superseded the State Department "suggestion" of immunity approach, and (5) prevented state immunity determinations from being based on purely political considerations. Head-of-state immunity, on the other hand, still involves the automatic grant of absolute immunity if the State Department issues a "suggestion" of immunity and remains mired in confusion regarding its scope. These problems, which were also faced by the doctrine of sovereign immunity and resolved by the FSIA, indicate that head-of-state immunity would similarly benefit by a change from executive determination to statutory clarification.

II. Two Approaches: Absolute Immunity at the Suggestion of the State Department or Restrictive Immunity Under the FSIA

The courts have taken divergent approaches to head-of-state immunity since the inception of the FSIA. Part II.A will discuss the approach of the Eastern District of New York in *Aristide v. Lafontant* that applies the outdated pre-FSIA practice of granting absolute immunity in accordance with executive branch determinations of head-of-state immunity.[91] Part II.B discusses the Ninth Circuit's application of a restrictive theory of head-of-state immunity in the *Marcos* case under an expansive and controversial reading of the FSIA.[92] The courts' differing approaches underscore the need for statutory clarification.

89. Trajano v. Marcos, No. 86 Civ. 0207, slip op. at 7 (D. Haw. July 18, 1986) ("Until such time as head of state immunity is made a creature of judicial interpretation, this court will not intrude on the prerogative of the executive branch to make such determinations.").

90. *See* Gary B. Born & W. Hardy Callcott, Case Note, 83 Am. J. Int'l L. 371, 375 (1989) ("This route [federal legislation] has been taken with some success for sovereign and diplomatic immunity . . . .").

91. *See infra* part II.A.

92. *See infra* part II.B.

A. *Absolute Immunity at the Suggestion of the State Department*

In *Lafontant v. Aristide*,[93] Judge Weinstein of the Eastern District of New York presented a lengthy analysis of head-of-state immunity that has received both attention and criticism.[94] The *Aristide* court's conclusion, that the pre-FSIA executive determination method still applies to head-of-state immunity because head-of-state immunity is not explicitly included in the statute, has been followed by other district courts.[95]

1. *Lafontant v. Aristide*

The plaintiff in *Aristide* sought compensation in money damages for the killing of her husband by Haitian soldiers who were allegedly acting on the orders of the President of Haiti, Jean-Bertrande Aristide.[96] Dr. Roger Lafontant had been jailed for attempting a coup d'etat against Aristide.[97] The defendant submitted a "suggestion" of immunity from the State Department claiming immunity because of his status as the head-of-state of Haiti,[98] and the court promptly dismissed the action.[99]

In a lengthy discussion of the FSIA and common-law precedents, the court explained its decision to follow the State Department's determination.[100] The court concluded that the "pre-1976 suggestion of immunity procedure survives the FSIA with respects to heads-of-state" because neither the language nor the legislative history of the FSIA addresses heads-of-state specifically.[101] The court further reasoned that the FSIA "was crafted primarily to allow state-owned companies . . . to be sued in United States courts in connection with their commercial activities . . . while leaving traditional head-of-state

93. 844 F. Supp. 128 (E.D.N.Y. 1994).

94. *See*, Dellapenna, *supra* note 6, at 528-29 ("Judge Weinstein's opinion presents the most extended and most carefully reasoned analysis of the so-called head-of-state immunity doctrine to date . . . . [His] theory seems to me to be wrong as a matter of law and as a matter of policy.").

95. *See, e.g.*, Kadic v. Karadzic, Nos. 94-9069, 1544, 94-035, 1541, 1995 WL 604585, at *14 (2d Cir. Oct. 13, 1995) (referring to *Aristide* as indicating the determinative power of the executive branch in head-of-state immunity cases); Alicog v. Kingdom of Saudi Arabia, No. CIV.A.H-93-4169, 1994 WL 447620, at *2 (S.D. Tex. Aug. 10, 1994) (referring to Aristide to support its decision to grant immunity to the King of Saudi Arabia at the suggestion of the State Department).

96. *Aristide*, 844 F. Supp. at 130.

97. *Id.*

98. *Id.* This letter declared the State Department's opinion that "permitting this action to proceed against President Aristide would be incompatible with the United States' foreign policy interests." *Id.* at 131.

99. *Id.* at 130.

100. *Id.* at 131-37.

101. *Id.* at 137. Consequently, all of the reasons for following executive determinations of immunity decisions elucidated by the Supreme Court in *Ex parte Peru* are still valid. *See supra* note 53.

and diplomatic immunities untouched."[102] Consequently, under the court's analysis, heads-of-state may receive absolute immunity at the request of the State Department without reference to the FSIA.[103]

2. Other Courts Following the *Aristide* Rationale

The Southern District of New York followed the *Aristide* court's lead in *Doe v. Karadzic*.[104] In *Karadzic*, victims of human rights violations committed by Bosnian-Serbs brought a class action suit against the self-proclaimed president of a Bosnian-Serb entity.[105] Although the defendant claimed head-of-state immunity, the United States had not recognized either his leadership or his state.[106]

After briefly addressing Karadzic's claim for immunity, the court ultimately declined to exercise subject matter jurisdiction on other grounds.[107] As an initial point, however, the court considered that Karadzic's claim for head-of-state immunity would be determined by State Department decisions.[108] The court reasoned that "[w]ere the Executive Branch to declare defendant a head-of-state, this Court would be stripped of jurisdiction. This consideration, while not dispositive at this point in the litigation, militates against the Court exercising jurisdiction over the instant action."[109]

On appeal, the Second Circuit reversed and granted subject matter jurisdiction under the Alien Tort Act.[110] As for the district court's head-of-state analysis, the Second Circuit followed the *Aristide* reasoning so far as to admit that future recognition by the executive branch of Karadzic as a head-of-state may immunize his actions.[111] The court further reasoned, however, "[e]ven if such future recognition, determined by the Executive Branch, would create head-of-state immunity, it would be entirely inappropriate for a court to create the functional equivalent of such an immunity based on speculation about what the Executive Branch might do in the future."[112] Although cit-

102. *Aristide*, 844 F. Supp. at 137.

103. *See id.*

104. 866 F. Supp. 734, 737-38 (S.D.N.Y. 1994), *rev'd*, Kadic v. Karadzic, Nos. 94-9069, 1544, 94-9-35, 1541, 1995 WL 604585 (2d Cir. Oct. 13, 1995) (involving two groups of plaintiffs).

105. *Id.* at 734-35. Defendant Karadzic was the leader of the Bosnian-Serb military faction. *Id.* at 735. The plaintiffs alleged that Karadzic ordered the Bosnian-Serb forces to engage in "ethnic cleansing" which included the following torts: genocide, war crimes, wrongful death, torture, rape, and intentional infliction of emotional harm. *Id.* at 736.

106. *See id.* at 737-38.

107. *Id.* at 737-38. The court decided subject matter jurisdiction did not exist under either the Alien Tort Claim Act or the Torture Victim Protection Act. *Id.* at 740-43.

108. *Id.* at 737-38.

109. *Id.* (citing Lafontant v. Aristide, 844 F. Supp. 128 (E.D.N.Y. 1994)).

110. *See* Kadic v. Karadzic, Nos. 94-9069, 1544, 94-9035, 1541, 1995 WL 604585, at *8 (2d Cir. Oct. 13, 1995).

111. *Id.* at *14.

