Fordham Law Review

Volume 84 | Issue 4 Article 17

2016

The New Tate Letter: Foreign Official Immunity and the Case for a Statutory Fix

Luke Ryan
Fordham University School of Law

THE NEW TATE LETTER: FOREIGN OFFICIAL IMMUNITY AND THE CASE FOR A STATUTORY FIX

*Luke Ryan**

> Our constitutional system was designed—and indeed works better—when the President and his subordinates must answer to people who don't work for them, particularly those in Congress and the courts.[1]

Plaintiffs sometimes bring civil lawsuits in U.S. federal courts against officials or ex-officials of foreign governments accused of committing atrocities abroad. In these types of cases, the foreign individuals will almost certainly invoke the affirmative defense of foreign official immunity. In the 2010 decision, Samantar v. Yousuf, *the Supreme Court unanimously held that the Foreign Sovereign Immunities Act (FSIA)—a 1976 statute governing the immunity of foreign states—did not control judicial determination of a foreign individual's request for immunity. Instead, the Court said that foreign officials may be entitled to immunity as a matter of federal common law. Because of the sensitive foreign policy implications of these types of cases, the executive branch—specifically the State Department—has aggressively asserted control over all foreign official immunity requests. In 2012, in the so-called "*Rosenberg *Statement" and "Koh Letter," the Justice Department and Legal Adviser to the State Department, Harold Hongju Koh, declared that (1) federal courts must refrain from deciding any foreign official immunity request that was not first presented to the State Department and (2) it was for the Executive, not the courts, to evaluate whether a foreign individual acted in an official capacity.*

While the Executive is certainly the branch of government with principal responsibility for foreign affairs, the Koh Letter and Rosenberg *Statement represent executive branch overreach into judicial supervision of a federal*

* J.D. Candidate, 2017, Fordham University School of Law; B.A., 2002, University of Virginia. The author is profoundly grateful to Professor Thomas H. Lee for his guidance and encouragement and is especially thankful to a courageous team who gave him the inspiration, joy, and resolve necessary to make this project a reality.

1. Harold Hongju Koh, *Foreword* to MICHAEL P. SCHARF & PAUL R. WILLIAMS, SHAPING FOREIGN POLICY IN TIMES OF CRISIS: THE ROLE OF INTERNATIONAL LAW AND THE STATE DEPARTMENT LEGAL ADVISOR, at xvi (2010).

lawsuit. Judicial deference to the Executive on foreign official immunity calls may be proper; blind obedience is not. In fact, such unilateral control ultimately hurts the State Department itself, which must balance complex and countervailing foreign policy interests. So how should the Executive's power play be answered? Despite the Supreme Court's reference to judge-made federal common law in Samantar*, this Note argues that the tug-of-war between the executive and judicial branches requires congressional action because the courts are in disarray, with some already having acquiesced to executive control. The current disorder is a striking replay of what happened in the doctrine of foreign sovereign immunity in the late 1950s and 1960s in the aftermath of the 1952 Tate Letter—an earlier dispatch from a different State Department Legal Advisor that sparked such confusion in the federal common law of foreign sovereign immunity that Congress was compelled to intervene with the FSIA. This Note concludes with a model statute that Congress should consider enacting.*

INTRODUCTION

On November 26, 2008, under a nearly moonless night sky, ten members of the Lashkar-e-Taiba (LeT) terrorist group[2] crouched aboard a small dinghy as it moved across the inky darkness of the Arabian Sea.[3] The men had abandoned their homes in the mountain villages of Eastern Pakistan and embarked on a one-way journey to the Indian coastline to "kill relentlessly."[4] Stained with blood after murdering the crew of an Indian fishing boat, the terrorists raced toward the darkened beach of the world's fourth largest city clutching automatic rifles, grenades, and satellite phones.[5] When their dinghy pushed ashore at a fisherman's slum in Mumbai's Back Bay, they ran into the bustling commercial capital to conduct one of the most spectacular terrorist attacks in history.[6] Over the course of four days, the world watched as Indian authorities scrambled to counterattack, and the terrorists methodically killed 166 people.[7]

The Mumbai attackers were guided to their targets by the detailed surveillance work of a U.S. citizen.[8] For nearly two years, David Coleman Headley had traveled around Mumbai, using a camera and pocket-sized Global Positioning System (GPS) to discreetly gather information about the Indian security apparatus and map out the scenes of mass murder.[9] In 2009, Headley was arrested in Chicago's O'Hare Airport and charged with aiding and abetting the murder of U.S. nationals.[10] He quickly confessed to his role in the Mumbai attacks.[11] In interviews with American and Indian authorities, Headley revealed that he and the LeT attackers had received money and other material support from agents of the Inter-Services Intelligence Directorate (ISI), the secretive Pakistani spy agency organized under Pakistan's Ministry of Defense.[12] Based on the information Headley

2. LeT is a Pakistan-based Islamic fundamentalist organization that has conducted numerous attacks against Indian government and civilian targets inside both countries. *See Lashkar-e-Tayyiba*, NAT'L COUNTERTERRORISM CTR., http://www.nctc.gov/site/groups/let.html (last visited Feb. 26, 2016) [perma.cc/TX46-8EXP]. On December 20, 2001, LeT was designated a foreign terrorist organization by the U.S. Secretary of State pursuant to section 219 of the Immigration and Nationality Act. *See Individuals and Entities Designated by the State Department Under E.O. 13224*, U.S. DEP'T OF STATE, http://www.state.gov/j/ct/rls/other/des/143210.htm (last visited Feb. 26, 2016) [perma.cc/THK4-5SYR].

3. *See* CATHY SCOTT-CLARK & ADRIAN LEVY, THE SIEGE: 68 HOURS INSIDE THE TAJ HOTEL 1–3 (2013).

4. *Id.*

5. *See id.*

6. *See id.*

7. *See id.* at 3, 137; *see also* Rosenberg v. Lashkar-e-Taiba, 980 F. Supp. 2d 336, 338 (E.D.N.Y. 2013), *aff'd sub nom.* Rosenberg v. Pasha, 577 F. App'x 22 (2d Cir. 2014).

8. *See* SCOTT-CLARK & LEVY, *supra* note 3, at 34; *see also* Government's Position Paper As to Sentencing Factors at 3–4, United States v. Headley, No. 09 CR 830 (N.D. Ill. Jan. 22, 2013), 2013 WL 951595.

9. *See* Government's Position Paper, *supra* note 8, at 3–4; SCOTT-CLARK & LEVY, *supra* note 3, at 55–56.

10. *See* Government's Position Paper, *supra* note 8, at 4.

11. *See id.* at 7–9.

12. *See id.* at 8–9; SCOTT-CLARK & LEVY, *supra* note 3, at xvi, 45, 53.

provided, the Justice Department issued an indictment against the ISI official who Headley had identified as his primary contact.[13]

When the victims of the Mumbai attacks filed an action in the Eastern District of New York against the ISI and two of its directors, the Pakistani government asserted immunity and petitioned the State Department to recommend that protection to the court.[14] The executive branch obliged,[15] and in the so-called "*Rosenberg* Statement,"[16] it recommended dismissal of the allegations against the ISI under the statutory doctrine of foreign *sovereign* immunity[17] and dismissal of the allegations against the ISI officials under the federal common law doctrine of foreign *official* immunity.[18] The statement declared that the immunity determinations were binding on the court.[19] More significant, however, was the second to last page of the document, where the Executive asserted control over all future foreign official immunity determinations when it wrote:

> [I]t is for the Executive Branch, not the courts, to determine whether the conduct alleged was taken in a foreign official's official capacity.[20]

And,

> [B]ecause a foreign state's request for immunity on behalf of an official itself has foreign relations implications, courts should ensure that the Executive Branch has been notified of and had an opportunity to consider such a request before ruling on the immunity issue. Indeed, for that reason, a foreign state's request for an official's immunity should first be presented to the Department of State, not to the court.[21]

These controversial assertions highlight the disarray that currently exists regarding determinations of foreign official immunity by the courts.[22] Unfortunately, this discord is not easily resolved because the doctrine of foreign official immunity involves the competing responsibilities of the

---

13. *See* Second Superseding Indictment at 3, United States v. Kashmiri, No. 09 CR 830-4 (N.D. Ill. Apr. 21, 2011), 2011 WL 1938505; Government's Position Paper, *supra* note 8, at 9.

14. *See* Rosenberg v. Lashkar-e-Taiba, 980 F. Supp. 2d 336, 339 (E.D.N.Y. 2013), *aff'd sub nom.* Rosenberg v. Pasha, 577 F. App'x 22 (2d Cir. 2014).

15. *See id.*

16. Statement of Interest and Suggestion of Immunity, Rosenberg v. Lashkar-e-Taiba, 980 F. Supp. 2d 336 (E.D.N.Y. 2013) (No. 10-CV-05381 (DLI)), ECF No. 35 [hereinafter *Rosenberg* Statement] [perma.cc/JW9C-AUNL].

17. Foreign sovereign immunity is synonymous with foreign state immunity.

18. *Rosenberg* Statement, *supra* note 16, at 2, 7.

19. *See id.* at 1 ("[T]he Department of State has determined that the former Directors General of the ISI . . . enjoy immunity, a determination that is not subject to judicial review.").

20. *Id.* at 9–10.

21. *Id.* at 9 n.5.

22. *See infra* Part I. Previously, the Executive had merely claimed "the primary role in determining the immunity of foreign officials" without making such an explicit assertion of total control. Statement of Interest of the United States at 5, Yousuf v. Samantar, No. 1:04cv1360 (LMB/JFA), 2011 WL 7445583 (E.D. Va. Feb. 15, 2011), *aff'd*, 699 F.3d 763 (4th Cir. 2012) (No. 04-CV-01360 (LMB)), ECF No. 147; *see also* Harold Hongju Koh, *Foreign Official Immunity After* Samantar*: A United States Government Perspective*, 44 VAND. J. TRANSNAT'L L. 1141, 1147 (2011).

executive and judicial branches, and the Constitution does not provide a clear answer.[23] Therefore, a solution most likely requires action by the third branch of government: Congress.[24] Fortunately, the analogous history of foreign *sovereign* immunity provides a useful roadmap to a pragmatic solution for the current disarray in the doctrine of foreign *official* immunity.[25] In 1976, after years of uncertainty and tension sparked by a different—yet surprisingly similar—statement of exclusive power from the Executive,[26] Congress enacted the Foreign Sovereign Immunities Act[27] (FSIA) and brought order to the immunity doctrine that protects foreign states and their instrumentalities from suit in U.S. courts.[28] The statute was a remarkable success and serves as a model for the current conflict.[29]

This Note examines the federal common law of foreign official immunity in the aftermath of the *Rosenberg* Statement and suggests a statutory fix for the current confusion in the doctrine. Part I outlines the modern law of foreign *official* immunity and the overlapping constitutional responsibilities that give rise to conflict between the executive and judicial branches, as well as the resulting confusion and discord among the courts. Part II investigates the analogous history of foreign *sovereign* immunity and its legislative solution. Part III analyzes the Executive's foreign affairs power and its authority to assert control over determinations of foreign official immunity. Finally, Part IV uses this new understanding to propose a division of authority between the executive and judicial branches that employs the expertise and constitutional authority of each. This Note concludes with an argument in favor of a Foreign Official Immunities Act and an appendix containing a proposed statute.

I. THE ORIGINS OF DISORDER: CONFUSION AND DISAGREEMENT IN THE CURRENT FEDERAL COMMON LAW OF FOREIGN OFFICIAL IMMUNITY

This part examines the disorder that has arisen in the current doctrine of foreign official immunity. In 2010, a unanimous U.S. Supreme Court held that the FSIA does not apply to the immunity of foreign officials, but left open the possibility that those individuals could be awarded immunity under federal common law.[30] The Court did not, however, establish how foreign official immunity determinations should be made.[31] In the five

23. *See, e.g.*, Chimène I. Keitner, *The Forgotten History of Foreign Official Immunity*, 87 N.Y.U. L. REV. 704, 704 (2012).

24. *See infra* Part IV.

25. *See infra* Part II.

26. *See infra* Part II.B.

27. Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended at 28 U.S.C. §§ 1330, 1332, 1391, 1441, 1602–1611 (2012)).

28. *See infra* Part II.C.

