YOUSUF V. SAMANTAR: DOES THE FOREIGN SOVEREIGN IMMUNITIES ACT PROTECT INDIVIDUAL GOVERNMENT OFFICIALS FROM LIABILITY?

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INTRODUCTION

In 1969, nine years after gaining its independence from a long history of colonial rule,[1] the Somali Republic faced a serious internal threat.[2] With the support of officers from the Somali National Army, Major General Mohamed Siad Barre led a socialist coup overthrowing the civilian leadership in Somalia.[3] Following the successful coup, a new governing body called the Supreme Revolutionary Council ("SRC") (composed of the Army officers who helped stage the coup) appointed Siad Barre President of a new Democratic Republic of Somalia.[4] The SRC began their governance by banning political parties, suspending the constitution, and eradicating the National Assembly.[5] Over the next two decades, domestic opposition to Siad Barre's authoritarian regime increased.[6] Between 1980 and 1990, in an attempt to quell opposition forces, the Somali military "intensified [its] political repression, using jailings, torture, and summary executions of dissidents and collective punishment of clans thought to have engaged in organized resistance."[7]

In 2004, five native Somalis filed a lawsuit in the Eastern District of Virginia under the Alien Tort Statute ("ATS") and the Torture Victim Protection Act ("TVPA") alleging that they were victims of torture perpetrated by the Siad Barre government throughout the 1980s.[8] The plaintiffs brought suit against Mohamed Ali Samantar (a resident of Fairfax, Virginia) who served as a General, Vice President, Minister of Defense, and Prime Minister for the Democratic Republic of Somalia during the Siad Barre regime in the 1980s.[9] The plaintiffs alleged that defendant Samantar "possessed and exercised command and effective control over the Somali military . . . [and] that he knew, or should have known, that his subordinates had committed, were

[1] FED. RESEARCH DIV., SOMALIA: A COUNTRY STUDY 10 (Helen Chapin Metz ed., 4th ed. 1993) (stating that from 1891–1960 "Somalis became the subjects of state systems under the flags of Britain, France, Italy, Egypt, and Ethiopia").

[2] *Id.* 36–37.

[3] *Id.* at 37.

[4] *Id.* at 36–37.

[5] *Id.*

[6] *Id.* at 45.

[7] *Id.*

[8] Brief of Appellants at *10, Yousuf v. Samantar, 552 F.3d 371 (4th Cir. 2009) (No. 07-1893), *aff'd*, 130 S. Ct. 2278 (2010); *Yousuf*, 552 F.3d at 373.

[9] Brief of Appellants, *supra* note 8, at *16; Petition for Writ of Certiorari at *2, Samantar v. Yousuf, 130 S. Ct. 2278 (2010) (No. 08-1555).

committing, or were about to commit" torture, extrajudicial killings, rape, and other crimes against humanity.[10] In his defense, Samantar filed a motion to dismiss, arguing (among other things) that the "[c]ourt lack[ed] subject matter jurisdiction over the complaint because he [was] immune from suit under the Foreign Sovereign Immunities Act of 1976 (FSIA)."[11] The district court granted Samantar's motion, and the plaintiffs appealed that decision to the Court of Appeals for the Fourth Circuit.[12]

The court of appeals reversed the district court's decision.[13] In doing so, the court of appeals repudiated the majority rationale of the Ninth, Sixth, Fifth, Second, and D.C. Circuits—further widening an already existing split in the federal courts regarding the interpretation of the FSIA. Rather than adopting the majority rationale, the court of appeals held that the FSIA does not apply to individual government officials or to former government officials.[14] This holding embraced the minority rationale set forth by the Seventh Circuit in the case *Enahoro v. Abubakar*.[15]

In reaching its decision, the court of appeals noted that the FSIA does not explicitly mention whether or not an individual foreign official may claim immunity under the statute.[16] In order to ascertain Congressional intent, the court of appeals analyzed the purpose, text, and legislative history of the FSIA. After performing this analysis, the court of appeals held that Congress did not intend for the statute to apply to individuals. As a result of this holding, when a foreign official is sued in the Fourth Circuit, this official cannot claim FSIA immunity. Instead, these individual officials can only rely upon the common law doctrines of "head of state immunity" or "act of state immunity" to avoid liability.[17]

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[10] Yousuf v. Samantar, No. 1:04cv1360, 2007 WL 2220579, at *6 (E.D. Va. Aug. 1, 2007), *rev'd*, 552 F.3d 371 (4th Cir. 2009), *aff'd*, 130 S. Ct. 2278 (2010).

[11] *Id.*

[12] *Id.* at *15.