112. *Id.* at *14 (citations omitted).

ing to *Aristide* several times, the court also referred to a prior Second Circuit case, In re *Doe*,[113] to assert that the scope of head-of-state immunity is still unsettled.[114]

The *Aristide* decision was also followed by a district court in Texas. In *Alicog v. Kingdom of Saudi Arabia*,[115] two family servants of the Royal Family of Saudi Arabia sued, among others, the Kingdom of Saudi Arabia and King Fahd of Saudi Arabia.[116] The plaintiffs claimed false imprisonment and abuse at the hands of Saudi officials during a trip to Houston where their employer, Prince Saad, was receiving medical treatment.[117]

The King moved to dismiss on the basis of head-of-state immunity.[118] The State Department intervened on behalf of the King by acknowledging that King Fahd is the head-of-state of Saudi Arabia.[119] After briefly discussing head-of-state immunity, the court accepted the recognition by the United States as conclusive.[120] Reasoning that the head-of-state as recognized by the executive branch is immune from personal jurisdiction in the United States, the court dismissed the case against King Fahd.[121]

3. A Critique of the *Aristide* Approach

The "suggestion" of immunity approach "preserv[es] the pre-FSIA 'absolute' theory of immunity."[122] Under this approach, the courts will grant immunity to the head-of-state at the behest of the State Department regardless of the nature of the alleged act.[123] In fact, unlike sovereign immunity, head-of-state immunity has evolved very little since the time when the Tate Letter tried unsuccessfully to control grants of immunity through executive determinations.[124]

The courts have given many reasons for maintaining absolute immunity in the head-of-state area. Many of these justifications are based on the same exaggerated concerns raised about pre-FSIA sover-

113. 860 F.2d 40, 45-50 (2d Cir. 1988).
114. *Kadic*, 1995 WL 604585, at *14.
115. No. Civ.A.H-93-4169, 1994 WL 447620 (S.D. Tex. Aug. 10, 1994).
116. *Id.* at *1.
117. *Id.* The plaintiffs claimed that they were not allowed to leave the Houston hotel unless accompanied by a guard. *Id.* Although after five months in Houston, the two left the hotel unimpeded, consular officers refused to deliver to the plaintiffs their passports and travel papers. *Id.* Prince Saad, the brother of King Fahd, subsequently died in July of 1993. *Id.*
118. *Id.* at *2.
119. *Id.*
120. *Id.* (citing to Lafontant v. Aristide, 844 F. Supp. 128, 137 (E.D.N.Y. 1994) for support in concluding that courts must defer to executive determinations of head-of-state immunity).
121. *Id.*
122. Lafontant v. Aristide, 844 F. Supp. 128, 137 (E.D.N.Y. 1994).
123. *Id.*
124. *See supra* notes 48-52 and accompanying text.

eign immunity. For example, the *Aristide* court referred to concerns about comity and the executive's role in forming foreign policy as justifications for the State Department retaining decisive control over grants of head-of-state immunity.[125] In addition, the State Department has used either a "suggestion" of immunity procedure, or a variation thereof, for many years.[126] This practice parallels a similar procedure regarding claims of diplomatic immunity[127] and the pre-FSIA practice regarding claims of foreign state immunity.[128] Foreign heads-of-state have also claimed that because absolute immunity is given to United States heads-of-state, as a matter of respect the courts should extend the same privilege to foreign leaders.[129]

Some of these reasons bear a striking similarity to the pre-FSIA concerns about sovereign immunity—issues that were later shown to be greatly exaggerated.[130] The use of "suggestions" of immunity cannot base its legitimacy on the pre-FSIA sovereign immunity common law history for the FSIA was enacted precisely because the common law approach proved unworkable.[131] Moreover, only in the head-of-state immunity cases does the State Department still attempt to assert

125. *Aristide*, 844 F. Supp. at 137.

126. *See* Spacil v. Crowe, 489 F.2d 614, 616-17 (5th Cir. 1974). By way of comparison, diplomatic immunity does not cover an action arising out of an individual's private commercial activity. *See* Vienna Convention, *supra* note 37.

127. *See infra* notes 244-48 and accompanying text for discussion on diplomatic immunity.

128. *See* Republic of Mex. v. Hoffman, 324 U.S. 30 (1945) (considering the lack of a State Department issued "suggestion" of immunity in a pre-FSIA determination of sovereign immunity).

129. *See* Republic of the Phil. v. Marcos, 806 F.2d 344, 360-61 (2d Cir. 1986) (citing Nixon v. Fitzgerald, 457 U.S. 731 (1982) for the proposition that "a former President of the United States enjoyed immunity from damages liability for acts within the outer perimeter of his official responsibility"). The Second Circuit decided to wait to explore this avenue of reasoning as the proof against the Marcoses developed. *Id.* at 361.

The Marcoses later made the same argument in the Fourth Circuit. *See In re* Grand Jury Proceedings, Doe #700, 817 F.2d 1108, 1111 (4th Cir.), *cert. denied*, 484 U.S. 890 (1987). The Fourth Circuit discounted the argument and distinguished *Nixon* as applying only to civil liability. *Id.* The court said "[t]he issue in this case, however, is not whether the Marcos' [sic] may be civilly liable, but whether they are wholly immune from process. Moreover, . . . an ex-President may be subpoenaed 'to produce relevant evidence in a criminal case,' and even a sitting President may not claim immunity from a criminal subpoena." *Id.* (citations omitted).

130. For example, the Fifth Circuit in a pre-FSIA case stated that "the judiciary must be sensitive to the overriding necessity that courts not interfere with the executive's proper handling of foreign affairs." *Spacil*, 489 F.2d at 616 (involving a "suggestion" of immunity for a Cuban vessel seized in the United States). The FSIA's application through the years has shown that this concern was unfounded at least with respect to sovereign immunity. *See* Dellapenna, *supra* note 6, at 531. Indeed, the FSIA has fostered a degree of certainty in litigation involving foreign states by reducing the political influence of the government. *See* Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095, 1099 (9th Cir. 1990) (involving an instance where the court analyzed a case on its own despite a Statement of Interest from the government).

131. *See supra* notes 54-58 and accompanying text.

binding determinations.[132] Lastly, the courts have rejected the reciprocity argument that because domestic heads-of-state may get immunity, so should foreign heads-of-state.[133]

The "suggestion" of immunity procedure for head-of-state immunity still presents the same problems for the courts as it did during pre-FSIA sovereign immunity cases. First, the courts have applied inconsistent approaches to cases that present similar issues.[134] Moreover, the "suggestion" of immunity process has few procedural safeguards.[135] When the State Department does not issue a suggestion of immunity, the courts are left to grapple with these complex issues with little guidance from existing case law.[136] As the Second Circuit noted: "When lacking guidance from the executive branch, as here, a court is left to decide for itself whether a head-of-state is or is not entitled to immunity."[137] Unfortunately, the courts have little guidance from the common law because of the ad hoc nature of head-of-state immunity decisions resulting from the State Department "suggestion" of immunity approach.[138]

In addition, the courts are the appropriate body to make determinations of immunity because the State Department is subject to greater political pressures in issuing these determinations.[139] The State De-

132. *See Foreign Governments, supra* note 71, at 275. "[I]t really is only in the head of state immunity realm that the U.S. Government still goes into court and lays out a series of rules and findings of fact to bind the court in the way the pre-FSIA suggestions of immunity did in all of these areas." *Id.* (remarks of David A. Jones, Jr.).

133. *See supra* note 129.

134. *See* Estate of Domingo v. Republic of the Phil., 694 F. Supp. 782, 785 (W.D. Wash. 1988), *appeal dismissed, sub. nom.* Estate of Domingo v. Marcos, 895 F.2d 416 (9th Cir. 1990). In *Estate of Domingo*, the Marcoses were sued for allegedly executing two political opponents. *Id.* at 783. In 1982, the court granted the Marcoses immunity and dismissed the case against them. *Id.* In 1987, the court reinstated the Marcoses as defendants "holding that once they left office, the Marcoses could not claim immunity as heads of state." *Id.* On a motion for rehearing, the court concluded that since a "suggestion" of immunity had not been reissued in the second case, Marcos may be tried for acts he committed while formerly in office. *Id.* at 785-86.

135. Professor Lowenfeld's discussion of the State Department pre-FSIA application of sovereign immunity points out that the State Department did not need to explain the reasoning behind its decision and the decision was not appealable. *See* Andreas F. Lowenfeld, *Litigating A Sovereign Immunity Claim-The* Haiti *Case*, 49 N.Y.U. L. Rev. 377, 391 (1974).

A State Department head-of-state immunity decision based on the foreign leader's political leverage "deprives the concept of due process of all meaning." *See* Mark A. Sherman, Comment, *An Inquiry Regarding the International and Domestic Legal Problems Presented in* United States v. Noriega, 20 U. Miami Inter-Am. L. Rev. 393, 417 (1989).

136. *See* Doe v. United States (*In re* Doe), 860 F.2d 40, 45 (2d Cir. 1988).

137. *Id.*

138. *See infra* notes 229-31 and accompanying text.