29. *See infra* APPENDIX.

30. *See* Samantar v. Yousuf, 560 U.S. 305, 325–26 (2010).

31. *See id.*; *see also* Peter B. Rutledge, Samantar *and Executive Power*, 44 VAND. J. TRANSNAT'L L. 885, 885–86 (2011); Ingrid Wuerth, *Foreign Official Immunity*

years since that landmark decision, the Executive has asserted primary control over the doctrine,[32] and, predictably,[33] the courts have struggled—and failed—to apply a consistent standard.[34] In the summer of 2015, a court in the Southern District of New York rejected the Executive's questionable assertion of control in the *Rosenberg* Statement and rendered an immunity determination that was not presented to the State Department in the first instance.[35] The court's decision highlights one unsettled aspect of a federal common law doctrine that needs repair.

Foreign official immunity determinations are difficult legal questions because the doctrine involves both the intersection of international and domestic law and the competing constitutional demands of the Executive and Judiciary.[36] Moreover, a court determination of nonimmunity in a case against a foreign official risks ruptures in relations with the official's country.[37] This is particularly problematic when the foreign country in question is a powerful one or an important ally.[38] Accordingly, some legal scholars argue that the Executive has a dominant role to play in recognizing and awarding foreign immunities because the determinations are integral to U.S. foreign policy,[39] and the Executive has plenary power over foreign affairs.[40] Other scholars, however, believe that the Executive has no place intruding on a legal question that is properly before the courts.[41] They fear

---

Determinations in U.S. Courts: The Case Against the State Department, 51 VA. J. INT'L L. 915, 917 (2011).

32. *See infra* Part I.B.

33. *See* Peter B. Rutledge, Samantar, *Official Immunity and Federal Common Law*, 15 LEWIS & CLARK L. REV. 589, 590 (2011); *infra* Part II.B.

34. *See infra* Part I.C. Courts are split on (1) a foreign official's right to immunity for violations of international law, and (2) the amount of deference that is owed to executive branch suggestions of immunity. *Compare* Warfaa v. Ali, No. 14-1810, 2016 WL 373716, at *6 (4th Cir. Feb. 1, 2016), *and* Yousuf v. Samantar, 699 F.3d 763, 773, 777 (4th Cir. 2012) ("The State Department's determination regarding conduct-based immunity, by contrast, is not controlling [and] officials from other countries are not entitled to foreign official immunity for [international law] violations."), *with* Rosenberg v. Pasha, 577 F. App'x 22, 23 (2d Cir. 2014) ("'[I]n the common-law context, we defer to the Executive's determination of the scope of immunity' and '[a] claim premised on the violation of [international law] does not withstand foreign [official] immunity.'" (quoting Matar v. Dichter, 563 F.3d 9, 15 (2d Cir. 2009))).

35. *See In re* Terrorist Attacks on Sept. 11, 2001, No. 03-MDL-1570 (GBD), 2015 WL 4879070, at *1 (S.D.N.Y. Aug. 14, 2015).

36. *See* Keitner, *supra* note 23, at 704.

37. *See infra* Part II.C.

38. *See infra* Part II.C.

39. The argument suffers when executive determinations in favor of (or against) immunity are used to advance foreign policy objectives because it means that the legal rights of private party litigants are decided on political and/or nonlegal grounds. *See infra* Part II.B.

40. *See* John B. Bellinger III, *The Dog That Caught the Car: Observations on the Past, Present, and Future Approaches of the Office of the Legal Adviser to Official Acts Immunities*, 44 VAND. J. TRANSNAT'L L. 819, 825 (2011); Koh, *supra* note 22, at 1147; *see also* Rosenberg v. Pasha, 577 F. App'x 22, 23 (2d Cir. 2014).

41. *See* Rutledge, *supra* note 31, at 909; Wuerth, *supra* note 31, at 975 (arguing that "the practice of binding executive branch immunity determinations lacks solid constitutional footing" and "executive control of immunity determinations has demonstrated functional disadvantages"); *see also* Yousuf v. Samantar, 699 F.3d 763, 773 (4th Cir. 2012).

that immunities will be granted by the State Department for political reasons due to diplomatic pressure from allies, for example, or as bargaining chips with countries that have tense relations with the United States.[42] The underlying concern is that determinations that should be made by the Judiciary under the rule-of-law end up being discretionary political calls.[43] The resulting conflict produces a muddled doctrine, unclear standards, and a legal system that leaves parties unsure whether U.S. courts are available to resolve ordinary legal disputes against foreign individuals.[44] This part examines the recent history of foreign official immunity to determine how the doctrine deteriorated so quickly—a mere five years after the *Samantar* decision.

A. Foreign Official Immunity As a Matter of Federal Common Law

In November 2004, a class action was filed in the Eastern District of Virginia against a former high-ranking official of the government of Somalia.[45] The plaintiffs alleged that Mohamed Ali Samantar had facilitated widespread torture and extrajudicial killing in Somalia in the late 1980s.[46] Samantar's motion to dismiss on immunity grounds was granted when the district court decided that he was an "agency or instrumentality" of Somalia and entitled to protection under the FSIA.[47] On appeal, the Fourth Circuit reversed Samantar's dismissal and held the FSIA did not entitle him to immunity because the statute only applied to foreign states and their *nonperson* agencies or instrumentalities.[48] In 2010, the Supreme Court unanimously affirmed the Fourth Circuit.[49] The Court's landmark decision effectively split the doctrine of foreign immunity into two parts: (1) the immunity of a foreign *state* and its nonperson agencies,

42. The year before the *Rosenberg* Statement's controversial recommendation of immunity for the ISI officials, the United States conducted more than sixty drone strikes in Pakistan and sent a team of Navy SEALs into the country to kill Osama Bin Laden. *See, e.g.*, The Data Team, *Drone Strikes: Cause or Effect*, ECONOMIST (Sept. 23, 2015), http://www.economist.com/blogs/graphicdetail/2015/09/daily-chart-drone-attacks-and-terrorism-pakistan [perma.cc/4J74-M3AV].

43. *See infra* Part II.B.

44. *See, e.g.*, Warfaa v. Ali, No. 14-1810, 2016 WL 373716, at *2 (4th Cir. Feb. 1, 2016) ("[T]he district court stayed the case [for more than seven years] until a party could provide a declaration from the United States Department of State indicating that the action would not interfere with U.S. foreign policy."); Rosenberg v. Lashkar-e-Taiba, 980 F. Supp. 2d 336, 339 (E.D.N.Y. 2013), *aff'd sub nom. Pasha*, 577 F. App'x 22 ("[T]he Court stayed the case [for nearly eight months until] the United States Department of State provide[d] the Court with a statement of interest on the question of whether the Moving Defendants [we]re immune from suit."); *see also infra* Part I.C.

45. *See* Yousuf v. Samantar, No. 1:04CV1360, 2007 WL 2220579, at *1 (E.D. Va. Aug. 1, 2007), *rev'd*, 552 F.3d 371 (4th Cir. 2009), *aff'd sub nom.* Samantar v. Yousuf, 560 U.S. 305 (2010).

46. *See id.* at *6.

47. *Id.* at *8, *15.

48. *See Yousuf*, 552 F.3d at 373, 381.

49. *Samantar*, 560 U.S. at 326.

organizations, and instrumentalities—governed by the FSIA;[50] and (2) the immunity of a foreign *individual* who acts on behalf of that state, agency, organization, or instrumentality—now governed by standards of federal common law to be determined by the district court on remand.[51]

After *Samantar*, the federal courts that have faced a request for foreign official immunity have usually reverted to a version of the historic "two-step procedure" that was used to determine foreign sovereign immunity in the years prior to the FSIA.[52] Under step one, the foreign government could request immunity directly from the State Department.[53] If the Executive decided that immunity was appropriate, the Justice Department would convey that determination to a court in a statement of interest.[54] Prior to the FSIA, these "suggestions of immunity" with respect to foreign *sovereign* immunity were binding and viewed as dispositive on the immunity request.[55] But in the years since *Samantar*, the Second and Fourth Circuits have split on the amount of deference that should be accorded to State Department suggestions of foreign *official* immunity.[56]

Under step two, the foreign government could request immunity directly from a court.[57] Whether step one was required before a foreign defendant could proceed with step two remains uncertain, however, because the pre-FSIA procedure did not clearly divide authority between the executive and judicial branches.[58] Under pre-FSIA federal common law,[59] courts were empowered to decide immunity "in the absence of recognition" by the Executive.[60] But the courts were also required to make that determination "in conformity to the principles" of the State Department.[61] The resulting

50. *See id.* at 325.

51. *See id.* at 325–26.

52. *See id.* at 311; *Yousuf*, 699 F.3d at 771; Wultz v. Bank of China Ltd., 32 F. Supp. 3d 486, 492 (S.D.N.Y. 2014).

53. *Samantar*, 560 U.S. at 311; *see also In re* Terrorist Attacks on Sept. 11, 2001, No. 03-MDL-1570 GBD, 2015 WL 4879070, at *3 (S.D.N.Y. Aug. 14, 2015).

54. *See* 28 U.S.C. § 517 (2012) ("The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States.").

55. *See, e.g.*, Republic of Mexico v. Hoffman, 324 U.S. 30, 35 (1945) ("It is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize."); *Ex parte* Republic of Peru, 318 U.S. 578, 589 (1943) ("The certification and the request that the vessel be declared immune must be accepted by the courts.").

56. *See infra* Part I.C.

57. *See Samantar*, 560 U.S. at 311; *see also In re Terrorist Attacks*, 2015 WL 4879070, at *3.

58. *See infra* Part II.

59. *See Hoffman*, 324 U.S. at 36 ("[T]he foreign government may also present its claim of immunity by appearance in the suit and by way of defense to the libel."); *see also* Bellinger, *supra* note 40, at 832 ("Prior to the enactment of the FSIA, a foreign government generally had the option to seek a resolution of its sovereign immunity claim either before the State Department or before the court.").

60. *Ex parte Peru*, 318 U.S. at 587; *see also Samantar*, 560 U.S. at 311.

61. *Hoffman*, 324 U.S. at 34–35; *see also Samantar*, 560 U.S. at 312.

tension and unclear division of control between the executive and judicial branches was one of the primary issues the FSIA was enacted to resolve.[62] After *Samantar*, this same procedural confusion returned, and the tension quickly intensified, when the Executive asserted primary control over all determinations of foreign official immunity and effectively declared that step one was mandatory before a foreign defendant could proceed to step two.[63]

B. The Executive Upsets the Balance

Almost immediately after *Samantar*, the Executive sought a leading role over all requests for foreign official immunity.[64] In 2011, the year after the decision, the State Department's Legal Advisor, Harold Hongju Koh, declared that *Samantar* had vested primary control over determinations of foreign official immunity with the Executive.[65] Koh's interpretation of the *Samantar* holding was based on the Court's dicta that "[w]e have been given no reason to believe that Congress saw as a problem, or wanted to eliminate, the State Department's role in determinations regarding individual official immunity."[66]

The Legal Advisor's broad assertion of control based on the language in *Samantar* is questionable.[67] While the Court declared that "the common law" governed foreign official immunity[68] and recounted the historic two-step procedure,[69] it did not express an opinion about the appropriate balance of authority between the Executive and Judiciary and certainly did not declare that the Executive alone should make foreign official immunity determinations.[70] Nevertheless, the following year, the Justice Department invoked the same ambiguous language from *Samantar* to make the

62. *See* H.R. REP. NO. 94-1487, at 7 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6606 [hereinafter HOUSE REPORT, with page numbers as reprinted] ("A principle purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch.").

63. *See infra* Part I.B.

64. *See supra* notes 16–22 and accompanying text.

65. *See* Koh, *supra* note 22, at 1141–42 ("In the *Samantar* case, the U.S. Supreme Court unanimously held that the immunity of foreign government officials . . . is not controlled by the Foreign Sovereign Immunities Act of 1976, but rather, by immunity determinations made by the Executive Branch.").

66. *Samantar*, 560 U.S. at 323.

67. *See* Rutledge, *supra* note 33, at 605 ("While the [doctrine of foreign official immunity] (whether statutory or common law) might take into account the executive branch's views (or even defer to them), no area of law to my knowledge depends on the executive branch's interpretation to define its very content."); *infra* Part III.