[13] *Yousuf*, 552 F.3d at 373.

[14] *Id.* at 383.

[15] 408 F.3d 877 (7th Cir. 2005), *cert. denied*, 546 U.S. 1175 (2006).

[16] *Yousuf*, 552 F.3d at 378.

[17] *See id.* at 383–84. For a discussion of the "act of state doctrine," see 44B AM. JUR. 2D *International Law* § 53 (2010) ("Under the current view of the act of state doctrine, an action will be barred only if: (1) there is an official act of a foreign sovereign performed within its own territory; and (2) the relief sought or the defense interposed in the action would require a court in the United States to declare invalid the foreign sovereign's official act."). Additionally, for an

The court of appeals' interpretation of the FSIA is inherently flawed. As suggested by Justice Stephen Breyer (during oral argument before the U.S. Supreme Court), this reading of the statute would make the FSIA "only good as against a bad lawyer."[18] Since foreign states must act through individuals, a "good lawyer" would simply file a lawsuit against an individual foreign official to circumvent the restrictions imposed by the FSIA.[19] This interpretation eviscerates the purpose of the FSIA legislation which was meant "to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations."[20] Also, under the court of appeals' interpretation, the State Department (executive branch) would still be involved in making suggestions of immunity for individual officials under the "head of state" and "act of state doctrines"— a situation that the FSIA sought to avoid.

Additionally, the court of appeals addressed a second issue. Assuming *arguendo* that the FSIA applies to individuals, the court of appeals held that it could not apply to former government officials. In reaching this conclusion, the court properly reasoned that the policy underlying foreign sovereign immunity is to provide "some *present* protection [to foreign states] from the inconvenience of suit as a gesture of comity,"[21] and not to award foreign officials perpetual immunity for their actions.

In Part I, this comment will discuss the relevant facts controlling the legal issues presented to the court of appeals in *Yousuf v. Samantar*. Additionally, this section will focus on the procedural history of *Yousuf*. Part II will trace the development of the doctrine of foreign sovereign immunity and provide historical context for the issues involved in this case. Part III will examine the majority opinion of the court of appeals in *Yousuf*. Part IV will critically analyze the court of appeals' decision and

explanation of the "head of state doctrine," see U.S. v. Noriega, 746 F. Supp. 1506, 1519 (S.D. Fla. 1990) ("[T]he doctrine of head of state immunity provides that a head of state is not subject to the jurisdiction of foreign courts, at least as to official acts taken during the ruler's term of office.").

[18] Transcript of Oral Argument at 31, Samantar v. Yousuf, 130 S. Ct. 2278 (2010) (No. 08-1555) [hereinafter Oral Argument], *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/081555.pdf.

[19] *Id.*

[20] H.R. REP. NO. 94-1487, at *2 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6606.

[21] *Yousuf*, 552 F.3d at 383.

rationale in *Yousuf*. Lastly, since the U.S. Supreme Court heard oral arguments in the *Yousuf* case on March 3, 2010, Part V will advise the Supreme Court on how to rule on the issues before that Court.

I. ALLEGED TORTURE AND EXTRAJUDICIAL KILLINGS SUFFERED BY PLAINTIFFS IN SOMALIA AND SAMANTAR'S RELATIONSHIP WITH THE UNITED STATES GOVERNMENT

Understanding the significant legal and foreign policy issues underlying the *Yousuf* case requires an appreciation of (1) the alleged torture and extrajudicial killings experienced by the plaintiffs and (2) the relationship that defendant Samantar developed with the U.S. government.

A. Alleged Torture and Extrajudicial Killings

(The information contained in this sub-section is not confirmed fact. It is merely allegations made by the plaintiffs in their pleadings and briefs.)

Plaintiff Bashe Abdi Yousuf ("Yousuf") survived for six and a half years in virtual darkness.[22] While being forced to live in solitary confinement, Yousuf undoubtedly replayed in his mind the disturbing events that led to his incarceration. As an altruistic businessman, Yousuf formed the UFFO (a group that sought to improve the living conditions in his native Hargeisa, Somalia).[23] However, Yousuf's affiliation with the UFFO caused suspicion within the Somali government.[24] On November 19, 1981, several members of the Somali National Security Service ("NSS") visited a warehouse where Yousuf had been working.[25] When they located Yousuf, they threw him into a truck and "took him to a building reserved for the detention and interrogation of members of the UFFO."[26] For two days Yousuf was left without any food or water.[27] For the next three months Yousuf