139. *See infra* notes 226-28. Political pressure to grant immunity is a recurring problem with immunities issued by the State Department. The FSIA was enacted to alleviate this problem in the sovereign immunity area. *See supra* note 65 and accompanying text.

partment is dependent on the foreign government's internal political climate in determining questions of immunity. The executive branch has to weigh such political considerations as the relationship and the relative popularities of the former government and the new leadership.[140] The State Department's determinations are also sensitive to the relationship between the United States and the foreign state at that particular time.[141] Shifting relations between states or individual heads-of-states can hardly form the basis of a coherent body of law.[142] Finally, the State Department has been accused of invoking head-of-state immunity in an attempt to control litigation against high foreign officials, contrary to the intent of the FSIA.[143]

B. *Restrictive Immunity Under the FSIA*

In a radical departure from the approach of the *Aristide* court, the Ninth Circuit has adopted a broad interpretation of the FSIA in the *Marcos* case.[144] The Ninth Circuit reads sovereign immunity under the FSIA to apply both to states and heads-of-state. Thus, the Ninth Circuit interprets the FSIA to immunize individuals who are sued as a result of acting in their official capacities.[145]

With respect to diplomatic immunity, in which the State Department still takes a limited part in issuing determinations of immunity, the government is pressured into granting immunity even when it is not justified. *Head of State Immunity: Hearings Before the House Committee on Banking, Finance, and Urban Affairs*, 103d Cong., 1st Sess. 13, n.26 (Dec. 9, 1994) [hereinafter *Immunity Hearings*] (testimony of Joseph W. Dellapenna, Professor of Law, Villanova University) (referring to Abdulaziz v. Metropolitian Dade County, 741 F.2d 1328, 1331-32 (11th Cir. 1984) (dismissing case against Prince Turki of Saudi Arabia who was given diplomatic status as a "special envoy" after the proceedings were instituted)). For a discussion of the procedure involved in issuing diplomatic immunity see *infra* notes 244-48 and accompanying text.

140. *See* Erin M. Callan, Comment, *In re* Mr. & Mrs. Doe: *Witnesses Before the Grand Jury and the Head of State Immunity Doctrine*, 22 N.Y.U. J. Int'l L. & Pol. 117, 118-19 (1989) (discussing Congressional dislike of the Marcoses). Although President Reagan was a close friend of the Marcoses, he did not suggest immunity on their behalf because such a move would have been politically unwise in a presidential election year. *Id.* at 137 n.107.

141. *See id.* at 136-37.

142. In the context of sovereign immunity and the pre-FSIA debate, Lowenfeld argues "[i]n the long run . . . foreign relations would probably be better served by a position of equal treatment for all foreign states than it would by considering each case in the context of current relations with the country concerned." Lowenfeld, *supra* note 135, at 390. This argument serves the purposes of head-of-state immunity as well. In one case, for example, the Marcoses lost their immunity when the State Department did not reissue a "suggestion" of immunity after they were exiled. *See* Estate of Domingo v. Republic of the Phil., 694 F. Supp. 782, 786 (W.D. Wash. 1988).

143. *See* Dellapenna, *supra* note 6, at 531.

144. 25 F.3d 1467 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 934 (1995).

145. *Id.* at 1470-71; *see also* Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095, 1103 (9th Cir. 1990) (granting immunity under the FSIA to a government official acting in his official capacity).

1. The FSIA's Application to Individual Officials

In *Chuidian v. Philippine National Bank*,[146] the Ninth Circuit applied the FSIA to an individual who was not a head-of-state.[147] *Chuidian* concerned a bank manager acting in his official capacity as the head of the Philippine government bank.[148] After discussing the language and history of the FSIA the *Chuidian* court decided that "[t]he most that can be concluded from the preceding discussion is that the Act is ambiguous as to its extension to individual foreign officials. Under such circumstances, we decline to limit its application as . . . [to do so would be] entirely inconsistent with the purposes of the Act."[149]

The Ninth Circuit held that the FSIA does not immunize foreign officials engaged in acts beyond the scope of their authority.[150] The court disagreed with the government's position that the FSIA did not affect pre-1976 common law with respect to foreign officials.[151] The court also suggested that the government's position would undermine the FSIA.[152] Because a "bifurcated approach to sovereign immunity was not intended by the Act," the court interpreted the FSIA as including individuals within its meaning.[153]

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146. 912 F.2d 1095 (9th Cir. 1990).

147. *See id.* at 1103.

148. *Id.* at 1106. Chuidian had settled a claim with the Philippines Export and Foreign Loan Guarantee Corporation, an instrumentality of the Republic of the Philippines. *Id.* at 1097. This settlement included an irrevocable letter of credit issued by the Philippine National Bank to Chuidian on behalf of the Corporation. *Id.* Daza, an official of the Philippine government, suspected fraud in the settlement and instructed the Bank to dishonor the letter of credit. *Id.* Chuidian then instituted a suit against the Bank and Daza in California state court. *Id.*

Daza claimed immunity under the FSIA because he qualified as an "agency or instrumentality of a foreign state." *Id.* at 1099. Chuidian contended that the FSIA did not apply or, alternatively, that one of the exceptions of the FSIA applied. *Id.* The government, in a "Statement of Interest of the United States," contended that the FSIA does not apply but immunity should nevertheless issue under the general principles of sovereign immunity expressed in the *Restatement (Second) of Foreign Relations Law* § 66(b). *Id.*

149. *Id.* at 1101.

150. *Id.* at 1106.

151. *Id.* at 1102.

152. *Id.* at 1102-03. The FSIA would be undermined by "a peculiar variant of forum shopping . . . . Litigants who doubted the influence and diplomatic ability of their sovereign adversary would choose to proceed against the official, hoping to secure State Department support, while litigants less favorably positioned would be inclined to proceed against the foreign state directly." *Id.*

153. *Id.* The court stated three reasons for its conclusion:

> First, every indication shows that Congress intended the Act to be comprehensive, and courts have consistently so interpreted its provisions. . . . Second, a bifurcated interpretation of the Act would be counter to Congress's stated intent of removing the discretionary role of the State Department. . . . Furthermore, no authority supports the continued validity of the pre-1976 common law in light of the Act. Indeed, the American Law Institute recently issued the *Restatement (Third) of Foreign Relations Law*, superseding the *Second Restatement* relied upon by the government in this action. The

The Court agreed with the bank manager that his actions were acts committed by an "agency or instrumentality of a foreign state" under section 1603(b) of the FSIA.[154] The court reasoned that "[w]hile section 1603(b) may not explicitly include individuals within its definition of foreign instrumentalities, neither does it expressly exclude them. The terms 'agency,' 'instrumentality,' 'organ,' 'entity,' and 'legal person,' while perhaps more readily connoting an organization or collective, do not in their typical legal usage necessarily exclude individuals."[155] Likewise, the court noted that the legislative history does not mention any intent to exclude individuals from the FSIA.[156] Finally, the court once again underscored the FSIA's purpose to codify existing common law principles of sovereign immunity.[157]

The Ninth Circuit supported its decision to apply the FSIA to individuals by referring to a line of cases starting in the Southern District of New York.[158] The first case in this series, *Rios v. Marshall*,[159] was an antitrust and civil rights class action brought by farm workers against various apple and sugar cane growers, and federal and state officials.[160] In discussing the FSIA claim the court said merely, "insofar as Edwards [the foreign official] is sued in his official capacity as agent of the instrumentality, he is equally protected by principles of foreign sovereign immunity."[161] *Rios* was followed by two district

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> new *Restatement* deletes in its entirety the discussion of the United States common law of sovereign immunity, and substitutes a section analyzing such issues exclusively under the Act.

Id. at 1102-03 (citations omitted). Since the time of the Chuidian decision in 1990, several courts have recognized the continued validity of the pre-1976 common law. *See supra* part II.A. Nevertheless, the court's interpretation of the *Restatements* remains true.

154. *See id.* at 1100-01. The FSIA provides, in relevant part:

> For purposes of this chapter —
> (a) A 'foreign state' . . . 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 . . . nor created under the laws of any third country.

28 U.S.C. § 1603(a)-(b) (1988).

155. Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095, 1101 (9th Cir. 1990).

156. *Id.*

157. *Id.*

158. *Id.* at 1103.

159. 530 F. Supp. 351 (S.D.N.Y. 1981).

160. *Id.* at 355-56. The court in Rios granted motions to dismiss to three of the defendants, the Government of Jamaica, the British West Indies Central Labor Organization, and the Organization's chief liaison agent in the United States, Harold Edwards, under the FSIA. *Id.* at 370-71.