68. *Samantar*, 560 U.S. at 325.

69. *See id.* at 311.

70. *See id.* at 325–26; *see also supra* note 31 and accompanying text. In the State Department's own report outlining the pre-FSIA common law of foreign sovereign and foreign official immunity, the Department recognized that "[g]enerally, the foreign state had the option to litigate its immunity claim before the Department or before the court." Sovereign Immunity Decisions of the Department of State, 1977 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW, app. at 1019.

Executive's strongest and most destabilizing assertion of authority over the doctrine to date.[71]

In April 2012, after Pakistan sought immunity for the ISI and its two officials, the district court stayed the proceedings and invited the views of the State Department.[72] Seven months later, the Executive submitted the *Rosenberg* Statement, a ten-page[73] document that declared the ISI immune under the FSIA and the Pakistani officials immune under the doctrine of foreign official immunity.[74] The statement was prepared by the Justice Department and was based in large part on a letter from Koh, the State Department Legal Advisor, to the Justice Department's Principal Deputy Assistant Attorney General, Stuart Delery.[75] In the *Rosenberg* Statement, the Executive analyzed the ISI's immunity request and concluded that the spy agency was entitled to have the allegations against it dismissed "because it is a foreign state within the meaning of the FSIA and no exception to immunity applies."[76] The statement also recommended immunity for the Pakistani officials based on Koh's "determination of the Department of State that [the officials] enjoy immunity from suit."[77] The Koh Letter declared that the "complaint contain[ed] largely unspecific and conclusory allegations" that only challenged the ISI directors' "exercise of their official powers as officials of the Government of Pakistan."[78] "In light of these circumstances," Koh wrote, and "taking into account principles of immunity articulated by the [e]xecutive [b]ranch in the exercise of its constitutional authority over foreign affairs . . . the Department of State has determined that [the officials] enjoy immunity from suit."[79]

The Koh Letter[80] and *Rosenberg* Statement established a new legal standard in federal common law and are eerily similar to a famous State

71. *See Rosenberg* Statement, *supra* note 16, at 9 n.5.

72. *See* Rosenberg v. Lashkar-e-Taiba, 980 F. Supp. 2d 336, 339 (E.D.N.Y. 2013), *aff'd sub nom.* Rosenberg v. Pasha, 577 F. App'x 22 (2d Cir. 2014).

73. *Compare Rosenberg* Statement, *supra* note 16, at 9–11 (devoting less than three pages to the analysis of the ISI officials' common law immunity claim), *with* Statement of Interest of the United States at 23–35, Matar v. Dichter, 500 F. Supp. 2d 284 (S.D.N.Y. 2006) (No. 05 Civ. 10270 (WHP)) (devoting nearly twelve pages to the analysis of the Israeli official's acts and the merits of his immunity claim).

74. *Rosenberg* Statement, *supra* note 16, at 11.

75. *See* Letter from Harold Hongju Koh, Legal Adviser, Dep't of State, to Stuart F. Delery, Principal Deputy Assistant Att'y Gen., Dep't of Justice (Dec. 17, 2012), attached as Exhibit 1 to *Rosenberg* Statement, *supra* note 16 [hereinafter Koh Letter].

76. *Rosenberg* Statement, *supra* note 16, at 6. Whether it was appropriate for the Executive to determine the applicability of the FSIA to the ISI is beyond the scope of this Note; however, most likely, a court is not required to defer to such a determination because one of the purposes of the FSIA was "to transfer primary responsibility for deciding 'claims of foreign states to immunity' from the State Department to the courts." Samantar v. Yousuf, 560 U.S. 305, 313 (2010) (quoting 28 U.S.C. § 1602 (2010)); *see also infra* Part III.C.

77. Koh Letter, *supra* note 75, at 1.

78. *Id.*

79. *Id.* at 2.

80. *See, e.g.*, Koh, *supra* note 22, at 1152.

Department letter from sixty years before.[81] In 1952, the acting State Department Legal Advisor, Jack Tate, also sent a letter ("the Tate Letter") to the Justice Department outlining new rules regarding the immunity of foreign states.[82] In the Tate Letter, the State Department announced the adoption of a new and more restrictive policy of awarding immunity.[83] The new policy required a complicated analysis of the nature of a foreign state's conduct that was unclear and could sometimes be used to justify immunity for nonlegal or political reasons.[84] The letter caused such confusion that the Executive itself almost abandoned the new theory.[85] As a result, the State Department and courts struggled to apply the Tate Letter consistently, and Congress was forced to restore clarity through the FSIA.[86]

The Koh Letter and *Rosenberg* Statement are just as disruptive. Like the Tate Letter, they assert a new and mandatory State Department policy that would empower the Executive with controlling authority over such traditional judicial tasks as evaluating the sufficiency of a complaint or analyzing the nature of a defendant's conduct.[87] Combined with the requirement that all requests for immunity be submitted to the State Department in the first instance, the statements have inserted an unclear political element into federal common law that jeopardizes the impartiality of the foreign official immunity doctrine. The courts are already in conflict.

C. Confusion in the Courts

On September 30, 2013, more than seven months after the Koh Letter and *Rosenberg* Statement were filed, the court sided with the Executive and awarded immunity to the ISI and Pakistani officials.[88] The *Rosenberg* plaintiffs appealed to the Second Circuit and argued that the State Department's immunity determination was invalid and not dispositive because the allegations against the ISI officials related to conduct that violated *jus cogens* norms.[89] The plaintiffs argued that the officials could not receive immunity—and therefore the State Department's recommendation was not controlling—because the provision of material and financial support to terrorists can never be considered official or state

81. *See* Letter from Jack B. Tate, Acting Legal Adviser, Dep't of State, to Philip B. Perlman, Acting Att'y Gen., Dep't of Justice (May 19, 1952), *reprinted in* 26 DEP'T ST. BULL. 984 (1952) [hereinafter Tate Letter]; *see also infra* Part II.B.

82. *See* Tate Letter, *supra* note 81.

83. *See id.*

84. *See infra* Part II.B.

85. *See* Kevin P. Simmons, *The Foreign Sovereign Immunities Act of 1976: Giving the Plaintiff His Day in Court*, 46 FORDHAM L. REV. 543, 549 (1977).

86. *See* Samantar v. Yousuf, 560 U.S. 305, 312–13 (2010); *infra* Part II.B.

87. *See supra* notes 75–79 and accompanying text.

88. *See* Rosenberg v. Lashkar-e-Taiba, 980 F. Supp. 2d 336, 344–45 (E.D.N.Y. 2013), *aff'd sub nom.* Rosenberg v. Pasha, 577 F. App'x 22 (2d Cir. 2014).

89. *See Pasha*, 577 F. App'x at 23. *Jus cogens* norms "are norm[s] accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." *Id.* (quoting Belhas v. Ya'alon, 515 F.3d 1279, 1286 (D.C. Cir. 2008)); *see also* Yousuf v. Samantar, 699 F.3d 763, 775 (4th Cir. 2012).

sanctioned.[90] Therefore, the plaintiffs argued, the foreign official immunity doctrine does not protect officials who engage in such acts.[91]

The plaintiffs supported their appeal by citing to *Yousuf v. Samantar*,[92] a Fourth Circuit decision that was issued a mere ten days before the Koh Letter and *Rosenberg* Statement were submitted by the Executive.[93] In November 2012, in a continuation of the same *Samantar* case the Supreme Court had decided in 2010,[94] the Fourth Circuit declared that State Department immunity determinations were not entitled to absolute deference[95] and—contrary to the views of the Executive[96]—foreign officials were not entitled to immunity for conduct that violated *jus cogens* norms.[97] When the same argument was used by the *Rosenberg* plaintiffs at the Second Circuit, the court rejected their appeal and, splitting with the Fourth Circuit, stated: "'[I]n the common-law context, [the Second Circuit] defer[s] to the Executive's determination of the scope of immunity' and '[a] claim premised on the violation of *jus cogens* does not withstand foreign [official] immunity.'"[98] The Second Circuit's decision effectively cut federal common law into two camps.[99] After *Rosenberg*, foreign official defendants in the Second Circuit are entitled to immunity based on the views of the Executive. Foreign official defendants in the Fourth Circuit, however, do not receive such automatic protection because the State Department's views regarding conduct-based immunity are not dispositive, and *jus cogens* violations are not protectable.[100]

In the aftermath of the circuit split and less than two years after the Koh Letter and *Rosenberg* Statement, another foreign official defendant sought immunity in the Second Circuit.[101] This time, however, no party requested

90. *See* Brief and Special Appendix for Plaintiffs-Appellants at 5–6, *Pasha*, 577 F. App'x 22 (No. 13-4334-CV), 2014 WL 582901, at *5–6.

91. *See id.*

92. 699 F.3d 763 (4th Cir. 2012).

93. *See Pasha*, 577 F. App'x at 23; *Yousuf*, 699 F.3d at 763.

94. Samantar v. Yousuf, 560 U.S. 305 (2010).

95. *Yousuf*, 699 F.3d at 773.

96. *See* Brief for the United States as Amicus Curiae at 18, Samantar v. Yousuf, 135 S. Ct. 1528 (2015) (No. 13-1361), 2015 WL 412283, at *18 ("The court of appeals also committed legal error in declining to rest its determination of non-immunity on the specific grounds set forth in the Executive Branch's Statement of Interest, and instead fashioning a new categorical judicial exception to immunity for claims alleging violation of *jus cogens* norms.").

97. *See Yousuf*, 699 F.3d at 773, 778.

98. *Pasha*, 577 F. App'x at 23 (quoting Matar v. Dichter, 563 F.3d 9, 15 (2d Cir. 2009)).

99. *Compare id.*, *with Yousuf*, 699 F.3d at 773, 777, *and* Warfaa v. Ali, No. 14-1810, 2016 WL 373716, at *6 (4th Cir. Feb. 1, 2016).

100. Earlier this year, the Supreme Court declined the opportunity to resolve the circuit split. *See* Samantar v. Yousuf, 135 S. Ct. 1528 (2015) (denying certiorari). The Executive, which opposes the views of the Fourth Circuit, recommended that the Court deny certiorari because "[t]he judgment of the court of appeals, which affirmed the district court's denial of petitioner's immunity, is therefore consistent with the Executive Branch's immunity determination, and it properly disposes of the immunity issue in this case." Brief for the United States, *supra* note 96, at 12.

101. *See In re* Terrorist Attacks on Sept. 11, 2001, No. 03-MDL-1570 (GBD), 2015 WL 4879070, at *2 (S.D.N.Y. Aug. 14, 2015).

a statement of interest from the Executive, and the court was forced to decide whether it was bound by the *Rosenberg* Statement.[102] In August 2013, the former head of two Saudi Arabian charities sought dismissal from an action brought by the victims of the September 11, 2001 terrorist attacks, which alleged he had sent financial and other material support to Osama Bin Laden and al Qaeda in the years prior to the attacks.[103] The *In re Terrorist Attacks on September 11, 2001*[104] plaintiffs argued that the Saudi official's immunity request was procedurally improper and should be denied because the court was not allowed to award immunity that was not first requested from the State Department.[105] After evaluating the *Rosenberg* Statement, *Samantar*, and the history of foreign immunities in general, the court rejected the plaintiffs' argument and the Executive's new policy.[106] The court awarded immunity to the former official based on its own analysis of the allegations in the complaint and its determination that the acts alleged were taken in the foreign official's official capacity.[107] An alternative argument that the Saudi official's conduct was unlawful, and thus not entitled to immunity, was also rejected because "[s]uch an assertion is merely an artful way of implicating the *jus cogens* doctrine, which is not recognized by the Second Circuit as an exception to common law [foreign official] immunity."[108]

The court also supported its decision to reject the *Rosenberg* Statement by examining two recent district court immunity determinations. In *Moriah v. Bank of China Ltd.*[109] and *Rishikof v. Mortada*,[110] district courts granted immunity to foreign officials in cases where the officials had not first petitioned the State Department.[111] The *In re Terrorist Attacks* court's rejection of the *Rosenberg* Statement remains controversial, however, because the plaintiffs in *Moriah* and *Rishikof* did not raise an objection to immunity based on the *Rosenberg* Statement,[112] and the *In re Terrorist Attacks* plaintiffs did not appeal the Saudi official's award of immunity to a higher court.[113]

The conflict over the Executive's assertions in the *Rosenberg* Statement highlights the need for clarification of federal common law in this area. In the Second Circuit, State Department immunity *determinations* are entitled to absolute deference.[114] Therefore, because the Koh Letter and *Rosenberg* Statement have only articulated a new State Department *policy*, *In re*

102. *See id.* at *3–4.
103. *See id.* at *1.
104. No. 03-MDL-1570 (GBD), 2015 WL 4879070 (S.D.N.Y. Aug. 14, 2015).
105. *See id.* at *3–4.
106. *See id.* at *4.
107. *See id.* at *5–6.
108. *Id.* at *6.
109. 107 F. Supp. 3d 272 (S.D.N.Y. 2015).
110. 70 F. Supp. 3d 8 (D.D.C. 2014).
111. *See Moriah*, 107 F. Supp. 3d at 278; *Rishikof*, 70 F. Supp. 3d at 12.
112. *See Moriah*, 107 F. Supp. 3d at 274; *Rishikof*, 70 F. Supp. 3d at 10–11.
113. *See In re Terrorist Attacks*, 2015 WL 4879070.
114. *See supra* notes 98–99 and accompanying text.