[22] Yousuf v. Samantar, No. 1:04cv1360, 2007 WL 2220579, at *4 (E.D. Va. Aug. 1, 2007), *rev'd*, 552 F.3d 371 (4th Cir. 2009), *aff'd*, 130 S. Ct. 2278 (2010).
[23] *Id.* at *3.
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*

experienced various forms of torture.[28] In December 1981, Yousuf was:

> blindfolded, handcuffed, and forced . . . into the back of a truck. When the vehicle stopped, Yousuf was forced down on the ground where the interrogators tightly tied his hands and feet together behind his back so that his body was arched backward in a slightly-tilted 'U' shape, with his arms and legs in the air. The interrogators then placed a heavy rock on his back, causing him excruciating pain. They also tightened the ropes, causing deep cuts in his arms and legs.[29]

Additionally, Yousuf was water-boarded eight times and twice experienced torture by electric shock.[30] In February 1982, Yousuf was accused of "national security crimes."[31] After a two day trial, he was convicted and sentenced to twenty years in prison.[32] In 1989, Yousuf was released from prison after only serving seven years (six and a half in solitary confinement).[33] He fled to the United States.

Plaintiff Aziz Mohamed Deria (representing the estates of his father, Mohamed Deria Ali, and his younger brother, Mustafa Mohamed Deria) fled Somalia in 1983; however, much of his family remained in Somalia.[34] On a June afternoon in 1988, members of the Somali military forcefully entered his family's home and abducted his father.[35] The soldiers returned to the family home later that afternoon and "reported that Mohamed Deria Ali had been killed."[36] The soldiers then proceeded to abduct Mustafa Mohamed Deria—he was never seen or heard from again.[37]

Plaintiff John Doe I, while tending camels with his two brothers, was approached by a group of Somali soldiers.[38] The soldiers accused the brothers of being involved in activities subversive to the government, and the brothers were forced into a military truck.[39] Four days later the brothers were sentenced to

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[28] *Id.* at *3–4.
[29] *Id.* at *3.
[30] *Id.*
[31] *Id.* at *4.
[32] *Id.*
[33] *Id.*
[34] Brief of Appellants, *supra* note 8, at *12.
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.* at *12–13.

death by a military court.[40] As they were loaded into a military truck for their execution, a "sympathetic guard" inquired as to whether the three men were brothers.[41] When he learned that they were, the guard released John Doe I.[42] John Doe I eventually discovered that both his brothers were executed later that day.[43]

Plaintiff Jane Doe, a student in Somalia, was arrested and accused of being a "subversive leader" for an anti-government group.[44] Put inside a small cell, "[h]er arms were tied behind her back with wire and then chained to the wall, and her left leg was chained to the floor. She was detained in this manner for three months."[45] While serving her sentence, Jane Doe was "raped at least fifteen times."[46] Since Jane Doe had been "subjected to infibulation, a procedure . . . . [Where] [h]er vagina was sewn closed except for a very tiny hole. [Her] rapist opened her vagina by cutting her with fingernail clippers."[47] After three and a half years in solitary confinement, Jane Doe was released and fled to the United Kingdom.[48]

Plaintiff John Doe II, an officer in the Somali Army, was arrested for being a member of the Isaaq clan (a group of Somalis targeted by the government because they were among the best educated and most prosperous citizens),[49] and detained with other Isaaq members of the military.[50] The next day, John Doe II and three other prisoners were removed from their cells.[51] Shortly thereafter, three Red Berets (in the Somali military) were ordered to kill the prisoners.[52] The soldiers discharged their weapons, and all four men fell backwards onto a pile of dead bodies; however, unlike the three other prisoners, John Doe II survived.[53] After sustaining flesh wounds, John Doe II laid among the heap of

[40] *Id.* at *13.
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.* at *14.
[45] *Id.*
[46] *Id.*
[47] *Id.* at n.10.
[48] *Id.* at *15.
[49] *Id.*; 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*, 130 S. Ct. 2278 (2010).
[50] Brief of Appellants, *supra* note 8, at *15.
[51] *Id.*
[52] *Id.*
[53] *Id.*

executed bodies until the soldiers left the area.[54] A short time later, John Doe II fled Somalia.[55]

1. Defendant Samantar's Relationship with the United States Government

During the years when the alleged torture occurred, defendant Samantar held several different government positions in Somalia (spanning the years 1971–1990).[56] During the 1980s, Samantar met with Vice President George H.W. Bush and other high ranking American officials while conducting an official state visit on behalf of Somalia.[57] From 1982–1988, Somalia was considered an American ally in the Cold War because Somalia sought American support after the United Soviet Socialist Republic ("USSR") aided Ethiopia in a war against Somalia in the late 1970s.[58] The plaintiffs allege that during the 1980s, while Samantar acted as Minister of Defense, he had control of and "led military forces . . . responsible for the widespread and systematic use of torture, arbitrary detention, and extrajudicial killing against the civilian population of Somalia."[59] In 1991, the government led by Siad Barre collapsed, and Samantar moved to Italy, and in 1997, he settled in Fairfax, Virginia.[60]