161. *Id.* at 371.

court cases in which the courts did not discuss at any length the FSIA's applicability to individuals.[162]

The next case in the series, *Kline v. Kaneko*,[163] presented an interesting blend of head-of-state immunity and the applicability of the FSIA to individuals.[164] In *Kline*, the plaintiff brought suit against the Secretary of the Government of Mexico and the wife of the Mexican President, Paloma Cordero De La Madrid, for expulsion from Mexico without process.[165] The federal district court dismissed the complaint against the Secretary holding that the FSIA "appl[ies] to individual defendants when they are sued in their official capacity."[166] Employing reasoning similar to that of *Chuidian*, the court held that the FSIA applied because the Secretary was a "political subdivision" or an "agency or instrumentality" of Mexico within the meaning of section 1603.[167] As to the case against the wife of the Mexican President, however, the court concluded the FSIA did not immunize the actions of Mrs. De La Madrid because she did not have an official position with the government.[168] With the removal of the FSIA claim, the federal court lost jurisdiction and the case was remanded to state court.[169] The state court granted Mrs. De La Madrid head-of-state immunity because the State Department filed a "suggestion" of immunity for her.[170]

In *Herbage v. Meese*,[171] decided later in the same year as *Chuidian*, the District of Columbia district court also held that individual officials acting in their official capacity are sovereigns within the meaning of the FSIA.[172] After being extradited to the United States from the United Kingdom, Herbage sued various British officials alleging violations in his extradition process.[173] The court referred to the same series of cases cited in *Chuidian*[174] and discussed the notable absence of

162. *See* American Bonded Warehouse v. Compagnie Nationale Air France, 653 F. Supp. 861, 863 (N.D. Ill. 1987) ("Defendants Francois Bachelet and Joe Miller, sued in their respective capacities as employees of Air France [an instrumentality of the government of France] are also protected by the FSIA."); Mueller v. Diggleman, No. 82 Civ. 5513 (CBM), 1983 WL 25419, at *3 (S.D.N.Y. May 13, 1983) (concluding that judges and clerks of a foreign court, sued in their official capacities, are entitled to immunity under the FSIA).

163. 685 F. Supp. 386 (S.D.N.Y. 1988).

164. *Id.* at 388.

165. *Id.*

166. Kline v. Kaneko, 685 F. Supp. 386, 389 (S.D.N.Y. 1988).

167. *Id.* at 392.

168. Kline v. Kaneko, 535 N.Y.S.2d 303, 305 (Sup. Ct. 1988), *aff'd mem., sub nom.* Kline v. Cordero De La Madrid, 546 N.Y.S.2d 506 (App. Div. 1989).

169. *Kline*, 685 F. Supp. at 388-89.

170. *Kline*, 535 N.Y.S.2d at 305.

171. 747 F. Supp. 60 (D.D.C. 1990), *aff'd*, 946 F.2d 1564 (D.C. Cir.), *cert. denied*, 112 S. Ct. 605 (1991).

172. *See id.* at 67.

173. *Id.* at 62.

174. *Id.* at 66; *see supra* notes 158-62 and accompanying text.

any reference to natural persons in the FSIA.[175] Deciding that the "British defendants are agents of a 'political subdivision' within the meaning of the FSIA," the court granted them immunity under the FSIA.[176]

2. The FSIA's Application to Heads-of-State

In 1994, the Ninth Circuit analyzed a head-of-state case, In re *Estate of Marcos*, for the first time under the FSIA.[177] The court did not make any specific references to head-of-state immunity but analyzed the case under sovereign immunity.[178] The suit was brought against the former president of the Philippines by the families of people who allegedly had been tortured and executed in the Philippines under Marcos' authority.[179] The Estate first contended that the case should be dismissed because the cause of action did not meet any of the exceptions to immunity set forth in the FSIA.[180] The Estate also argued that Marcos' actions were "official or public acts" and therefore nonjusticiable acts of state.[181]

The court concluded that the FSIA did not immunize former President Marcos's human rights violations because these acts were not official acts covered by his authority as head-of-state.[182] Because "Marcos' acts were not taken within any official mandate and were therefore not the acts of an agency or instrumentality of a foreign state within the meaning of FSIA . . . [n]o exception to FSIA thus

175. *Herbage*, 947 F. Supp. at 66.

176. *Id.* at 67 & n.13.

177. *See* Hilao v. Marcos (*In re* Estate of Marcos), 25 F.3d 1467, 1470 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 934 (1995).

178. *See id.* at 1468-72. This approach is consistent with earlier circuit precedent because under *Chuidian* any authorized actions of a state official would fall within the domain of the FSIA. *See* Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095, 1106 (9th Cir. 1990). Presumably, in appropriate circumstances, the court would look to the FSIA and withhold immunity for any acts which fell into one of the exceptions for immunity.

179. Hilao v. Marcos (*In re* Estate of Marcos), 25 F.3d 1467, 1469 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 934 (1995). Initially the suit had also been brought against Marcos' daughter, Imee Marcos-Manotoc, who had controlled the military police. *Id.* In prior proceedings, Marcos-Mantoc moved to set aside a default judgment against her. *See* Trajano v. Marcos, 978 F.2d 493, 498 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 2960 (1993). The Ninth Circuit concluded that although the FSIA was implicated, the statute did not apply to these particular circumstances. *Id.* Since "she has admitted acting on her own authority, not on the authority of the Republic of the Philippines. . . . [H]er acts cannot have been taken within any official mandate and therefore cannot have been acts of an agent or instrumentality of a foreign state within the meaning of the FSIA." *Id.*

180. Hilao v. Marcos (*In re* Estate of Marcos), 25 F.3d 1467, 1470 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 934 (1995).

181. *Id.* at 1471.

182. *Id.* As the court viewed the situation, " 'Ferdinand Marcos does not appear to have had the authority of an absolute autocrat. He was not the state, but the head of the state, bound by the laws that applied to him.' " *Id.* (citations omitted).

need be demonstrated."[183] In fact, the court decided the FSIA did not even apply in this instance.[184] By declaring the FSIA inapplicable to Marcos, the court implicitly authorized applying the FSIA to heads-of-states in some circumstances.

The court's analysis invoked the FSIA because a suit against an individual official is "the practical equivalent of a suit against the sovereign directly."[185] Nevertheless, the court reasoned that "[a] lawsuit against a foreign official acting outside the scope of his authority does not implicate any of the foreign diplomatic concerns involved in bringing suit against another government in United States courts."[186] For all of these reasons, the Ninth Circuit allowed the suit against Marcos' Estate[187] and ultimately held that the plaintiffs had a viable cause of action despite Marcos' death.[188]

3. A Critique of The Ninth Circuit's Approach

Even though the FSIA provides the only existing statutory basis for jurisdiction over foreign states and their agencies or instrumentalities,[189] courts have found many problems with applying the statute as written to heads-of-state.[190] First, the FSIA does not specifically mention individuals.[191] Second, the FSIA defines foreign state as the "state and its agencies or instrumentalities."[192] Although the term "agency" may embrace individuals, stretching the word's meaning deviates from Congressional intent.[193] Moreover, the *Restatement (Third) of Foreign Relations Law* which was written after the FSIA

183. *Id.* at 1472 (footnote omitted).

184. *Id.* The Ninth Circuit ultimately granted the plaintiff's cause of action against Marcos's Estate under the Alien Tort Act. *Id.* at 1475.

185. *Id.* at 1472. (quoting Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095, 1101 (1990)).

186. *Id.* The court bolstered its reasoning by indicating the Philippine government's agreement to the suit against Marcos. *Id.*

187. *Id.*

188. *Id.* at 1476. The court continued its discussion under the Alien Tort Act, 28 U.S.C. § 1350. *Id.* at 1472-74. Since the court did not even mention head-of-state immunity, this omission implies that the FSIA analysis covered both head-of-state immunity and sovereign immunity.

189. *Id.* at 1469-70.

190. *See, e.g.*, Lafontant v. Aristide, 844 F. Supp. 128, 137 (E.D.N.Y. 1994) ("The view that the FSIA is inapplicable to a head-of-state comports with both the history of the FSIA and the underlying policy of comity."); Lininger, *supra* note 30, at 185 ("[M]ost human rights suits against foreign states are vulnerable to dismissal under the FSIA.")

191. *See* 28 U.S.C. § 1603 (1988).

192. *Id.*

193. Examples of types of agencies or instrumentalities listed in the legislative history do not include any individuals. *See* H.R. Rep. No. 1487, 94th Cong., 2d Sess., 15-16 (1976), *reprinted in* 1976 U.S.S.C.A.N. 6604, 6614 (listing state trading companies, mining enterprises, airlines, steel companies, central banks, export associations, government procurement agencies, and ministries as examples of agencies or instrumentalities). Additionally, individuals are not mentioned in the legislative history. *Id.*

was enacted also conforms to the common understanding that the FSIA does not apply to individuals.[194]

The Ninth Circuit's extension of the FSIA to cover individual officials has been met with criticism.[195] Although head-of-state immunity should have limits, heads-of-state are included in the FSIA only through a convoluted reading of the statute. This interpretation deviates both from the language of the statute and congressional intent.[196] The omission in the FSIA of any mention of heads-of-state should be treated as an oversight by the drafters, and the statute amended to clearly address this immunity.