Terrorist Attacks arguably does not violate Second Circuit precedent.[115] But the policy rejection—and the Fourth Circuit's holding in *Yousuf*[116]—is in tension with federal common law, which, as *Samantar* declared, should govern foreign official immunity determinations.[117] Under step two of the pre-FSIA analysis, "the courts may decide for themselves whether all the requisites of immunity exist . . . in conformity to the principles accepted by the department of the government charged with the conduct of our foreign relations."[118] The Koh Letter and *Rosenberg* Statement adopted two new principles: (1) a foreign official was not entitled to immunity unless and until the Executive had the first opportunity to decide the request; and (2) courts are not supposed to determine whether a foreign official acted in an official capacity.[119] Viewed from that perspective, the *In re Terrorist Attacks* court's grant of immunity may have violated *Samantar* because the justification for immunity was not a "ground of immunity . . . which it is the established policy of the [State Department] to recognize."[120]

Days before this Note went to press, the Fourth Circuit reaffirmed *Yousuf*,[121] the 2012 decision that the *Rosenberg* plaintiffs relied on in their appeal to the Second Circuit.[122] In *Warfaa v. Ali*,[123] the Fourth Circuit denied common law foreign official immunity to another former Somali military leader accused of committing atrocities that violated *jus cogens* norms.[124] The *Warfaa* court avoided addressing the rift *Yousuf* caused with the executive branch[125] by declaring that the court was bound to apply Fourth Circuit precedent in the same way the court in *Rosenberg v. Pasha*[126] avoided the hard question of whether immunity was appropriate for alleged *jus cogens* violations by the ISI officials.[127] Nevertheless, the soft circuit split that existed in the aftermath of *Pasha* has now hardened and will likely remain until the Supreme Court or Congress resolves it.[128]

---

115. In the Fourth Circuit, the *Rosenberg* Statement's assertions would probably receive the same noncontrolling deference as an immunity determination. *See* Yousuf v. Samantar, 699 F.3d 763, 773, 777 (4th Cir. 2012).

116. *Id.*

117. *See* Samantar v. Yousuf, 560 U.S. 305, 325–26 (2010).

118. Republic of Mexico v. Hoffman, 324 U.S. 30, 34–35 (1945).

119. *See supra* notes 20–21 and accompanying text.

120. *Samantar*, 560 U.S. at 312 (quoting *Hoffman*, 324 U.S. at 36). *But see infra* Part III.C (arguing *Hoffman* is no longer applicable).

121. *See* Warfaa v. Ali, No. 14-1810, 2016 WL 373716, at *6 (4th Cir. Feb. 1, 2016).

122. *See supra* notes 93–97 and accompanying text.

123. No. 14-1810, 2016 WL 373716 (4th Cir. Feb. 1, 2016).

124. *See id.* at *6.

125. *See* Brief for the United States, *supra* note 96, at 18.

126. 577 F. App'x 22, 24 (2d Cir. 2014).

127. *See Warfaa*, 2016 WL 373716, at *6 ("One panel's 'decision is binding, not only upon the district court, but also upon another panel of this court—unless and until it is reconsidered *en banc*.'" (quoting Doe v. Charleston Area Med. Ctr., Inc., 529 F.2d 638, 642 (4th Cir. 1975))); Rosenberg v. Pasha, 577 F. App'x 22, 24 (2d Cir. 2014) ("We are bound to follow that precedent, unless and until it is overruled implicitly or expressly by the Supreme Court, or by this Court sitting *in banc*.").

128. If *Warfaa* is appealed to the Supreme Court, the Executive may once again choose to recommend that the Court deny certiorari for the same reasons it recommended denial in *Yousuf*. *See* Brief for the United States, *supra* note 96, at 12. On the other hand, because the

The law needs clarification. In the five years since *Samantar*, the Judiciary has been in a fight with itself and the Executive. Two circuits are on opposite sides regarding the deference owed to executive determinations of immunity and the type of conduct entitled to protection. The Executive has made a weakly supported grab for control over the entire process, only to have a district court reject that assertion in a way that appears to conflict with the Supreme Court's most recent decision on the subject. The disarray is clear and requires a remedy. Fortunately, the history of foreign *sovereign* immunity serves as a useful case study.

II. THE HISTORY OF A SOLUTION: FOREIGN SOVEREIGN IMMUNITY AS AN ANALOGY TO THE CURRENT CONFLICT

In the mid-1960s and early 1970s, the President, Congress, and the Supreme Court worked together to clarify and implement a workable foreign sovereign immunity doctrine.[129] The conflict involved two parts: the circumstances when a foreign sovereign was entitled to immunity for (1) acts *inside* the sovereign's borders; and (2) acts *outside* the sovereign's borders. In 1964, the Supreme Court clarified the first situation when it reaffirmed[130] the federal common law act of state doctrine that granted immunity to a foreign sovereign for acts performed inside its borders.[131] Immunity for acts performed outside the foreign sovereign, however, proved intractable under federal common law because the analysis was complicated[132] and the division of authority among the branches of government forced the Executive into "the awkward position of a political institution trying to apply a legal standard to litigation already before the courts."[133] In 1976, with full support from the State Department, Congress enacted the FSIA and empowered the courts with exclusive authority to decide requests for foreign sovereign immunity.[134]

In essence, a statute was necessary because federal common law was not able to support a doctrine that awarded immunity to a foreign state for conduct that occurred outside its territorial borders, because the scope and

---

State Department did not make an immunity determination in *Warfaa*, the Executive may recommend the Court grant certiorari to determine whether it was appropriate for the Fourth Circuit to "fashion[] a new categorical judicial exception to immunity for claims alleging violation of *jus cogens* norms." *Id.* at 18.

129. *See* HOUSE REPORT, *supra* note 62, at 6605; *see also infra* Part II.B.

130. *See infra* notes 145–52 and accompanying text.

131. Under the act of state doctrine, a foreign sovereign is totally immune from suit in U.S. courts for all government actions that occur within the sovereign's territory. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 416 (1964); *see also* Natalie A. Turchi, Note, *Restructuring A Sovereign Bond Pari Passu Work-Around: Can Holdout Creditors Ever Have Equal Treatment?*, 83 FORDHAM L. REV. 2171, 2186 (2015) (discussing application of the act of state doctrine to sovereign debt cases).

132. *See infra* Part II.B.

133. HOUSE REPORT, *supra* note 62, at 6607; *see also infra* Part II.B.

134. *See* HOUSE REPORT, *supra* note 62, at 6604–07; *see also* Daniel P. Roy III, Note, *(Don't) Take Another Little Piece of My Immunity, Baby: The Application of Agency Principles to Claims of Foreign Sovereign Immunity*, 84 FORDHAM L. REV. 1283, 1289–94 (2015) (discussing the doctrine of foreign sovereign immunity and enactment of the FSIA).

complexity of the immunity analysis yielded inconsistent results.[135] Immunity for acts occurring *within* a sovereign's borders is governable by federal common law under the act of state doctrine because the relevant inquiry focuses on a straightforward question of locational identity: where the act occurred.[136] Immunity for acts *outside* the sovereign's borders is more complicated because it focuses on the nature of the act: whether the conduct is considered public or private.[137] As a result, immunity determinations for acts outside a sovereign's borders often hinge on particularized facts, and a clear set of guidelines—which a common-law based doctrine struggles to provide—was necessary to achieve consistency. As the analogy in this part shows, a common law solution can work for individual official immunity that is based on nothing more than identity—such as head-of-state or consular immunity. But immunity that is based on the nature of a foreign entity's conduct is too complicated to be governed by federal common law.

This part examines the disarray that once existed in the federal common law of foreign *sovereign* immunity, the solution that was adopted to resolve that conflict, and the similarities between that history and the current conflict within the doctrine of foreign *official* immunity.

A. The Roots of Foreign Sovereign and Foreign Official Immunity in American Jurisprudence

The reciprocal practice where the United States does not subject a foreign sovereign to suit in U.S. courts was first recognized as a matter of federal common law by Chief Justice John Marshall's historic decision, *Schooner Exchange v. McFaddon*.[138] In 1810, the French Navy commandeered a privately owned American ship as it sailed across the Atlantic Ocean.[139] When the ship's former owners learned that their hijacked vessel was anchored in the port of Philadelphia after seeking shelter during a storm, they sued the French government to recover the ship.[140] To their dismay, the district court dismissed their claim when the Executive intervened and recommended immunity for the French government.[141] On appeal to the Supreme Court, Chief Justice Marshall affirmed the dismissal[142] and established the federal common law of foreign sovereign immunity under principles of international law and the then-current custom of absolute

135. *See infra* Part II.B.
136. *See infra* Part II.A.
137. *See infra* Part II.B.
138. 11 U.S. 116 (1812); *see also* Samantar v. Yousuf, 560 U.S. 305, 311 (2010). The doctrine of foreign official immunity can also be traced to cases from the 1790s involving an early form of the conduct-based immunity argument. *See generally* Keitner, *supra* note 23, at 749–50 (examining six civil suits brought against current or former foreign officials that involved statements of interest by the Executive).
139. *See Schooner Exch.*, 11 U.S. at 117.
140. *See id.*
141. *See id.* at 118–19.
142. *Id.* at 147.

immunity.[143] For more than a century, the judicial branch looked to customary international law to grant foreign states near-total amnesty from the subject matter jurisdiction of U.S. courts.[144]

Almost ninety years after *Schooner Exchange*, the act of state doctrine was first introduced. The doctrine extended immunity to all acts of a foreign state—including the personal protection of an individual—when the acts were performed inside the sovereign's territorial borders.[145] In *Underhill v. Hernandez*,[146] an American citizen living and working in Venezuela during the Revolution of 1892 was detained by a Venezuelan military leader.[147] When the American was freed and returned to the United States, he filed suit in the Eastern District of New York against the official for false imprisonment, assault, and battery.[148] The district and circuit courts awarded immunity,[149] and the Supreme Court affirmed under the act of state doctrine.[150] Because the Venezuelan official had acted in an official capacity, and the tortious conduct occurred entirely inside the territorial boundaries of Venezuela, the Court famously declared that "the courts of one country will not sit in judgment on the acts of the government of another done within its own territory."[151] After *Underhill*, federal common law granted absolute immunity to a foreign state for all acts within its borders, including the personal immunity of an individual when his or her actions were considered the acts of the sovereign.[152]

In the late 1930s and early 1940s, federal common law evolved again when the Supreme Court started giving tremendous deference to the Executive in cases involving foreign affairs.[153] As the world entered a new era of global commerce, foreign sovereigns and private individuals began to interact in more frequent and significant ways.[154] In response to a rise in

143. *See id.* at 136–39; *see also* Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 486 (1983).

144. *See Verlinden B.V.*, 461 U.S. at 486; Wuerth, *supra* note 31, at 924–25.

145. *See* Underhill v. Hernandez, 168 U.S. 250, 252 (1897) ("The immunity of individuals from suits brought in foreign tribunals for acts done within their own states, in the exercise of governmental authority, whether as civil officers or as military commanders, must necessarily extend to the agents of governments ruling by paramount force as matter of fact.").

146. 65 F. 577 (2d Cir. 1895), *aff'd*, 168 U.S. 250 (1897).