B. Procedural History: Ruling of the District Court in the Eastern District of Virginia

The district court granted defendant Samantar's motion to dismiss for lack of subject matter jurisdiction.[61] In granting this motion, the court acknowledged that the FSIA is silent on the subject of whether an individual can claim immunity under the

[54] *Id.* at *15–16.
[55] *Id.* at *16.
[56] Brief for Defendant-Appellee at *4, Yousuf v. Samantar, 552 F.3d 371 (4th Cir. 2009) (No. 07-1893), *aff'd*, 130 S. Ct. 2278 (2010) (explaining that Samantar served "[f]irst [as] Vice President and, in the President's absence, Acting President (January 1976 to December 1986); Minister of Defense (1971 to 1980 and 1982 to 1986); [and] Prime Minster (January 1987 to approximately September 1990)").
[57] *Id.*
[58] Brief of Appellants, *supra* note 8, at *5.
[59] *Id.* at *5–6.
[60] *Id.* at *17.
[61] Yousuf v. Samantar, No. 1:04cv1360, 2007 WL 2220579, at *15 (E.D. Va. Aug. 1, 2007), *rev'd*, 552 F.3d 371 (4th Cir. 2009), *aff'd*, 130 S. Ct. 2278 (2010).

statute.[62] However, relying on the decision in *Velasco v. Government of Indonesia*,[63] the court ruled that individuals acting in their official capacity are due immunity under the FSIA.[64] In its application of the *Velasco* rule, the court analyzed the decisions in *Belhas v. Ya'Alon*[65] and *Matar v. Dichter*[66] to hold that defendant Samantar was acting in his official capacity, and therefore, due immunity under the statute. Furthermore, the court's decision was influenced by Senate Report Number 102-249, which is the legislative history accompanying the TVPA.[67] Lastly, the court held that alleged violations of *jus cogens*[68] norms do not constitute an implied waiver of the protection afforded by the FSIA.[69]

1. District Court's Reliance Upon *Velasco v. Government of Indonesia*

In *Velasco*, the plaintiff brought suit against the government of Indonesia to enforce payment on a fraudulent promissory note that he purchased from two deputies who worked for the National Defense Security Council of the Republic of Indonesia ("NDSC").[70] Both Indonesia and the NDSC claimed sovereign immunity under the FSIA statue.[71] The plaintiff argued that the FSIA's "commercial activity exception" applied.[72] Under this exception, a foreign state is not entitled to immunity if a legal claim is "'based upon a commercial activity carried on in the United States by the foreign state.'"[73] The court framed the issue in these terms: "[w]e must determine, therefore, whether the unauthorized acts of Hartomo and Mawardi [(two deputies in the NDSC)] in issuing

[62] *Id.* at *8.
[63] 370 F.3d 392 (4th Cir. 2004).
[64] *Yousuf*, 2007 WL 2220579, at *15.
[65] 466 F. Supp. 2d 127 (D.D.C. 2006), *aff'd*, 515 F.3d 1279 (D.C. Cir. 2008).
[66] 500 F. Supp. 2d 284 (S.D.N.Y. 2007), *aff'd*, 563 F.3d 9 (2d Cir. 2009).
[67] *Yousuf*, 2007 WL 2220579, at *12.
[68] *Id.* at *13 n.16 ("The Vienna Convention on the Law of Treaties defines a *jus cogens* norm . . . as a 'a norm 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.'").
[69] *Id.* at *14.
[70] Velasco v. Gov't of Indon., 370 F.3d 392, 395 (4th Cir. 2004).
[71] Yousuf v. Samantar, 552 F.3d 371, 379 (4th Cir. 2009), *aff'd*, 130 S. Ct. 2278 (2010).
[72] *Id.*
[73] *Id.*

the notes under color of authority from the NDSC are sufficient to deprive the Government of Indonesia or the NDSC of their sovereign immunity."[74] Both Indonesia and the NDSC argued that that the deputies' actions (issuing fraudulent promissory notes) could not be considered a "commercial activity of a foreign state" because the deputies were acting *ultra vires*.[75] The court agreed with this argument and held that "the commercial activity exception may be invoked against a foreign state only when its officials have actual authority," and here the defendants acted outside the scope of their authority.[76]