In summary, these cases highlight the need for clear statutory guidance in this area by showing the different ways in which head-of-state immunity is treated. The *Aristide* decision has emerged as the standard support for the argument that the State Department should retain control over head-of-state immunity. On the other hand, the Ninth Circuit proposes a convoluted but statutory answer to this issue. These approaches gloss over concerns in order to achieve other policies.[197]

III. A Proposed Solution to the Confusion Surrounding Head-of-State Immunity

Any solution to the current split in authority surrounding head-of-state immunity needs to address two issues. First, as part III.A discusses, the solution must explicitly state that a restrictive theory of foreign immunity should apply to head-of-state immunity. Second, as part III.B explores, the solution must be statutory. Clearly stated guidelines would allow the lower courts to apply the FSIA uniformly in head-of-state cases. The best solution is to amend the FSIA.

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194. *Compare* Restatement (Third) of Foreign Relations Law of the United States §§ 451-60 (1992) (omitting any reference to individuals within the meaning of sovereign immunity) *with* Restatement (Second) of Foreign Relations Law of the United States § 66 (1962) (including individuals within the meaning of pre-FSIA sovereign immunity). The Ninth Circuit in Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095 (9th Cir. 1990) has acknowledged the significance of this change. *See supra* note 153.

195. *See* Joan Fitzpatrick, *The Claim to Foreign Sovereign Immunity by Individuals Sued For International Human Rights Violations*, 15 Whittier L. Rev. 465, 467-68 (1994); Lininger, *supra* note 30 at 187-88.

196. One commentator notes:

> I'm quite concerned about the drift of the cases on head of state immunity . . . . It was never the intention of the drafters of the Foreign Sovereign Immunities Act to encompass that. . . . In my days in the State Department, when we subsequently confronted that issue, it became my conviction that there should be absolute immunity for suits against foreign officials relating to acts of official duty, and that those actions ought to be brought in the U.S. courts against the foreign state when the conditions of the [FSIA] were present and justify the jurisdiction.

Foreign Governments, *supra* note 71, at 276 (remarks of Mark Feldman).

197. *See* Dellapenna, *supra* note 6, at 529 ("This theory [in *Aristide*] seems to me to be wrong as a matter of law and as a matter of policy.").

A. *The Restrictive Theory Should Apply to Head-of-State Immunity*

The United States should adopt a restrictive approach to head-of-state immunity. Subject to proper jurisdiction, a head-of-state should be liable in court for his private and commercial activities.[198] Courts and scholars have argued that the purposes of head-of-state immunity, namely comity and its related principles, would not be implicated in holding a foreign head-of-state liable for his private and commercial activities.[199] As one commentator noted, "[T]he interests of justice or regulatory goals predominate when the state or the officeholder descends from the heights of sovereign (or public or official) duty to the plane of private or commercial activity or otherwise behaves so that the shield of immunity is lost."[200] A head-of-state who behaves as a private actor in commerce should be subject to the same rules as other private actors.

Several compelling arguments favor the application of the restrictive immunity approach. For example, in the modern global economy many heads-of-state are involved as independent private actors in commercial activities.[201] Of the twenty-five richest people in the world, six are members of ruling families and may assert a claim of head-of-state immunity.[202] Although the number of people who could claim head-of-state immunity may seem small, the potential for harm resulting from a liberal approach is evidenced by the BCCI[203] scandal where the head-of-state of Abu Dhabi, Sheikh Zayed bin Sultan al-Nahyan, was involved in a $1.5 billion suit for allegedly conspiring to defraud the United States banking system.[204] If he had been declared immune, his victims would never have been compensated and he would have been able to wreak economic havoc with impunity.

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198. *See Immunity Hearings*, *supra* note 139, at 23-24 (memorandum of Andreas Lowenfeld, Professor, New York University Law School) ("Whether the challenged commercial activity was carried out by the head of state as agent or as principal, the head of state should be required to answer for it in court, subject of course to the other requirements of personal and subject matter jurisdiction, but without benefit of any immunity.").

199. *See Immunity Hearings*, *supra* note 139, at 17 (testimony of Joseph W. Dellapenna, Professor of Law, Villanova University) (stating the reasons for head-of-state immunity narrowly, namely avoidance of embarrassment to the executive branch and interfering in the political affairs of a foreign country).

The Ninth Circuit reached a similar conclusion. *See* Hilao v. Marcos (*In re* Estate of Marcos), 25 F.3d 1467, 1472 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 934 (1995).

200. Dellapenna, *supra* note 6, at 531-32. The only reason to treat foreign heads-of-state differently from foreign states is to avoid "the personal affront that arises from the service of process and consequent claim of personal jurisdiction upon a foreign head of state on an official visit." *Id.*

201. *See Immunity Hearings*, *supra* note 139, at 7 (statement of Virgil Mattingly, General Counsel, Bd. of Governors of the Fed. Reserve Bank).

202. *Id.*

203. BCCI is the common name of the now-defunct Bank of Credit & Commerce International. *See Sovereign Impunity*, Wall St. J., Dec. 8, 1993, at A14.

204. *Id.*; *see infra* notes 222-28 and accompanying text.

By way of comparison, the increase in international commerce was a factor in the adoption of the restrictive theory of sovereign immunity in the United States.[205] Support for the proposition that a sovereign state, or leader entering into the private market place should not be allowed the sovereign's privilege of immunity can be found as far back as Chief Justice John Marshall's opinions:

> It is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted.[206]

The increase in head-of-state involvement in American commercial activities parallels a general increase in foreign direct investment in the United States,[207] and foreign investment is expected to grow even further.[208] Because the trend of foreign heads-of-state entering into

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205. *See* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 702 (1976) ("[T]he enormous increase in the extent to which foreign sovereigns had become involved in international trade made essential 'a practice which will enable persons doing business with them to have their rights determined in the courts.' " (citation omitted)).

206. Bank of The United States v. Planters' Bank of Georgia, 22 U.S. (9 Wheat.) 904, 906 (1824). The Supreme Court bolstered its analysis promoting the restrictive immunity which the Tate Letter had just espoused by referring to Chief Justice Marshall's opinion in *Planter's Bank of Georgia*. *See Alfred Dunhill*, 425 U.S. at 695-96. The Planter's Bank analysis was also brought to Congress's attention during the hearings prior to enactment of the FSIA. *See States Hearings*, *supra* note 1, at 30.

207. *See* Edward M. Graham & Paul R. Krugman, Foreign Direct Investment in the United States 2 (2d ed. 1991).

> By the end of 1989 foreign-owned firms controlled a little less than 4 percent of the US economy as a whole and, depending on the measure used, between 10 percent and 17 percent of the manufacturing sector; by 1990 foreign firms controlled some 14 percent to 21 percent of the US banking industry .... These numbers represent increases of about 200 percent for the US economy as a whole and about 150 percent for both the manufacturing and the banking sectors since the mid-1970s .... Thus, the foreign role in the US economy has indeed grown rapidly and is fairly substantial.

Id. During the time the restrictive theory was first proposed in the Tate Letter and the enactment of the FSIA, foreign direct investment had likewise grown substantially. *See* Earl H. Fry, Financial Invasion of the U.S.A. 2 (1980) (showing an increase in foreign direct investment from $4.6 billion in 1954 to $33.7 billion in 1977). Because increase in commerce was an important reason for the change in policy concerning sovereign immunity, likewise the dramatic growth of foreign investment in the past two decades demands a reevaluation of the policies behind head-of-state immunity.

208. *See* Graham & Krugman, *supra* note 207, at 159.