147. *See id.* at 578–79.

148. *Id.* at 578.

149. *Id.* at 583 ("[T]he acts of the defendant were the acts of the government of Venezuela, and, as such, are not properly the subject of adjudication in the courts of another government.").

150. *Underhill*, 168 U.S. at 254.

151. *Id.* at 252.

152. *See id.*; *see also In re* Doe, 860 F.2d 40, 45 (2d Cir. 1988) ("[I]mmunity is a personal right. It derives from and remains an 'attribute of state sovereignty.'" (quoting *In re* Grand Jury Proceedings, 817 F.2d 1108 (4th Cir. 1987))); Statement of Interest, *supra* note 22, at 7 ("The immunity protecting foreign officials for their official acts ultimately belongs to the sovereign rather than the official.").

153. *See* Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897, 1913–16 (2015).

154. *See* HOUSE REPORT, *supra* note 62, at 6605.

litigation involving foreign defendants, and the lack of a clear system that could be used to assert immunity, the Court established the famous two-step procedure[155] that allowed a foreign state to petition the State Department or a court for a determination of immunity.[156] In the aftermath of *Erie Railroad Co. v. Tompkins*[157] and disputes with the Executive over New Deal legislation, the Court also moved away from federal common law's reliance on customary international law and judge-made determinations of immunity.[158] Instead, the Court looked to the views of the Executive and focused on whether immunity was consistent with the practices and policies of the State Department.[159] The trend toward absolute deference culminated with two controversial[160] World War II-era decisions: *Republic of Mexico v. Hoffman*[161] and *Ex parte Republic of Peru*,[162] in which the Court declared that immunity determinations by the Executive were controlling and "must be accepted by the courts."[163]

By the early 1950s, the doctrine of foreign sovereign immunity was an imperfect blend of executive and judicial authority, but the system worked relatively well because the law was built on the stable foundation of absolute immunity.[164] Under the absolute theory of immunity, the analysis focused on identity: if the defendant was a foreign state, it usually was entitled to immunity. That stability was shattered, however, when the absolute theory of immunity was replaced by the new restrictive theory.[165] Overnight, the doctrine's bedrock principle of analysis changed, and the law devolved into a mess of politics, confusion, and uncertainty.[166]

B. The Tate Letter and Conflict in the Doctrine of Foreign Sovereign Immunity

In 1952, the United States joined a majority of other nations and adopted the restrictive theory of foreign sovereign immunity.[167] The State Department's Tate Letter announced that the Executive would no longer

155. *See* Compania Espanola de Navegacion Maritima, S.A. v. The Navemar, 303 U.S. 68, 74 (1938) ("[I]t is open to a friendly government . . . to claim [its] immunity from suit, either through diplomatic channels or, if it chooses, as a claimant in the courts of the United States.").

156. *See supra* notes 52–61 and accompanying text; *see also* HOUSE REPORT, *supra* note 62, at 6606.

157. 304 U.S. 64 (1938) (limiting the scope of federal common law).

158. *See* Wuerth, *supra* note 31, at 926–27.

159. *See* HOUSE REPORT, *supra* note 62, at 6606.

160. *See infra* Part III.C.

161. 324 U.S. 30 (1945).

162. 318 U.S. 578 (1943).

163. *Id.* at 589.

164. Tension between the executive and judicial branches was minimal because the analysis focused on whether the entity requesting immunity was a recognized foreign sovereign. *See, e.g.*, *Hoffman*, 324 U.S. at 33–34.

165. *See* Tate Letter, *supra* note 81. The absolute theory is also known as the classical theory. *See id.*

166. *See infra* Part II.B.

167. *See* Tate Letter, *supra* note 81.

endorse a foreign state's assertion of immunity for acts considered private, commercial, or nonofficial.[168] The policy took immediate effect and controlled immunity determinations made by both the State Department and the Judiciary.[169] This shift, however, complicated the immunity doctrine because the governing standards that identified conduct that was "nonsovereign" or "commercial" were unclear and required a careful analysis of the plaintiff's allegations.[170] The disarray was further compounded by the holdings in *Hoffman* and *Ex parte Peru*,[171] because the branch that had the most expertise evaluating the nuances of "nonofficial" or "private" conduct[172] was bound to accept the immunity determinations of a highly political branch that lacked "the machinery to take evidence, to hear witnesses, or to afford appellate review."[173]

After the Tate Letter, foreign defendants would often petition the State Department for a suggestion of immunity under step one of the two-step procedure,[174] then exert political pressure for a recommendation that was entitled to absolute deference in the courts.[175] The State Department struggled to make impartial decisions, and "[o]n occasion, political considerations led to suggestions of immunity in cases where immunity would not have been available under the restrictive theory."[176] As a result, politics sometimes interfered with the legal rights of private litigants, and immunity determinations were made on nonlegal grounds, under procedures that did not ensure due process.[177] Litigants also suffered from a lack of information because the justifications for immunity were usually short, and "very often no indication was given as to why immunity was recognized."[178]

The Executive's inconsistent application of the restrictive theory also had ripple effects in the courts because judges were required to render immunity determinations in accordance with the State Department's unclear policies.[179] Under step two, when a foreign state wanted to avoid political considerations—or the Executive entirely—it could petition a court

168. *See id.* ("[T]he immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*)."). Interestingly, the letter also incorrectly commented on the decisional tug-of-war between the executive and judicial branches when it observed "that a shift in policy by the executive cannot control the courts." *Id.* at 985; *see also supra* notes 159–63 and accompanying text.

169. *See, e.g.*, Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 487–88 (1983).

170. *See* Samantar v. Yousuf, 560 U.S. 305, 313 (2010); *Verlinden B.V.*, 461 U.S. at 487.

171. *See supra* notes 161–62 and accompanying text.

172. *See infra* Part IV.B.

173. HOUSE REPORT, *supra* note 62, at 6607.

174. *See supra* note 52 and accompanying text.

175. *See supra* notes 161–62 and accompanying text.

176. Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 487 (1983).

177. *See* HOUSE REPORT, *supra* note 62, at 6606.

178. Sovereign Immunity Decisions of the Department of State, *supra* note 70, at 1022; *see also supra* note 73.

179. *See supra* note 55 and accompanying text.

directly.[180] But courts struggled to apply a clear standard, and due process concerns persisted as courts were forced to defer to executive determinations that sometimes broke with clear precedent.[181] In *Victory Transport Inc. v. Comisaria General*[182] and *Petrol Shipping Corp. v. Kingdom of Greece*,[183] for example, the Second Circuit denied immunity on the grounds that a contract to transport grain was a commercial act. Five years later, in *Isbrandtsen Tankers, Inc. v. President of India*,[184] the same court was forced to reverse itself and award immunity under nearly identical circumstances, because the State Department decided that the transportation of grain was a sovereign act, entitled to immunity.[185]

For more than ten years, the doctrine limped along. Finally, in the mid-1960s, the executive and legislative branches agreed that the law was broken and a statutory fix was necessary.[186] In 1976, after almost twenty-five years of case-by-case determinations made by two rival branches of government, Congress enacted the FSIA.[187] The statute codified the restrictive theory and placed full authority over foreign sovereign immunity determinations with the courts.[188] It helped free the Executive from diplomatic pressure to engage in horse-trading for suggestions of immunity by removing political considerations from the analysis. The FSIA also helped the courts by placing the law under a set of clear statutory guidelines to ensure immunity was granted for only legal reasons that were subject to appellate review.[189] It was a remarkable success.[190]

C. The Foreign Sovereign Immunities Act of 1976

Congress had two primary goals when it enacted the FSIA. First, it wanted to clarify the law by establishing "when and how parties can maintain a lawsuit against a foreign state or its entities in the courts of the United States."[191] Second, and more importantly, it wanted to eliminate the disarray in federal common law that necessitated the need for a statute in the first place by "facilitat[ing] and depoliticiz[ing] litigation against

180. *See* Sovereign Immunity Decisions of the Department of State, *supra* note 70, at 1019; *see also Verlinden B.V.*, 461 U.S. at 487–88.

181. *See Verlinden B.V.*, 461 U.S. at 487–88.

182. 336 F.2d 354 (2d Cir. 1964).

183. 360 F.2d 103 (2d Cir. 1966).

184. 446 F.2d 1198 (2d Cir. 1971).

185. These cases demonstrate the challenge that conduct-based determinations of immunity present. In some circumstances, an agreement to transport grain is a commercial act (e.g., a government program that supports for-profit businesses); in other circumstances, it is a sovereign act (e.g., during a crop failure to ensure enough food is available to a community). Liability often hinges on a fact-based determination.

186. *See* HOUSE REPORT, *supra* note 62, at 6608.

187. *See* Samantar v. Yousuf, 560 U.S. 305, 313 (2010).

188. *See id.*

189. Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 488 (1983).

190. *See* Mark B. Feldman, *The United States Foreign Sovereign Immunities Act of 1976 in Perspective: A Founder's View*, 35 INT'L & COMP. L.Q. 302, 318 (1986).

191. HOUSE REPORT, *supra* note 62, at 6604.

foreign states[,] and . . . minimiz[ing] irritations in foreign relations arising out of such litigation."[192]

Under "the pre-existing common law"[193] that the FSIA set out to fix, immunity determinations represented "a devil's choice"[194] that placed the United States in a lose-lose situation. Foreign countries could use the two-step procedure to pressure the State Department into awarding immunity in circumstances that were not consistent with the restrictive theory.[195] The second- and third-order effects of such political or foreign policy-motivated immunity determinations not only harmed private litigants, but also made diplomacy more difficult.[196] When the State Department engaged in horse-trading or awarded immunity on questionable legal grounds, relations with third-party states could suffer when those uninvolved states were denied immunity in the future under similar circumstances.[197] The nonreciprocal nature of the situation also compounded the lose-lose dynamic because the United States usually could not obtain the same sort of case-by-case preferential treatment in the justice systems of other countries.[198] In the United States, a decision to *deny* immunity had significant drawbacks because foreign states knew that immunity was an option, and the denial could be viewed as an unfriendly act.[199] Likewise, a decision to *grant* immunity also had drawbacks because the decision could cause tension with uninvolved parties,[200] make future diplomacy or immunity determinations more difficult, and negatively impact the ability of a private litigant to obtain recourse.[201] The FSIA corrected that lose-lose dynamic when it eliminated step one of the two-step procedure.

---

192. Letter from Robert S. Ingersoll, Deputy Sec'y, Dep't of State, and Harold R. Tyler, Jr., Deputy Att'y Gen., Dep't of Justice, to Hon. Carl O. Albert, Speaker, H.R. (Oct. 31, 1975), *reprinted in* HOUSE REPORT, *supra* note 62, at 6634.

193. Samantar v. Yousuf, 560 U.S. 305, 313 (2010).

194. *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Admin. Law & Governmental Relations of the H. Comm. on the Judiciary*, 94th Cong. 26 (1976) (statement of Monroe Leigh, Legal Advisor, Dep't of State) [hereinafter Leigh Statement].

195. *See id.*

196. *See id.* at 26–27.

197. E.g., the transportation contracts in *Victory Transport* and *Isbrandtsen Tankers*. *See supra* notes 182–84 and accompanying text.

198. *See* Leigh Statement, *supra* note 194, at 27 ("In virtually every other country in the world, sovereign immunity [wa]s a question of international law decided exclusively by the courts and not by institutions concerned with foreign affairs.").

199. E.g., in the context of the *Rosenberg* Statement, if the ISI directors were not granted immunity, Pakistan could become less cooperative with U.S. interests in the region. *See supra* note 42.

200. E.g., after learning that the ISI officials were granted immunity, India released a statement saying "the decision of the US authorities in this case is a cause of serious disappointment." Aditi Phadnis, *Expressing Concern: India Disappointed Over ISI's Immunity in US Civil Suit*, EXPRESS TRIB. (Dec. 19, 2012), http://tribune.com.pk/story/481746/expressing-concern-india-disappointed-over-isis-immunity-in-us-civil-suit/ [perma.cc/DWV5-2AAA].