In issuing its opinion, the *Velasco* court did not directly address the question of whether an individual government official can claim immunity under the FSIA. In fact, this question was not an issue in the case.[77] However, in passing, the *Velasco* court cited the decision of the Ninth Circuit in *Chuidian v. Philippine National Bank*[78] and stated that "[a]lthough the statute is silent on the subject, courts have construed foreign sovereign immunity to extend to an individual acting in his official capacity on behalf of a foreign state."[79] The district court in *Yousuf* relied upon this language to determine that the Fourth Circuit had accepted the rationale of the Ninth Circuit when analyzing claims against individuals under the FSIA.[80]

2. Evaluation of *Belhas v. Ya'Alon* and *Matar v. Dichter*

The district court applied the rule from *Velasco* by evaluating the decisions in *Belhas* and *Matar*. In *Belhas*, a former Israeli general faced a lawsuit from citizens of Lebanon.[81] The plaintiffs brought suit under the TVPA and the Alien Tort Claims Act ("ATCA") alleging "that the bombing of Qana, within southern Lebanon, by the Israeli military . . . constituted war crimes [and] extrajudicial killing."[82] In that case, the court relied upon a letter sent from the State of Israel which approved the activities taken

[74] *Velasco*, 370 F.3d at 398.
[75] *Id.* at 402.
[76] *Id.* at 400.
[77] *Yousuf*, 552 F.3d at 379.
[78] 912 F.2d 1095 (9th Cir. 1990).
[79] *Velasco*, 370 F.3d at 398.
[80] *See* Yousuf v. Samantar, No. 1:04cv1360, 2007 WL 2220579, at *8 (E.D. Va. Aug. 1, 2007), *rev'd*, 552 F.3d 371 (4th Cir. 2009), *aff'd*, 130 S. Ct. 2278 (2010).
[81] *Id.*
[82] *Id.*

by the defendant as "sovereign actions of the State of Israel."[83] Therefore, in reliance upon this letter, the *Belhas* court held that the defendant was "acting in his official capacity" on behalf of Israel and was shielded from suit by the FSIA.[84]

In *Matar*, the plaintiffs brought suit under the TVPA and ATCA against another former Israeli general. The plaintiffs alleged that the former general was "responsible for war crimes; [and] crimes against humanity."[85] In response to this lawsuit, the Israeli ambassador wrote a letter to the State Department stating "'[a]nything Mr. Dichter . . . did in connection with the events at issue in the suit [ ] was in the course of [his] official duties, and in furtherance of official policies of the State of Israel.'"[86] Placing "'great weight'" upon this letter, the court held that the Israeli general was "acting in his official capacity," and therefore, he was entitled to immunity under the FSIA.[87]

The district court in the *Yousuf* case received two letters from the Somali Transitional Federal Government ("STFG").[88] In the first letter, the STFG stated:

> We wish to indicate that the actions attributed to Mr. Samantar in the lawsuit in connection with the quelling of the insurgencies from 1981 to 1989 would have been taken by Mr. Samantar in his official capacities and to reaffirm Mr. Samantar's entitlement to sovereign immunity from prosecution for those actions.[89]

The second letter simply attempted to bolster the argument set forth in the first letter.[90] In line with the decisions in *Belhas* and *Matar*, the district court afforded the letters "great weight." The court stated that these letters "persuade the Court that dismissal [based on the FSIA] is appropriate."[91]

3. The District Court Relies Upon the Legislative History of the TVPA to Hold that Samantar is Entitled to Sovereign Immunity

The district court also cited the legislative history of the TVPA,

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[83] *Id.*

[84] *Id.* (quoting Belhas v. Ya'Alon, 466 F. Supp. 2d 127, 131 (D.D.C. 2006), *aff'd*, 515 F.3d 1279 (D.C. Cir. 2008)).

[85] *Id.* at *9.

[86] *Id.*; *see* Matar v. Dichter, 500 F. Supp. 2d 284, 287 (S.D.N.Y. 2007), *aff'd*, 563 F.3d 9 (2d Cir. 2009).

[87] *Yousuf*, 2007 WL 2220579, at *10.

[88] *Id.* at *11.