A headline making foreign investor, Prince Alwaleed, a member of the Royal Family of Saudi Arabia, has substantial investments in the United States. *See* John Rossant, *The Prince*, Bus. Wk., Sept. 25, 1995, at 88, 92 (detailing in a cover story that the Prince's North American empire includes a 9.9% stake in Citicorp, 50% of Fairmont,

commercial transactions in the United States will undoubtedly continue, this immunity will continue to be invoked.[209]

Moreover, restricting immunity will lend more certainty to the dealings of American individuals and businesses involved in commercial transactions with foreign heads-of-state.[210] American business partners will be assured of a judicial resolution of any dispute that may arise and that the dispute will not be artificially raised to the level of a political brouhaha. When the State Department advocated the enactment of the FSIA, it was concerned about the commercial uncertainty and unfairness involved in the existing system.[211]

A statutory resolution of head-of-state immunity will also provide an element of fairness for both heads-of-state and Americans who transact with them. Clear statutory authority will forewarn foreign heads-of-state that entering into commercial transactions in the United States will expose them to the jurisdiction of the United States courts. Shielding heads-of-state behind the cloak of immunity is unfair and unjust for those business people with legitimate commercial disputes.[212]

Both courts[213] and commentators have speculated that head-of-state immunity requires special discretion to implement.[214] A head-

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50% of the Plaza Hotel, 26.6% of the Four Seasons Hotel, and 11% of Saks Fifth Avenue). Prince Alwaleed maintains a keen interest in further investment in the United States and has dropped hints about entering the U.S. broadcasting market. *See id.* at 98.

209. *See* Rebecca Mead, *To Di For*, N.Y. Mag., Feb. 5, 1995, at 37. This article presents a lighthearted portrayal of the Princess of Wales' life in New York if indeed she moved to that city. *Id.* Ms. Mead based her cover story on press reports that the Princess of Wales was shopping for apartments in Trump Tower and discussing the possibility of moving to New York to take a job at Harper's Bazaar. *Id.* Although purely conjecture, such a move would provide interesting ramifications for head-of-state immunity because the Princess of Wales could claim immunity in any suit brought against her.

210. *See* Mallory, *supra* note 34, at 179.

211. *See States Hearings*, *supra* note 1.

> [W]hen the foreign state enters the marketplace or when it acts as a private party, there is no justification in modern international law for allowing the foreign state to avoid the economic costs of the agreements which it may breach or the accidents which it may cause.
>
> The law should not permit the foreign state to shift these everyday burdens of the marketplace onto the shoulders of private parties.

Id. The State Department's concerns regarding sovereign immunity can be equally applied to head-of-state immunity.

212. *See* Dellapenna, *supra* note 6, at 531 ("While it is true that any litigation against an officeholder interferes to some extent with that person's discharge of the duties of office, to shield that person behind a claim of immunity works a denial of justice to those wronged by the officeholder and interferes with the achievement of regulatory goals in the nation to which the activity pertains." (citation omitted)).

213. *See supra* note 125 and accompanying text.

214. *See* Born & Callcott, *supra* note 90, at 374-75 (asserting that any resolution of the issue would require exercise of executive branch discretion); Callan, *supra* note 140, at 136 (advocating a common law framework because a "legislative determina-

of-state sued in the United States would face embarrassment both for himself and for his country. Other commentators, however, have maintained that the head-of-state should be treated neither more nor less favorably than the state itself.[215] Adjudication of a commercial claim against a sovereign state (as well as the head-of-state) does not implicate the sovereignty of a foreign nation.[216] Instead, the court reviews the sovereign's conduct as a merchant, subject to the same laws as other merchants.[217] With forewarning, foreign heads-of-state can assess the risk of any potential liability from suit and act accordingly.

Some courts have already tentatively advocated applying a restrictive approach to head-of-state immunity.[218] For example, the Second Circuit has held that immunity may be inappropriate when the individual is "no longer head of state and the current government is suing him."[219] Although the Fourth Circuit has allowed waivers of immunity, the court expressly declined to decide "whether that immunity would have extended to unauthorized acts . . . or whether it would have been limited to official authorized acts."[220] In addition, other courts have claimed that the head-of-state doctrine applies only to "authorized official acts taken while the ruler is in power."[221]

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tion of when to impose the immunity cannot adequately address the distinct circumstances involved in head of state immunity cases.").

Such comments had also been made with reference to sovereign immunity before the enactment of the FSIA. Nevertheless, the FSIA proved workable. *See supra* note 130.

215. *See Immunity Hearings*, *supra* note 139, at 114 (memorandum of Andreas Lowenfeld, Professor, New York University Law School).

216. *See States Hearings*, *supra* note 1, at 26-29. The courts would need to determine on a case-by-case basis whether an act was commercial or non-commercial or conducted by the head-of-state or the state itself. For example, Sheikh Zayed of Abu Dhabi by tradition and historical background "owns all the land and natural resources of the country in fee simple absolute, with no distinctions being made among the wealth of the ruler, his family, and the nation itself." Staff of the Senate Comm. on Foreign Relations, 102d Cong., 2d Sess., Report on the BCCI Affair 28 (Comm. Print 1992).

217. *See States Hearings*, *supra* note 1, at 26-29.

218. For a discussion concerning the Ninth Circuit's implementation of a restrictive theory of head-of-state immunity under the FSIA see *supra* part II.B.

219. Republic of the Phil. v. Marcos, 806 F.2d 344, 360 (2d Cir. 1986), *cert. denied*, 481 U.S. 1048 (1987). This approach effectively constitutes a waiver of immunity by the foreign government.

220. *In re* Grand Jury Proceedings, Doe #700, 817 F.2d 1108, 1111 (4th Cir.), *cert. denied*, 484 U.S. 890 (1987).

221. *Id.* at 1110; *see also* Doe v. United States (*In re* Doe), 860 F.2d 40, 45 (2d Cir. 1988) (stating that the head-of-state defense does not apply to "private or criminal acts in violation of American law").

The courts have looked for support for the rationale of head-of-state immunity in making these assertions. *See* United States v. Noriega, 746 F. Supp. 1506, 1519 n.11 (S.D. Fla. 1990) (expressing "ample doubt whether head of state immunity extends to private or criminal acts in violation of U.S. law"). The district court reserved discussion on the issue but stated that "[c]riminal activities such as the narcotics trafficking with which Defendant is charged can hardly be considered official acts or governmental duties which promote a sovereign state's interests, especially where, as here, the

The BCCI affair presented an excellent example of the problems caused by the current confusion in the head-of-state immunity doctrine. Sheikh Zayed bin Sultan Al-Nahyan, the head-of-state of the Kingdom of Abu Dhabi, owned seventy-seven percent of the BCCI when the bank was closed due to widespread fraud.[222] Sheikh Zayed is the head-of-state of a pro-American Persian Gulf state and an American ally during the Persian Gulf War.[223] For his participation in the BCCI scandal, Sheikh Zayed was sued for $1.5 billion in a civil action brought by the trustees of an American bank owned by BCCI.[224] When Sheikh Zayed asked for head-of-state immunity, then House Banking Committee Chairman Henry Gonzalez called for a hearing into the matter because "giving Zayed immunity 'would be a mockery of our U.S. banking statutes and a terrible precedent.' "[225]

When State and Justice Department officials refused to attend the hearing, "Gonzalez said he was 'disappointed' in the departments' 'reluctance to take a public stand on this issue.' "[226] The United States government was caught in a Hobson's choice—not wanting to offend Zayed, a friendly foreign state's leader, but needing to address the injustice created by the fraud.[227] The government was spared from deciding the issue of Zayed's immunity because the case eventually settled, albeit for a fraction of the original amount of damages sought.[228] In such situations, a statutory interpretation by a U.S. court

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activity was allegedly undertaken for the sole personal benefit of the foreign leader." *Id.*

222. *Abu Dhabhi's Ruling Family Must Forfeit $104 Million*, Wash. Post, July 31, 1992, at A10.

223. Sharon Walsh, *BCCI Suit Becomes a Diplomatic Battle: Rep. Gonzalez Disputes Abu Dhabi Ruler's Immunity Claim in Case*, Wash. Post, Dec. 9, 1993, at B14.

224. *Id.*

225. *Id.* at B14, B16.

226. *Id.* at B16.

227. *See id.* at 314. The BCCI scandal affected the lives of thousands of ordinary Americans who lost their jobs and/or their savings. Sharon Walsh, *The Continuing Anguish of BCCI: Two Years After Bank's Shutdown, Toll Mounts on Depositors and Employees*, Wash. Post, May 28, 1993, at B1, B8.