201. E.g., the victims of the 2008 Mumbai attacks.

For the most part, the FSIA works remarkably well[202] because the executive and judicial branches work together in a way that employs the expertise and constitutional authority of each.[203] The Executive plays a minor role through its recognition power and authority to designate state sponsors of terrorism.[204] The courts play the dominant role based on their expertise interpreting statutes, applying the law, and evaluating the sufficiency of a plaintiff's complaint.[205]

The FSIA converts a judge-made or political decision into a statutory interpretation question under straightforward and relatively clear guidelines.[206] The statute awards immunity to a foreign state for all acts, minus certain specified exceptions such as waiver, commercial activity, or state sponsors of terrorism.[207] While complications sometimes arise over whether an exception applies, the doctrine is stable and consistent because the FSIA is interpreted and applied by the courts based on precedent and subject to appellate review.[208] The statute gives the doctrine the stability it lacked under federal common law.[209]

The FSIA is also admirable because of its impact on international law and the immunity doctrines adopted by other nations.[210] The statute was the first of its kind and served as a model for the immunity laws in other countries.[211] Since 1976, many states have actually gone a step further and codified the immunity of foreign *officials* in the same statutory structure as the immunity of foreign *sovereigns*.[212] The United States, however, appears to be in a situation analogous to the late 1960s and early 1970s: its doctrine of foreign official immunity is in disarray, while the legal systems of many other countries have evolved to incorporate the immunity of foreign individuals under comprehensive and nonpolitical statutory doctrines.[213]

---

202. *See* Feldman, *supra* note 190.

203. *See infra* Part IV.

204. *See infra* Part III.B.

205. *See infra* Part IV.B.

206. The FSIA is also interesting because the statute intentionally transfers authority to the judicial branch. Most of the time, when Congress codifies federal common law under a new statute, the new law has the effect of limiting judicial discretion. In many ways, the FSIA does the opposite.

207. *See* 28 U.S.C. § 1605 (2012).

208. *See* Feldman, *supra* note 190.

209. *Cf. supra* Part I.

210. *See* Feldman, *supra* note 190, at 303.

211. *See id.*

212. *See, e.g.*, G.A. Res. 59/38, U.N. Convention on Jurisdictional Immunities of States and Their Property (Dec. 2, 2004). As of February 6, 2016, there are twenty-eight signatories and twenty-one ratifications of the U.N. Jurisdictional Immunities Convention. The United States has not joined. *See* UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=III-13&chapter=3&lang=en (last visited Feb. 26, 2016) [perma.cc/EY72-5W94].

213. *See* Curtis A. Bradley & Laurence R. Helfer, *International Law and the U.S. Common Law of Foreign Official Immunity*, 2010 SUP. CT. REV. 213, 232–48, 252; Rutledge, *supra* note 33, at 589.

III. THE GRACEFUL EXIT: AGAINST EXECUTIVE BRANCH MONOPOLY OF FOREIGN OFFICIAL IMMUNITY DETERMINATIONS

The State Department's role in the doctrine of foreign official immunity is the subject of much ongoing debate and scholarly work.[214] This part discusses the justifications the Executive has given for that role and its authority to make the Koh Letter and *Rosenberg* Statement's assertions of control.

In the 2015 decision, *Zivotofsky v. Kerry*,[215] a divided Supreme Court affirmed the executive branch's exclusive authority to grant formal recognition to a foreign sovereign.[216] The decision was limited to a specific situation that did not involve foreign official immunity; but the Court's treatment of the proper role of the Executive in matters involving *foreign affairs* helps inform the discussion about the proper role of the Executive in matters involving *foreign official immunity* because the Executive justifies its assertions of control by invoking "its constitutional authority over foreign affairs."[217]

Zivotofsky is especially relevant if executive authority over foreign affairs in the context of foreign official immunity is viewed as a function of its recognition power.[218] The State Department, however, has wisely avoided making such an argument because the constitutionality of the FSIA,[219] which would infringe on that exclusive authority, cuts against the Executive's assertions in the *Rosenberg* Statement.[220] Nevertheless, *Zivotofsky*'s majority and dissenting opinions cast doubt on the *Rosenberg* Statement even under the broader "foreign affairs power," because absolute control by the executive branch is extreme and in conflict with the constitutional system of checks and balances.[221]

This part examines arguments in favor of executive control. Part III.A explores federal common law and draws parallels between the two types of

---

214. *See, e.g.*, Bellinger, *supra* note 40, at 829; Bradley & Helfer, *supra* note 213, at 258; Koh, *supra* note 22, at 1142; Rutledge, *supra* note 31, at 909; Wuerth, *supra* note 31, at 975.

215. 135 S. Ct. 2076 (2015).

216. *See id.* at 2086. The vote was six-to-three (Justice Kennedy's majority opinion was joined by Justices Ginsberg, Breyer, Sotomayor, and Kagan; Justice Breyer filed a concurring opinion; Justice Thomas filed an opinion concurring in part and dissenting in part; Justice Roberts's dissent was joined by Justice Alito; and Justice Scalia's dissent was joined by Justices Roberts and Alito).

217. Koh Letter, *supra* note 75, at 2. The Executive has also indicated the recognition power as a justification for control over immunity determinations. *See, e.g.*, Statement of Interest, *supra* note 22, at 5–6.

218. *See Zivotofsky*, 135 S. Ct. at 2089; Baker v. Carr, 369 U.S. 186, 213 (1962) (stating "it is the executive that determines a person's status as representative of a foreign government"); Bradley & Helfer, *supra* note 213, at 258.

219. *See* Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 497–98 (1983); Republic of Austria v. Altmann, 541 U.S. 677, 691 (2004).

220. *See, e.g.*, Wuerth, *supra* note 31, at 932.

221. *See infra* Part III.B; *see also* Celidon Pitt, Note, *Fair Trade: The President's Power to Recover Captured U.S. Servicemembers and the Recent Prisoner Exchange with the Taliban*, 83 FORDHAM L. REV. 2837, 2842–62 (2015) (examining the constitutional balance of power between the executive and legislative branches).

foreign *official* immunity and the two theories of foreign *sovereign* immunity discussed in Part II. Part III.B evaluates the scope of the Executive's "constitutional authority over foreign affairs"[222] through the lens of *Zivotofsky*. Part III.C examines Supreme Court precedent and considers the dual World War II-era decisions[223] that the Executive invokes to assert the binding nature of its immunity determinations. Informed by this new examination of federal common law, the Constitution, and Supreme Court precedent, this part concludes that the *Rosenberg* Statement's assertion of total control is inappropriate as well as imprudent.

A. Status- and Conduct-Based Immunities

Foreign official immunity can be classified into two types: (1) immunity based on an individual's status, and (2) immunity based on an individual's conduct.[224] Status-based immunities apply to individuals such as sitting heads of state or diplomats and extend to the individual based on the unique *position* he or she occupies on behalf of the foreign state.[225] Conduct-based immunities, on the other hand, apply to an individual's *acts* and are derived from the foreign state's delegation of responsibility to the official to operate within a certain scope of authority.[226] Similar to the relationship between the absolute and restrictive theories of foreign sovereign immunity, the two types of individual immunity are closely related to each other, but are just different enough to cause complications with their application under federal common law.[227]

Status-based immunity focuses on the identity of the individual and is similar to the absolute theory.[228] Immunity based on status protects a foreign official if the individual is a member of a certain group—similar to the way the absolute theory once protected a defendant if it was deemed a foreign sovereign.[229] Conduct-based immunity, on the other hand, focuses on the individual's acts and is similar to the restrictive theory that was codified by the FSIA.[230] Immunity based on conduct protects a foreign official when the nature of the acts in question are "official" or are attributable to the sovereign. It does not protect an individual when the acts are considered private or personal—similar to the restrictive theory's "public versus commercial" distinction.[231]

---

222. Koh Letter, *supra* note 75, at 2.

223. *See* Republic of Mexico v. Hoffman, 324 U.S. 30, 35 (1945); *Ex parte* Republic of Peru, 318 U.S. 578, 589 (1943).

224. *See* Yousuf v. Samantar, 699 F.3d 763, 774 (4th Cir. 2012); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 66 (1965); Chimène I. Keitner, *The Common Law of Foreign Official Immunity*, 14 GREEN BAG 2D 61, 63 (2010).

225. *See Yousuf*, 699 F.3d at 774.

226. *See id.*

227. *See supra* Part I.

228. *See supra* Part II.A.

229. *See supra* Part II.A.

230. *See supra* Part II.B.

231. *See supra* note 168 and accompanying text.

The similarity of the two types of individual immunity to the two theories of sovereign immunity helps inform a solution to the current disarray in the doctrine of foreign official immunity.[232] Under the absolute theory, the system of executive determinations of state immunity worked well partly because the question that decided whether immunity was appropriate—whether the defendant was a foreign sovereign—was a question very similar to recognition and well within the Executive's scope of authority and expertise.[233] When the restrictive theory of foreign sovereign immunity replaced the absolute theory, the doctrine fell into disarray because the relevant question was no longer as straightforward.[234] Under the restrictive theory—and in a conduct-based immunity analysis—the critical inquiry asks whether the acts alleged in the complaint are "official" or "private." The problematic nature of an inquiry that evaluates the nuances of conduct was the very reason the restrictive theory did not work as a matter of federal common law and had to be codified by the FSIA.[235]

B. Zivotofsky v. Kerry *and Executive Authority Over Foreign Affairs*

The State Department's primary justification for control over foreign official immunity determinations is grounded in the Executive's constitutional authority over foreign affairs.[236] Courts are usually very deferential to the President in cases that affect foreign policy[237] because the Constitution gives the Executive tremendous power in the context of foreign affairs, and foreign relations requires "one voice" that "must be the President's."[238] The Executive, however, is not given absolute control.[239] As with nearly all areas of the law, the Constitution tempers the power it gives to a single branch through the system of checks and balances.[240] Executive control over foreign affairs is limited by congressional authority over such areas as spending, treaty ratifications, and declarations of war[241] and is further limited by the judicial branch's authority of review.[242]

Less than a year ago, the Court provided a lengthy discussion about the Executive's foreign affairs power. In *Zivotofsky v. Kerry*, the Court held that an act of Congress requiring the State Department to list "Jerusalem, Israel" on U.S. passports was an unconstitutional intrusion on the

232. *See supra* Part I.C.
233. *See infra* Parts III.B, IV.A.
234. *See supra* Part II.B; *infra* Part III.C.
235. *See supra* Part II.B.
236. *See Rosenberg* Statement, *supra* note 16, at 7; Koh Letter, *supra* note 75, at 2.
237. *See* Zivotofsky v. Kerry, 135 S. Ct. 2076, 2081 (2015); *see also* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 401 (2003); Sitaraman & Wuerth, *supra* note 153, at 1900.
238. *Zivotofsky*, 135 S. Ct. at 2086.
239. *See, e.g.*, Boumediene v. Bush, 553 U.S. 723, 732–33 (2008); Sitaraman & Wuerth, *supra* note 153, at 1902–03.
240. *See Zivotofsky*, 135 S. Ct. at 2090.
241. *See id.* at 2087; *see also* Pitt, *supra* note 221, at 2842–44.
242. *See* Sitaraman & Wuerth, *supra* note 153, at 1902–03.

Executive's exclusive authority to recognize foreign sovereigns formally.[243] In its discussion, the Court repeatedly observed that the Executive did not have absolute control over the conduct of foreign relations because the system of checks and balances gave Congress the authority to act in ways that limit the Executive's ability to act internationally.[244]

The six-to-three decision was limited to the circumstances in question because the majority and dissent did not agree about whether the passport requirement implicated the recognition power.[245] The case is still helpful to the discussion about the Executive's role over foreign official immunity determinations, however, because of the similar ways in which the majority and dissent characterized the Executive's authority over foreign affairs.[246] In essence, both sides agreed that the Executive is entitled to deference in the conduct of foreign relations because in that context, "assurances cannot be equivocal" and "[f]oreign countries need to know, before entering into diplomatic relations or commerce with the United States, [information such as] whether their officials will be immune from suit in federal court."[247] That being said, both sides also agreed that even though the Executive should have tremendous authority over foreign affairs, that authority is still subject to checks and balances by the other branches of government.[248] Moreover, where the Executive has asserted absolute control over an aspect of foreign affairs—such as recognizing a foreign state—the Court indicated that Congress has a responsibility to check and balance that assertion through its own law-making powers.[249]

The *Rosenberg* Statement's assertion of total control over foreign official immunity is open to doubt in light of the Court's analysis of the Executive's scope of authority over foreign affairs. While the Executive certainly has authority to declare an entity a foreign sovereign to which the FSIA or federal common law could grant immunity, the system of checks and balances dilutes the Executive's authority actually to take unilateral action on that recognition[250] because the Executive does not have "unbounded

243. *See Zivotofsky*, 135 S. Ct. at 2086.