[89] *Id.*

[90] *See id.*

[91] *Id.*

found in Senate Report Number 102-249, to support its ruling that Samantar was entitled to immunity under the FSIA.[92] The court specifically focused on the section of the Senate Report which stated "[t]o avoid liability by invoking the FSIA, a former official would have to prove an agency relationship to a state, which would require that the state 'admit some knowledge or authorization of relevant acts.'"[93]

The district court found that this language provides former government officials with immunity from suit under the TVPA if their home state authorizes their actions.[94] Additionally, the court construed the legislative history to limit the application of the TVPA to prevent "potential abuse of this statute" which could lead to "ill-founded" lawsuits that could "give rise to serious frictions in international relations and would also be a waste of . . . limited and already overburdened judicial resources."[95] Applying this interpretation of the intent of the TVPA statute, the district court held that the two letters from the STFG were sufficient to create an agency relationship between Samantar and Somali.[96] Therefore, the court held that Samantar could claim immunity under the FSIA and avoid liability under the TVPA.[97]

4. District Court Holds that Violations of jus cogen norms do not Constitute a Waiver of the FSIA's Protections

Under the FSIA, specifically 28 U.S.C. § 1605(a)(1), "[a] foreign state shall not be immune from the jurisdiction of the courts . . . in any case . . . in which the foreign state has waived its immunity either explicitly or *by implication*."[98] The district court cited this provision of the FSIA in holding that violations of a *jus cogen* norm cannot constitute an implied waiver of the FSIA.[99] The case *Siderman de Blake v. Republic of Argentina*[100] (quoting the Vienna Convention on the Law of Treaties) defined a *jus cogen* norm as "a norm accepted and recognized by the international community of states as a whole as a norm from

[92] *Id.* at *12.
[93] *Id.*
[94] *Id.*
[95] *Id.* at *13.
[96] *See id.* at *12.
[97] *Id.*
[98] 28 U.S.C. § 1605(a)(1) (2006) (emphasis added).
[99] *Yousuf*, 2007 WL 2220579, at *14.
[100] 965 F.2d 699, 714 (9th Cir. 1992).

which no derogation is permitted."[101] While the district court acknowledged that the allegations against defendant Samantar would constitute brash violations of *jus cogen* norms, the Ninth, Seventh, and Second Circuits all held that "Congress did not create an implied waiver exception to foreign sovereign immunity under the FSIA for *jus cogen* violations."[102] The district court was persuaded by the rationale of these jurisdictions, and held that defendant Samantar's actions did not implicitly waive his right to FSIA immunity—even though his alleged actions would be in violation of *jus cogen* norms.[103]

II. HISTORICAL AND LEGAL CONTEXT FOR THE DOCTRINE OF FOREIGN SOVEREIGN IMMUNITY

After analyzing the district court's decision in *Yousuf*, it is essential to evaluate the history of the doctrine of foreign sovereign immunity. Understanding the development of this doctrine will provide the proper perspective for critiquing the opinion of the Fourth Circuit Court of Appeals. Evaluating the historical development of foreign sovereign immunity is best accomplished by looking at how the doctrine evolved over three different periods of time: (1) period of absolute immunity (1812–1952), (2) introduction of the Tate Letter and the doctrine of restricted immunity (1952–1976), and (3) the enactment of the FSIA (1976–present).

A. Schooner Exchange v. McFaddon*: The Doctrine of Absolute Immunity (1812–1952)*

In 1812, the U.S. Supreme Court ruled on a case involving a lawsuit filed against Napoleon and the French Empire.[104] The plaintiff (McFaddon) alleged that he was the sole owner of the maritime vessel named the *Schooner Exchange* ("*Exchange*").[105] In 1809, the plaintiff allegedly sailed the *Exchange* out of Baltimore harbor bound for Spain.[106] However, he alleged that while on this trip his ship was forcibly taken from him by the

[101] *Id.*; *Yousuf*, 2007 WL 2220579, at *13 n.16.
[102] *Yousuf*, 2007 WL 2220579, at *14.
[103] *Id.*
[104] Schooner Exch. v. McFaddon, 11 U.S. 116 (1812).
[105] *Id.* at 117.
[106] *Id.*

French military under "decrees and orders of NAPOLEON, *Emperor of the French*."[107] The plaintiff filed a lawsuit against the French government after an armed vessel (called the *Balaou*) commissioned by the French navy docked in the port of Philadelphia due to the "great stress of weather upon the high seas."[108] The plaintiff alleged that the *Balaou* was actually his ship, the *Exchange*, which had been stolen from him and renamed by France.[109]

In writing the opinion for the Court, Chief Justice Marshall dismissed the lawsuit by holding that France was entitled to sovereign immunity.[110] Chief Justice Marshall's opinion set forth the doctrine of absolute immunity for foreign nations by stating:

> One sovereign . . . being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only . . . [with] the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.[111]