228. Sharon Walsh, *U.S. Strikes Deal in BCCI Case: Pact Frees Up $400 Million, Gives Prosecutors Access to Key Witness*, Wash. Post., Jan. 9, 1994, at A1 (revealing the $1.5 billion civil lawsuit was dropped in return for Sheikh Zayed agreeing to give up claims for $400 million that the Royal Family had invested in the U.S. bank owned by BCCI). Other aspects of the BCCI scandal were also settled outside of the public eye in order to avoid unpleasant political and diplomatic ramifications. *See* Timothy L. O'Brien, *U.S. Regulators Likely to Crack Down on Foreign Banks After Daiwa Scandal*, Wall St. J., Nov. 6, 1995, at A4. In discussing scandals involving foreign banks in the United States, this article stated:

> In 1992, National Commercial Bank, a Saudi Arabian bank with close ties to that country's royal family, 'voluntarily liquidated' its U.S. operations after accusations from U.S. regulators that the bank helped BCCI conceal its ownership and financial condition. Regulators familiar with the incident said National Commercial was allowed to pursue a voluntary liquidation to help keep diplomatic waters calm between the U.S. and Saudi Arabia.

Id.

would doubtless have been less politically charged and fair for everyone involved.

B. *The Need for Statutory Clarification: A Proposed Amendment*

Head-of-state immunity would best be implemented through a statutory framework. As the previous discussion of the divergent approaches of the courts shows, the common law method has not proven effective. Part of the problem has been that "[u]nlike foreign sovereign immunity, which has been codified in order to permit judicial interpretation, there is no readily ascertainable standard of judicial review" in head-of-state immunity.[229] The judiciary's continued reliance upon "suggestions" of immunity in head-of-state immunity cases has resulted in the failure to create a coherent body of case law.[230] The courts, moreover, are hesitant to adjudicate in sensitive matters relating to foreign relations.[231] A statutory framework would lend much needed certainty to this sensitive area of the law. Consequently, courts and scholars have called for Congress either to enact a new statute or amend the FSIA.[232]

An amendment is preferable for a variety of reasons.[233] Although Congress could subsume head-of-state under the concepts of foreign state, agency, or instrumentality of a foreign state, this linguistic manipulation could lead to more confusion.[234] To avoid such confusion, Congress should include an additional subsection specifically to cover

229. Trajano v. Marcos, Civ. No. 86-0207, slip op. at 6-7 (D. Haw. July 18, 1986) (denying Marcos' request for head-of-state immunity based on precedent, stating that "this court will not intrude on the prerogative of the executive branch").

230. *See* Lisa J. Damiani, Student Article, *The Power of United States Courts to Deny Former Heads of State Immunity From Jurisdiction*, 18 Cal. W. Int'l L.J. 355, 360 n.43 (1988).

The only consistent rule emerging from the case law method is that a State Department "suggestion" of immunity letter will provide immunity. *See supra* part II.A. "When the State Department has declined to suggest head-of-state immunity, on the other hand, our courts have rejected such claims even when the facts were indistinguishable from those cases in which the State Department suggested, and courts accorded, immunity." Dellapenna, *supra* note 6, at 531.

231. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964) (expressing "the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere").

232. *See, e.g.*, *In re* Doe, 860 F.2d 40, 45 (2d Cir. 1988) ("Congress should enact—or amend existing—legislation to make [immunity] clear"); Dellapenna, *supra* note 6, at 532 (suggesting either an amendment to the FSIA or for the courts to infer a derivative immunity for heads-of-state from the FSIA); Fitzpatrick, *supra* note 195, at 469-70 (suggesting an amendment to the FSIA as one of several solutions).

233. *See* Dellapenna, *supra* note 6, at 532 (claiming it is the simplest solution to the present problems of head-of-state immunity).

234. *See* Fitzpatrick, *supra* note 195, at 470 ("[A] careful legislative strategy will be necessary to obtain a clarifying amendment to § 1603(b) of the FSIA that will actually reduce rather than increase confusion over the extent to which individual foreign officials should enjoy immunity . . . ."). After discussing several alternatives, Ms. Fitzpat-

heads-of-state. The FSIA should cover sovereign immunity for the state and the head-of-state because both immunities share not only the same historical development but also similar purposes.[235] Furthermore, although enacted recently, the FSIA has been heavily litigated, and this case law can also shed light on the issues involved in head-of-state immunity.[236]

The drafters of the statutory addition could look to the British State Immunity Act for guidance[237] and explicitly limit the immunity of foreign heads-of-state. Such an amendment could read in part:

> The Immunities and Privileges conferred by this Act apply to:
> (1) the sovereign or other head-of-state in his public capacity and
> (2) members of his family forming part of his household which persons shall be determined by the Executive.

Similar to the proposed amendment, the British State Immunity Act and other statutes modeled on it expressly subject foreign heads-of-state to the restrictive theory of immunity.[238] In the British statute, heads-of-state are not only included expressly within the definition of "state," but also merit a separate definition.[239] The British Act is thus more specific and precise than its American counterpart. Conse-

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rick decides the existing common-law approach to head-of-state immunity is sufficient. *Id.*

In addition, an amendment would explicitly express Congressional wishes in a statute which has already been criticized for being convoluted. *See* Chisholm & Co. v. Bank of Jam., 643 F. Supp. 1393, 1398 n.2 (S.D. Fla. 1986) ("a peculiarly twisted exercise in statutory draftsmanship"); Gibbons v. Udaras na Gaeltachta, 549 F. Supp. 1094, 1106 (S.D.N.Y. 1982) (referring to the FSIA as "remarkably obtuse" and "a statutory skeleton").

235. *See supra* part I.B.

236. *See generally Gibbons*, 549 F. Supp. at 1105-06 (remarking on the heavy litigation surrounding the FSIA).

237. *See* State Immunity Act, 1978, ch. 33, §§ 14(1)(a), 20, (U.K.), *reprinted in* 17 I.L.M. 1123, 1127-29 (1978).

238. *See id*; State Immunity Act, ch. 95, §§ 2-4 (1982) (Can.), *reprinted in* 21 I.L.M. 798, 801 (1982).

239. *See* State Immunity Act, 1978, ch. 33, §§ 14(1)(a), 20 (U.K.), *reprinted in* 17 I.L.M. 1123, 1127-29 (1978).

The first part of the British provision reads in pertinent part:

> (1) The immunities and privileges conferred by this Part of this Act apply to any foreign or commonwealth State other than the United Kingdom; and references to a State include references to—
> (a) the sovereign or other head of that State in his public capacity;
> (b) the government of that State; and
> (c) any department of that government, but not to any entity (hereafter referred to as a "separate entity") which is distinct from the executive organs of the government of the State and capable of suing or being sued.

Id. § 14(1)(a)-(c). The supplementary definition of head-of-state provides:

> (1) Subject to the provisions of this section and to any necessary modifications, the Diplomatic Privileges Act 1964 shall apply to—
> (a) a sovereign or other head of State;
> (b) members of his family forming part of his household; and

quently, the British Act has achieved a greater certainty in litigation in Britain regarding head-of-state immunity than the FSIA has achieved in the United States.[240]

Additional provisions would define the scope of the immunity and the courts' jurisdiction.[241] As one commentator proposed: "A 'head-of-state' should be defined as the political or ceremonial head of a government recognized by the United States."[242] For example, under this definition, both Queen Elizabeth II, the ceremonial head-of-state, and the Prime Minister, the political head-of-government of the United Kingdom, would be entitled to restrictive immunity. The immunity should extend to the head-of-state's immediate family because of the potential opportunity to embarrass or harass the public figure through his or her family by instituting frivolous suits.

Head-of-state immunity would be granted if the defendant met certain statutory criteria: (1) the United States recognizes the defendant's government, and (2) the act in question is an official or public act. A process similar to the practice used in diplomatic immunity may be used to determine who qualifies as a head-of-state.[243] In cases involving requests for diplomatic immunity, the executive branch has a "Diplomatic List" containing the names and particulars of everyone who is eligible for diplomatic immunity.[244] The diplomatic list is periodically updated by the Office of Protocol in the Department of

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(c) his private servants, as it applies to the head of a diplomatic mission, to members of his family forming part of his household and to his private servants.

Id. § 20(1).

240. *See Immunity Hearings*, *supra* note 139, at 24 (testimony of Joseph W. Dellapenna, Professor of Law, Villanova University).

241. For example, a further provision which prohibits the service of process on a visiting foreign head-of-state would take care of any concerns about embarrassing political figures or preventing them from carrying out their duties. *See* Dellapenna, *supra* note 6, at 532.

242. Mallory, *supra* note 34, at 188.

243. Similar to the practice in diplomatic immunity, the executive branch should have a definitive list of all such persons who would receive immunity if a problem arose. Such a practice would curtail the problem of political influence determining the people who would qualify for immunity. Even with changes of political leaders, the positions would remain the same.