244. For example, Congress can stymie diplomatic relations by refusing to authorize funds for construction of an embassy or approve the nomination of an ambassador. *See id.* at 2087.

245. *Compare id.* at 2086, *with id.* at 2114 (Roberts, C.J., dissenting), *and id.* at 2118 (Scalia, J., dissenting).

246. *See id.* at 2084 (majority opinion) (stating "[l]egal consequences follow formal recognition" and recognized sovereigns "may benefit from sovereign immunity when they are sued"); *id.* at 2112 (Thomas, J., concurring in part and dissenting in part) (stating "[i]mportant consequences are understood to flow from one state's recognition of another [such as the ability to] invoke sovereign immunity").

247. *Id.* at 2086 (majority opinion); *see also id.* at 2113–14 (Roberts, C.J., dissenting) (expressing "serious doubts" that the Executive's recognition power is entitled to absolute deference).

248. *See id.* at 2090 (majority opinion); *id.* at 2107 (Thomas, J., concurring in part and dissenting in part); *id.* at 2113 (Roberts, C.J., dissenting); *id.* at 2126 (Scalia, J., dissenting).

249. *See id.* at 2090 (majority opinion).

250. *See id.* at 2088.

power" over all aspects of foreign affairs.[251] The Executive's authority actually to act on the recognition it makes must be tempered in some way by the other branches of government.[252] Therefore, an immunity doctrine where "it is for the Executive Branch, not the courts, to determine whether the conduct alleged was taken in a foreign official's official capacity"[253] is probably too extreme to fit under the scope of the Executive's foreign affairs power.

Congress is the most appropriate body to temper the Executive. Under current federal common law as it relates to foreign official immunity, the courts are already too deferential to sufficiently check and balance the Executive's authority.[254] The clearest example of that undue deference can be seen in the weight that is still given to the pre-Tate Letter decisions, *Hoffman* and *Ex parte Peru*, decisions that, after the shift to the restrictive theory, should no longer control and which one renowned legal scholar believes "were wrongly reasoned—if not wrongly decided."[255]

C. Hoffman *and* Ex parte Peru *Under the Restrictive Theory of Foreign Sovereign Immunity*

While the Executive probably does not have the constitutional authority to assert the degree of control over foreign official immunity determinations that it has,[256] even if the *Rosenberg* Statement is retracted, a thorny issue remains because the Executive can still invoke *Hoffman* and *Ex parte Peru* to achieve a similar outcome.[257] Under 28 U.S.C. § 517, the Executive may, sua sponte, submit a statement of interest in any pending litigation.[258] Under *Hoffman* and *Ex parte Peru*, the courts are required to defer to executive branch determinations of immunity.[259] Therefore, because *Hoffman* and *Ex parte Peru* appear to be binding,[260] the Executive can still assert control over foreign official immunity determinations in a way that remains unchecked and unbalanced.

Such a sleight of hand, however, should not be available to the Executive because *Hoffman* and *Ex parte Peru* are not applicable under the restrictive theory of foreign sovereign immunity and should not be binding on the

---

251. *Id.* at 2089; *see also id.* at 2115–16 (Roberts, C.J., dissenting).

252. *See id.* at 2090 (majority opinion); *id.* at 2116 (Scalia, J., dissenting) ("[A] sound structure of balanced powers [is] essential to the preservation of just government, and international relations form[] no exception to that principle.").

253. *See Rosenberg* Statement, *supra* note 16, at 9–10.

254. *See, e.g.*, *supra* Part I.C; *infra* Part III.C.

255. Wuerth, *supra* note 31, at 921.

256. *See supra* Part III.B.

257. *See supra* notes 161–63 and accompanying text.

258. *See supra* note 54.

259. *See supra* notes 161–63 and accompanying text.

260. *See* Samantar v. Yousuf, 560 U.S. 305, 311–12 (2010) (quoting from *Hoffman* and *Ex parte Peru*); *see also* Doe v. De León, 555 F. App'x 84, 85 (2d Cir. 2014), *cert. denied sub nom.* Jane Doe 1 v. Ponce De León, 135 S. Ct. 78 (2014); *In re* Greene, 980 F.2d 590, 599 (9th Cir. 1992); Rex v. Cia. Pervana de Vapores, S.A., 660 F.2d 61, 68 (3d Cir. 1981); Weixum v. Xilai, 568 F. Supp. 2d 35, 37–38 (D.D.C. 2008).

courts.[261] *Hoffman* and *Ex parte Peru* were decided in the pre-FSIA era of absolute immunity when foreign states (and their officials) were entitled to immunity simply because the states were recognized as foreign sovereigns.[262] Under the absolute theory, mandatory deference was appropriate[263] because immunity depended on identity and/or recognition—traditional areas of executive branch authority and expertise.[264] But when the Executive embraced the restrictive theory through the Tate Letter and supported its codification under the FSIA, the Executive waived its right to the sort of absolute control *Hoffman* and *Ex parte Peru* allowed.[265]

After the FSIA, foreign sovereign immunity is restricted to certain types of conduct.[266] Because the statute vested sole authority in the courts to make that conduct-based analysis, a suggestion of immunity from the Executive regarding a foreign *state's* immunity should not be binding because the FSIA explicitly eliminated the role of the Executive from such determinations.[267] That same logic should extend to modern day determinations of foreign official immunity because the immunity of foreign individuals flows out of the immunity of the foreign state.[268] *Hoffman* and *Ex parte Peru*'s mandatory deference under the restrictive theory is invalid because the decisions applied to immunity under the absolute theory, and the Tate Letter and FSIA changed the foundational immunity question.[269] If the courts are not required to submit blindly to executive recommendations of foreign *sovereign* immunity, it is illogical to require mandatory deference to determinations of foreign *official* immunity that necessitates the same conduct-based immunity analysis that the FSIA purposefully took away from the Executive.[270]

While the Supreme Court in *Samantar* did observe that "[w]e have been given no reason to believe that Congress saw as a problem, or wanted to eliminate, the State Department's role in determinations regarding individual official immunity,"[271] the shift from the absolute theory to the restrictive theory—that is to say, the Tate Letter, not necessarily the

261. *See* Wuerth, *supra* note 31, at 924 (arguing "that the Court's cursory reasoning in *Ex parte Peru* and *Republic of Mexico v. Hoffman* is unconvincing in the light of the text and structure of the Constitution").

262. *See supra* Part II.A.

263. *But see supra* note 261.

264. *See infra* Part IV.A.

265. *See* Wuerth, *supra* note 31, at 928.

266. *See supra* Part II.C.

267. *See supra* note 188 and accompanying text.

268. *See* Chimène I. Keitner, *Foreign Official Immunity After* Samantar, 44 VAND. J. TRANSNAT'L L. 837, 849 (2011); *supra* note 152.

269. Mandatory deference to executive determinations of foreign official immunity under *Hoffman* and *Ex parte Peru* is also doubtful because the two cases were actions in rem and in admiralty—circumstances that are very different from typical foreign official immunity cases like *Samantar* and *Rosenberg* that involve tortious acts by a foreign individual. *See, e.g.*, Wuerth, *supra* note 31, at 928.

270. Deference to executive determinations of status-based immunity is still appropriate. *See infra* Part IV.A.

271. Samantar v. Yousuf, 560 U.S. 305, 323 (2010).

FSIA—changed the State Department's role in determinations of foreign state and foreign official immunity. Therefore, *Hoffman* and *Ex parte Peru*, which only applied in the pre-Tate Letter era of the absolute theory, and were partly to blame for the disarray that necessitated the FSIA in the first place,[272] are not applicable in the current era of the restrictive theory.[273]

IV. THE FIX: THE BEST SOLUTION GIVES AUTHORITY TO THE EXPERTS

The first step toward solving a problem is admitting that one exists. Currently, the courts and Executive are locked into an unnecessary and self-defeating tug-of-war that Congress must acknowledge and regulate.[274] The circumstances are ripe to codify the doctrine under a foreign official immunity statute because the Executive has overplayed its hand with the *Rosenberg* Statement,[275] and the resulting disarray should help focus attention on the problem in a way that compels action.[276] For purely pragmatic reasons, the Executive should unilaterally retract the *Rosenberg* Statement's assertions of control and seek only an advisory role in foreign official immunity determinations because Executive authority over pending litigation actually makes diplomacy more difficult.[277] In the meantime, the courts should evaluate foreign official immunity requests in the same manner as *In re Terrorist Attacks* and treat Executive suggestions of immunity as just that—suggestions.[278]

This part argues in favor of a statute that places foreign official immunity determinations under a procedure similar to foreign sovereign immunity. A foreign official immunity statute still would allow the Executive to assert varying degrees of influence—not control—over judicial determinations of

272. *See supra* notes 171–73 and accompanying text.

273. The Judiciary's current deference to *Hoffman* and *Ex parte Peru* also demonstrates that a nonstatutory fix, such as the application of customary international law to federal common law, is not the best way to resolve the current disarray. *Cf.* Wuerth, *supra* note 31, at 975–76.

274. *See supra* Part I.C.

275. *See supra* Part III.B.

276. The Executive's lack of a role in the act of state doctrine provides additional support. *See* Bradley & Helfer, *supra* note 213, at 258 ("[I]n a closely analogous context—judicial development of the common law governing the act of state doctrine—the Supreme Court has declined to treat as dispositive the Executive's views concerning the contours of that law, and a majority of Justices have also balked at the idea of giving absolute deference to the Executive in the case-specific applications of the doctrine.").

277. E.g., Former State Department Legal Advisor Davis Robinson has recounted a story that underscores the problem with executive control over immunity determinations. *See* SCHARF & WILLIAMS, *supra* note 1, at 44. In the 1980s, Secretary of State George Schultz met with Chinese President Deng Xiaoping to discuss payment of Chinese prerevolutionary debts. *See id.* During the meeting, President Deng became "highly annoyed" about an attachment order that was issued against a Chinese 747 aircraft and said, "Why don't you just call that judge down in Alabama and tell him to lay off the People's Republic of China." *Id.* Schultz replied, "Oh, we have the separation of powers, you have to understand." *Id.* President Deng asked, "Well, what is the separation of powers?" *Id.* Schultz answered, "I'll send you my lawyer [i.e., the legal advisor] to explain it." *Id.*

278. *See supra* notes 101–14 and accompanying text.

immunity[279] by: (1) offering its general views on a legal question as an amicus curiae; (2) arguing in favor of a specific result as an interested party; or (3) taking specific action within its authority that has ripple effects on the courts—such as placing a state on the State Sponsors of Terrorism List to deny FSIA protection,[280] or recognizing an individual as a head of state.[281] The overall effect of a statute would eliminate the Executive's ability to dictate judicial action, such as the Koh Letter's award of immunity and dismissal of the ISI officials, for conduct-based immunity determinations but not for determinations of status-based immunity.[282]

A. Status-Based Immunity to the Executive

Status-based foreign official immunity determinations are basically acts of recognition[283] that fall under the Executive's Article II, section 3 power to "receive ambassadors and other public ministers."[284] As a result, executive suggestions of status-based immunity are more appropriately viewed as executive recognitions of immunity that are "'a quintessentially executive function' for which absolute deference is proper."[285] Therefore, a new statute should vest authority for determinations of status-based immunity with the Executive.