This rationale led Chief Justice Marshall to conclude that France, or any other foreign nation that entered American territory, did so under the implied promise that the foreign nation would be "exempt from the jurisdiction of the [United States]."[112] When writing his decision, Chief Justice Marshall also followed the advice of the executive branch, which encouraged him to rule in favor of the defendant.[113] By following the advice of the executive branch, this opinion began a trend of judicial deference to executive policy when faced with sovereign immunity questions.[114]

In 1897, the U.S. Supreme Court once again heard a case that required the application of the doctrine of foreign sovereign immunity. In *Underhill v. Hernandez*,[115] the plaintiff (an

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[107] *Id.*
[108] *Id.* at 118.
[109] *Id.* at 117–18.
[110] *Id.* at 147.
[111] *Id.* at 137.
[112] *Id.* at 147.
[113] H.R. REP. NO. 94-1487, at *3 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6606.
[114] Enahoro v. Abubakar, 408 F.3d 877, 880 (7th Cir. 2005), *cert. denied*, 546 U.S. 1175 (2006); Erin Nelson, Comment, *Does an Individual Foreign Official Qualify as a Foreign State for Purposes of the Foreign Sovereign Immunities Act?*, 57 CATH. U. L. REV. 853, 860–62 (2008).
[115] 168 U.S. 250 (1897).

American citizen) was allegedly falsely imprisoned in the city of Bolivar, Venezuela by General Hernandez (a General in the Venezuelan armed forces).[116] The issue the Court addressed in that case "was whether a country's military general should be immune from suit in American courts."[117] Stated alternatively, the Court had to decide whether foreign sovereign immunity could apply to an individual government official.[118] In reaching its conclusion, the Court granted the defendant immunity based on the common law "act of state doctrine."[119] The Court recognized this doctrine by affirming the rationale of the Second Circuit Court of Appeals. The Second Circuit clearly described the "act of state doctrine" which provides immunity for "individuals [engaging in] . . . acts done in their own country, in behalf of their government, by virtue of their official authority."[120] Therefore, under the "act of state doctrine," General Hernandez was immune from suit for acts done in Venezuela, on behalf the Venezuelan government, and under his official authority as a General in the armed forces. Since General Hernandez satisfied all elements of this doctrine, he was due immunity.

In 1938 and 1945, the U.S. Supreme Court once again applied the doctrine of foreign sovereign immunity in two cases with similar issues. In *Compania Espanola de Navegacion, SA v. The Navemar*,[121] the Court addressed the issue of whether Spain could claim sovereign immunity from suit where the plaintiff was seeking to recover possession of a merchant vessel that the Spanish government allegedly wrongfully seized from the plaintiff.[122] In *Republic of Mexico v. Hoffman*,[123] the Court had to decide whether a merchant vessel owned by the Mexican government was immune from suit after it allegedly collided with plaintiff's fishing vessel causing damage to plaintiff's vessel's "engines, machinery, tackle and furniture."[124] In both cases, the Court embraced the rationale that a friendly foreign government will be afforded sovereign immunity from suit upon

[116] *Id.* at 250–51.
[117] Nelson, *supra* note 114, at 859–60.
[118] *Id.* at 860.
[119] Donald T. Kramer, Annotation, *Modern Status of the Act of State Doctrine*, 12 A.L.R. FED. 707, 715–16 (1972).
[120] Underhill v. Hernandez, 65 F. 577, 580 (2d Cir. 1895).
[121] 303 U.S. 68 (1938).
[122] *Id.* at 70.
[123] 324 U.S. 30 (1945).
[124] *Id.* at 31.

recommendation by the U.S. Department of State.[125] The policy underlying this rationale was revealed in *Hoffman* where the Court stated:

> This practice is founded upon the policy recognized both by the Department of State and the courts that the national interests will be best served when controversies growing out of the judicial seizure of vessels of friendly foreign governments are adjusted through diplomatic channels rather than by the compulsion of judicial proceedings.[126]

This underlying rationale also preserved the separation of powers between the judiciary and the executive by enabling the executive to maintain its authority over foreign affairs as expressly declared in Article II, section two of the U.S. Constitution.[127]

In the 130 years following Chief Justice Marshall's decision in the *Schooner Exchange*, the world underwent tremendous technological advancements in communications and transportation. This innovation brought forth a greater volume of international interactions, including commerce between sovereign nations and private parties.[128] After the Court's decision in *Hoffman*, and the end of World War II in 1945, the United States became involved in more foreign litigation than ever before.[129] Soon the executive branch became privy to the fact that "almost every country in Western Europe followed the restrictive principle of sovereign immunity."[130] Under this restrictive theory, foreign governments were only immune from suit if their public acts were the target of the lawsuit, leaving their private commercial activities exposed to the risk of litigation. For the U.S., continuing to adhere to the doctrine of absolute immunity "seemed inappropriate [because it] relieve[d] those governmental entities of the obligations and responsibilities that accompanied private parties engaged in [commercial] transactions."[131] To provide protection to businessmen engaging in commerce with foreign states, and to conform to the international trend away from absolute immunity, the U.S.