This Note suggests that only the part of the procedure involving the diplomatic list should be a model for deciding head-of-state immunity cases under an amended FSIA. The FSIA and the Vienna Convention are not only unrelated but also involve two very different immunities. *See* Tabion v. Mufti, No. CIV.A.94-1481-A, 1995 WL 67614, at *3-4 (E.D. Va. 1995) (refusing to apply the FSIA interpretation of the term "commercial activity" with regard to the term's use in the Vienna Convention because of the differences between the two laws).

244. *See* Grant V. McClanahan, Diplomatic Immunity: Principles, Practices, Problems 86 (1989). Diplomatic lists which are not normally classified documents record the name, official designation and other pertinent information for each diplomat. *Id.*

State.[245] The U.S. government then files an affidavit with the court indicating that the defendant is on the diplomatic list and that the applicable rules granting immunity are set forth in the Vienna Convention.[246] Before dismissing the case, a court may view a person being named on the diplomatic list as only prima facie evidence of immunity and may require supporting testimony from the foreign ministry.[247]

A diplomatic list provides not only a convenient reference tool for diplomats and local businesses but also evidence of diplomatic immunity.[248] Both of these advantages would translate well into the head-of-state immunity context. The list would not only provide notice to everyone involved but also would impart a certain amount of certainty and fairness to grants of head-of-state immunity.[249] In addition, a head-of-state list would be even easier to maintain because the list would be shorter and less subject to frequent change.[250]

Under this proposal, the executive branch's discretion in requests for immunity would be limited to choosing whether or not to recognize a foreign government.[251] Although the executive branch would inevitably continue to play a role in the way head-of-state immunity is fashioned,[252] their discretion would no longer include actually dispensing the immunity itself. The courts would be the final arbiters of immunity and would have statutory guidance and objective criteria in making their decisions.[253]

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245. *Id.* at 90. Diplomatic lists come in various forms and may be supplemented by consular lists. *Id.* at 86. For an example of a diplomatic list see *id.* at 87-89.

246. *See Foreign Governments*, *supra* note 71, at 275.

> The State Department does not file suggestions of immunity in the old sense ... We file what is essentially an affidavit by the Associate Chief of Protocol that says the person is on our list, that they fit into this or that category of the Vienna Convention, and those are the rules that apply.

Id. (remarks of David A. Jones, Jr.).

247. *See* McClanahan, *supra* note 244, at 86.

248. *Id.* at 91.

249. Although such a list is still open to manipulation as has been seen in the case of diplomatic immunity, this system will still lend more certainty and fairness to the process than is currently available. *See supra* note 139.

250. Former political leaders would qualify for immunity as well for official, public acts committed during their tenure. For this reason, the head-of-state named on a particular list could seek immunity, even after leaving office, for acts committed during the time the list was operative.

251. For example, de facto rulers such as Noriega would not be encompassed by this proposed amendment because the U.S. would not have recognized his government.

252. For example, the State Department may continue its practice under the FSIA of issuing amicus curiae to inform the court of its position. *See* Dellapenna, *supra* note 6, at 529. Although the courts have the discretion to weigh such political considerations, determinations of head-of-state immunity will no longer be made on an ad hoc basis because each decision must relate to the statute and previous case law.

253. *See* Dellapenna, *supra* note 6, at 532. "[E]xperience under the [FSIA] has taught us that there is room enough for the play of political concerns in determining what acts are commercial [or private] and when they are sufficiently linked to the

C. *The Proposed Amendment in Practice*

A hypothetical example will illustrate the manner in which the proposed amendment to the FSIA would operate. A foreign head-of-state, ("President") is the leader of a friendly foreign state. The State Department has a list on which President is designated as a head-of-state.[254]

During his tenure in office, President has invested heavily in United States real estate. He owns a large hotel which is burned to the ground causing several casualties. The victims' families allege the hotel did not meet adequate fire regulations and safety standards. The families bring a civil suit in a United States district court.[255] President seeks head-of-state immunity from the court. The State Department verifies that President is indeed a head-of-state. Although he is on the head-of-state list, he does not qualify for immunity under the FSIA because he is engaged in a private, commercial activity outside the scope of his public, official duties. The district court will try the case, subject to other jurisdictional requirements being met, on its merits.

President is involved in another case during his tenure in office. In an ongoing border dispute, he had ordered air strikes against a neighboring country killing several people. The victims' families are in the United States and bring suit against him in a United States district court.[256] President seeks head-of-state immunity from the State Department. The State Department again sends an affidavit to the court indicating President is indeed a head-of-state. Applying the FSIA, the court will dismiss the case against him because he was acting in his official capacity as a foreign leader.[257]

If President were to lose his position as head-of-state of the foreign country, the results in these cases would remain the same. He would not be granted immunity for private or commercial acts, but would receive immunity for public or official acts committed during his tenure in office. A public or official act would not become the basis of a viable claim simply because President is no longer in a position of power or usefulness to the United States government.

United States that we need not fear excessive claims of jurisdiction over foreign heads of state." *Id.*

254. This list is in effect prior to any incidents involving potential immunity.

255. Assume jurisdictional requirements have been met.

256. Assume jurisdictional requirements have been met.

257. President's act involved a decision regarding his country's national defense and armed forces. This type of act has been traditionally viewed as falling within the immunity granted to *de jure imperii*. *See* Victory Transp., Inc. v. Comisaria Gen. de Abastecimientos y Transportes, 336 F.2d 354, 358 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965).

CONCLUSION

The current state of confusion surrounding head-of-state immunity has existed for many years. Despite common origins in customary international law, sovereign immunity for states and heads-of-state are now separate doctrines following the enactment of the FSIA. While sovereign immunity for states has been governed by the FSIA, the statute does not make any mention of heads-of-state. The courts have approached this problem gingerly because head-of-state immunity presents many complex issues.

In the absence of a specific reference to heads-of-state in the FSIA, the courts have taken two different approaches. Some courts, such as the Eastern District of New York in *Aristide*, have concluded that the pre-FSIA procedure for sovereign immunity still applies to head-of-state immunity. By following the pre-FSIA procedure, these courts will grant immunity at the request of the State Department. On the other hand, the Ninth Circuit, in *Marcos*, has concluded that the FSIA does apply to heads-of-state. According to the Ninth Circuit, while the FSIA does not specifically include individuals, neither does the statute exclude them.

Consequently, the courts are divided not only about the extent to which immunity should be granted to heads-of-state but also the method under which a head-of-state immunity case is analyzed. Neither complete deference to the State Department's determinations nor a broad reading of the FSIA is the correct resolution of the problem. Under the *Aristide* approach, grants of immunity are highly politicized by the intervention of the State Department. Furthermore, the ad hoc determination of head-of-state immunity cases has stymied the growth of a coherent body of case law. Although the Ninth Circuit is correct in restricting the availability of immunity, reading head-of-state immunity into the FSIA as written violates both the plain language of the statute as well as congressional intent.

This Note proposes that the best solution is an amendment to the FSIA which would restrict immunity for heads-of-state to their public acts, but not their private or commercial ones. By basing the judicial determination of immunity on objective statutory criteria, executive discretion in the realm of head-of-state immunity would be limited. A coherent body of case law would develop in this area similar to that which has evolved regarding sovereign immunity.

Heads-of-state should be subject to a restrictive immunity for official or public acts committed during the head-of-state's tenure in office. The increase in international commerce and the growing participation of heads-of-state in commercial ventures mandates protection for American business interests. A statutorily implemented restrictive immunity would provide more certainty for American businesses that transact with foreign heads-of-state. Both Americans and

foreign heads-of-state would receive notice about the consequences of their actions. Moreover, restricting immunity for heads-of-state is only fair because foreign officials who behave as businessmen should be treated in the same manner as other market players.

The restrictive theory of immunity should also be statutorily implemented. The current common law approach has failed to create a coherent body of case law because these decisions are made on an ad hoc basis. Giving the courts statutory criteria and objective guidance will limit the State Department's discretion merely to recognizing a foreign government. Immunity decisions would no longer be determined by political pressures. An amendment to the FSIA is the best solution because the body of case law already developed around this statute will become available for head-of-state immunity as well. Sovereign immunity for states and heads-of-state were historically the same and, despite a short separation, still share similar rationales and goals.

Consequently, Congress should amend the FSIA to specifically include heads-of-state within the statute. For a commercially and legally sophisticated nation such as the United States, the present state of uncertainty is simply untenable and short-sighted.