B. Conduct-Based Immunity to the Judiciary

Determinations of conduct-based foreign official immunity should be vested with the courts because the judicial branch has the most experience and expertise in evaluating conduct. Moreover, the history of foreign sovereign immunity demonstrates that a clear standard, subject to review by a higher authority, and applied by a nonpolitical body, is the most effective system.[286]

Similar to the way the Federal Tort Claims Act[287] requires the U.S. government to take responsibility for "the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment,"[288] conduct-based immunity determinations should force a foreign sovereign to take responsibility for the harmful acts of its officials.[289] When a foreign individual seeks immunity for conduct

279. *See* Rutledge, *supra* note 31, at 887.
280. *See* 28 U.S.C. § 1605A (2012).
281. *See supra* Part III.A; *infra* Part IV.A.
282. *See supra* Part III.A; *infra* Part IV.A; *see also* Yousuf v. Samantar, 699 F.3d 763, 768 (4th Cir. 2012) ("The extent of the State Department's role, however, depends in large part on what kind of immunity has been asserted.").
283. *See* Rutledge, *supra* note 33, at 605–06.
284. U.S. CONST. art. II, § 3, cl. 4; *see also* Keitner, *supra* note 224, at 71.
285. *Yousuf*, 699 F.3d at 772 (quoting Rutledge, *supra* note 33, at 606).
286. *See supra* Part II.C.
287. 28 U.S.C. § 1346(b) (2012).
288. *Id.*
289. *See, e.g.*, Keitner, *supra* note 268 ("[T]he burden should be on the defendant to ensure that his or her government is made aware of the legal proceedings[] and intervenes in a timely fashion.").

that he or she performed on behalf of a foreign state, the immunity that is awarded is best viewed as the immunity of the foreign sovereign because the actions of the individual are essentially the actions of the state.[290] Sometimes, when a foreign official seeks immunity, the analysis that is conducted is incomplete because it only asks whether the foreign official's conduct was "official conduct" in the sense that it *could be* taken on behalf of the foreign state. Analysis that only inquires whether conduct could be official does not determine whether the foreign state actually takes responsibility for such conduct. Such analysis is problematic because it does not require the foreign state affirmatively to declare that the foreign official's alleged conduct, if proven, was state sanctioned. A foreign official immunity statute can fix that by requiring a state affirmatively to extend its immunity before an official is entitled to protection.[291]

Consider two examples. In *Matar v. Dichter*,[292] an Israeli military officer was sued for allegedly authorizing the bombing of a building in Gaza that killed Palestinian civilians.[293] The official was awarded immunity, however, after the Israeli government effectively stepped into his shoes and took responsibility for the decision to bomb.[294] The allegations of wrongdoing by the official were dismissed because the official's conduct was attributable to the state, and under the FSIA, the tortious act that was alleged in the complaint was a sovereign act entitled to immunity.[295]

In *Rosenberg v. Lashkar-e-Taiba*,[296] on the other hand, Pakistan was never required to take responsibility for the allegations of providing financial and material support to the Mumbai terrorists.[297] The State Department determined that the ISI officials should receive immunity because the Executive itself viewed the allegations in the complaint as official acts.[298] Pakistan was not forced to declare affirmatively that, if proven, the act of providing financial and material support to LeT would constitute a sovereign act. Conduct-based immunity probably should not be available to foreign officials without an affirmation by the foreign state to extend its sovereign immunity over the alleged acts of its officials.[299] The

290. *See* Samantar v. Yousuf, 560 U.S. 305, 324 (2010).

291. *See supra* note 152 and accompanying text.

292. 500 F. Supp. 2d 284 (S.D.N.Y. 2007), *aff'd*, 563 F.3d 9 (2d Cir. 2009).

293. *See id.* at 287; *see also supra* Part I.

294. *Matar*, 500 F. Supp. 2d at 291 ("[T]he State of Israel has represented to this Court that Dichter's actions were taken 'in the course of [his] official duties, and in furtherance of official policies of the State of Israel.'" (quoting Letter from Daniel Ayalon, Ambassador of Isr. to the U.S., to Nicholas Burns, Under Sec'y for Political Affairs, Dep't of State (Feb. 6, 2006), attached as Exhibit A to Declaration of Jean E. Kalicki, *id.* (No. 05 Civ. 10270 (WHP)), ECF No. 19)).

295. *See id.*

296. 980 F. Supp. 2d 336 (E.D.N.Y. 2013), *aff'd sub nom.* Rosenberg v. Pasha, 577 F. App'x 22 (2d Cir. 2014).

297. *See id.* at 343.

298. *See* Koh Letter, *supra* note 75, at 1.

299. Pakistan would still be entitled to immunity under the FSIA even if it had declared that the act of providing financial and material support to LeT was official because the

ratification process for a foreign official immunity statute would force a debate over whether the sovereign itself must take responsibility, as Israel did in *Matar* and as the United States does under the Federal Tort Claims Act, or whether the courts may impute responsibility and decide for themselves when a foreign official is "acting within the scope of his office or employment,"[300] as the State Department did in *Rosenberg*. The ratification process would also be an excellent opportunity to resolve the split between the Second and Fourth Circuits regarding immunity for *jus cogens* violations.[301]

CONCLUSION

A statute that codifies foreign official immunity is good for everyone. For Congress, it enables oversight of the State Department and protects the legal rights of private individuals. For the Executive, it eliminates the strain that foreign official immunity requests currently place on diplomatic relations. For the Judiciary, it brings order to the law and gives courts and litigants a clear idea of the legal playing field. A statutory fix also benefits the weak and marginalized victims of a foreign state who are the litigants most likely to be harmed by an unclear immunity doctrine because they most likely cannot compete with the lobbying and legal power of the sovereign.

History has a habit of repeating itself. The United States should not be forced to wait another twenty-five years for a statute to resolve disorder created by executive overreach. Congress must act.

Executive has not designated Pakistan a state sponsor of terrorism. *See supra* note 280 and accompanying text.

300. Federal Tort Claims Act, 28 U.S.C. § 1346(b) (2012).

301. *See supra* Part I.C.

APPENDIX

PROPOSED FOREIGN OFFICIAL IMMUNITIES ACT

A BILL

To define the jurisdiction of United States courts in suits against foreign officials, the circumstances in which foreign officials are entitled to immunity, the circumstances in which execution may not be levied on their personal property, and for other purposes.

SECTION 1. SHORT TITLE.

This Act may be cited as the "Foreign Official Immunities Act of 20xx."

SECTION 2. FINDINGS AND PURPOSE.

For purposes of this chapter—,

(a) Congress makes the following findings—,

(1) In some circumstances, foreign officials, by virtue of the position they hold on behalf of a foreign state, are entitled to immunity from the jurisdiction of the courts of the United States and of the States;

(2) In some circumstances, foreign officials, by virtue of the actions they take on behalf of a foreign state, are entitled to dismissal from a civil action brought in the courts of the United States and of the States; and

(3) In all circumstances, the judiciary is the most appropriate body to render final and binding determinations of immunity that affect the legal rights of parties to a civil action brought in the courts of the United States and of the States.

(b) The purpose of this bill is to—,

(1) Establish the circumstances in which a foreign official may be awarded immunity and dismissed from a civil action for lack of subject matter jurisdiction;

(2) Establish the circumstances in which a foreign official may be awarded immunity and dismissed from a civil action for failure to state a claim upon which relief can be granted; and

(3) Vest all foreign official immunity determinations with the courts of the United States and of the States in conformity with the principles set forth in this chapter.

SECTION 3. DEFINITIONS.

For purposes of this chapter—,

(a) A "foreign official" is any individual who is—,
  (1) a natural person;
  (2) an officer of a foreign state as defined in subsection (b); and
  (3) neither a citizen of the United States nor of a State of the United States as defined in section 1332 (c) and (d) of the United States Code, nor created under the laws of any third country.

(b) An "officer of a foreign state" is any individual who—,
  (1) is an official, so designated by a foreign state as defined in subsection (c);
  (2) acts on behalf of a foreign state as defined in subsection (c);
  (3) acts in an official capacity; and
  (4) acts within the scope of his or her official responsibility.

(c) A "foreign state" is any entity that—,
  (1) may be awarded immunity under the Foreign Sovereign Immunities Act // 28 U.S.C. §§ 1602–11 *et seq.* //; and
  (2) seeks to extend its immunity under the Foreign Sovereign Immunities Act // 28 U.S.C. §§ 1602–11 *et seq.* // to the actions of the individual seeking immunity under this statute.

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

SECTION 4. IMMUNITY OF AN OFFICIAL FROM JURISDICTION.

Subject to existing international agreements to which the United States is a party, the following foreign officials, designated by the President and while holding the indicated office, shall be immune from the jurisdiction of the courts of the United States and of the States for all official conduct taken on behalf of a foreign state entitled to immunity under the Foreign Sovereign Immunities Act // 28 U.S.C. §§ 1602–11 *et seq.* //, except as provided in section 6 of this chapter—,

(a) sitting heads of state;
(b) sitting foreign ministers;
(c) diplomats; and
(d) members of special diplomatic missions.

SECTION 5. IMMUNITY OF AN OFFICIAL FROM SUIT.

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act, a foreign official, acting within the scope of his or her office or employment and on behalf of a foreign state entitled to immunity under the Foreign Sovereign Immunities Act // 28 U.S.C. §§ 1602–11 *et seq.* //,

shall be entitled to dismissal in the courts of the United States and of the States for all official conduct taken within the scope of his or her office or employment, except as provided in section 6 of this chapter.

SECTION 6. EXCEPTIONS TO IMMUNITY.

A foreign official shall not be immune under this chapter in any case—,

(a) in which the foreign state has waived its immunity either explicitly or by implication; or

(b) in which the foreign state has not officially petitioned the court for immunity on behalf of the foreign official; or

(c) in which the foreign state is not entitled to immunity under the Foreign Sovereign Immunities Act // 28 U.S.C. §§ 1602–11 *et seq.* //.

SECTION 7. EXTENT OF LIABILITY.

As to any claim for relief with respect to which a foreign official is not entitled to immunity under section 6 of this chapter, the foreign official shall be liable in the same manner and to the same extent as a private individual under like circumstances including for punitive damages.

SECTION 8. COUNTERCLAIMS.

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

(a) for which a foreign official would not be entitled to immunity under section 6 of this chapter had such claim been brought in a separate action against the foreign official; or

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

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

SECTION 9. SERVICE; TIME TO ANSWER; DEFAULT.

The requirements of service, time to answer, and default shall apply to a foreign official in the same manner as those that apply to a foreign state under the Foreign Sovereign Immunities Act // 28 U.S.C. §§ 1602–11 *et seq.* //.

SECTION 10. IMMUNITY FROM ATTACHMENT AND EXECUTION OF PROPERTY OF A FOREIGN OFFICIAL.

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act, the property in

the United States of a foreign official shall be immune from attachment, arrest, and execution, except as provided in section 11 of this chapter.

SECTION 11. EXCEPTIONS TO THE IMMUNITY OR INDEMNITY FROM ATTACHMENT OR EXECUTION.

The property in the United States of a foreign official used for a commercial activity in the United States as defined in the Foreign Sovereign Immunities Act // 28 U.S.C. §§ 1602–11 *et seq.* // shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if such an exception to immunity from attachment or execution is not recognized for a foreign state by the Foreign Sovereign Immunities Act // 28 U.S.C. §§ 1602–11 *et seq.* //.

SECTION 12. CERTAIN TYPES OF PROPERTY IMMUNE FROM EXECUTION.

Notwithstanding the provisions of section 11 of this chapter, the property of those individuals designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act // 22 U.S.C. § 288 // shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign official as the result of an action brought in the courts of the United States or of the States.

SECTION 13. ADDITIONAL INFORMATION.

If any provision of this Act or the application thereof is held invalid, the invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

SECTION 14. EFFECTIVE DATE.

This Act shall take effect ninety days after the date of its enactment.

DRAFTING NOTES

This statute only applies to natural persons who act in some sort of official capacity on behalf of a foreign state that is itself entitled to immunity under the Foreign Sovereign Immunities Act. Judicial analysis of a foreign individual's request for dismissal under this statute should begin with an examination of the foreign state that has petitioned the court for immunity on behalf of the foreign individual. If the court determines that the foreign state is entitled to protection under the Foreign Sovereign Immunities Act, the court should then consider whether the foreign official is entitled to status-based immunity under section 4, or conduct-based immunity under section 5. If the foreign official is entitled to status-based

immunity under section 4, the court does not have subject matter jurisdiction over the allegations against the foreign official and must dismiss the suit. If the foreign official seeks conduct-based immunity under section 5, the court should engage in a thorough analysis of the merits of the affirmative defense. If conduct-based immunity is appropriate, the court must dismiss the action for failure to state a claim upon which relief can be granted.

Section 4 intentionally omits the requirement that international agreements be in place prior to enactment of this statute to give Congress and the Executive the flexibility to modify the scope of status-based immunity through future international agreements.