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[125] *Id.* at 34; *Navemar*, 303 U.S. at 74.

[126] *Hoffman*, 324 U.S. at 34.

[127] U.S. CONST. art. II, § 2; *see* Nelson, *supra* note 114, at 861–62.

[128] *See* Joseph F. Morrissey, *Simplifying the Foreign Sovereign Immunities Act: If a Sovereign Acts like a Private Party, Treat it like One*, 5 CHI. J. INT'L L. 675, 681–82 (2005).

[129] H.R. REP. NO. 94-1487, at *3–4 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6607.

[130] *Id.*

[131] Morrissey, *supra* note 128, at 680.

Department of State repudiated the rationale of absolute immunity in 1952.[132]

B. The Tate Letter and Restricted Immunity (1952–1976)

In 1952, in response to concerns about the State Department's position on foreign sovereign immunity, Jack B. Tate, the Acting Legal Adviser for the U.S. Department of State, wrote a letter to Acting U.S. Attorney General Philip B. Perlman which stated in part:

> A study of the law of sovereign immunity reveals the existence of two conflicting concepts of sovereign immunity, each widely held and firmly established. According to the classical or absolute theory of sovereign immunity, a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign. According to the newer or restrictive theory of sovereign immunity, the 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*). . . . [I]t will hereafter be the Department's policy to follow the restrictive theory . . . in the consideration of requests of foreign governments for a grant of sovereign immunity.[133]

The U.S. Department of State adopted the theory of restrictive immunity advocated by Mr. Tate in his letter written in 1952.[134] Under this new "restrictive theory," foreign sovereign immunity was "confined to suits involving the foreign sovereign's public acts, and [did] not extend to cases arising out of a foreign state's strictly commercial acts."[135] However, this policy change did not alter the process by which federal courts analyzed foreign sovereign immunity issues.[136] The U.S. Supreme Court in *Republic of Austria v. Altmann* explained: "'[a]s in the past, initial responsibility for deciding questions of sovereign immunity fell primarily upon the Executive acting through the State Department,' and courts continued to 'abid[e] by' that Department's 'suggestions of immunity.'"[137] Since the

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[132] *Id.* at 681.

[133] Republic of Austria v. Altmann, 541 U.S. 677, 689–90 (2004); Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep't of State, to Philip B. Perlman, Acting Attorney Gen., U.S. Dep't of Justice (May 19, 1952), *in* 26 DEP'T ST. BULL. 984, 984 (1952).

[134] Verlinden B.V. v. Cent. Bank of Nig., 461 U.S. 480, 486–87 (1983).

[135] *Id.* at 487.

[136] *Altmann*, 541 U.S. at 690.

[137] *Id.* (quoting *Verlinden*, 461 U.S. at 487).

responsibility for deciding questions of immunity still resided with the executive branch, determining which country was or was not due immunity became a highly politicized process.[138] In *Verlinden B.V. v. the Central Bank of Nigeria*, the Court stated that "[o]n occasion, political considerations led to suggestions of immunity in cases where immunity would not have been available under the restrictive theory."[139]

Rich v. Naviera Vacuba S.A.[140] is one example of a case where political implications overrode the philosophy of restrictive immunity set forth in the Tate Letter. In *Rich*, a vessel owned by Cuba sailed from a Cuban port with 5,000 bags of sugar destined for Russia.[141] Nine days after the ship began its voyage, the master and ten crewmen steered the ship off course heading to Virginia seeking asylum in the United States.[142] When the ship came into American territory, two plaintiffs filed a lawsuit against the vessel. The plaintiffs alleged that they owned the vessel, and that it had been unlawfully seized by the revolutionary government in Cuba.[143] A third plaintiff, the United Sugar and Fruit Company, filed suit against the cargo of the vessel. United Sugar alleged that the sugar belonged to the company, and it was unlawfully stolen from them by the Cuban revolutionary government.[144] Despite the fact that the vessel was engaged in a commercial activity (shipping sugar to Russia), the executive branch recommended that the district court dismiss the lawsuit based on the doctrine of foreign sovereign immunity. The district court did dismiss the case, and the court of appeals affirmed this decision by stating that:

> the certificate and grant of immunity issued by the Department of State should be accepted by the court without further inquiry. . . . We think that the doctrine of the separation of powers under our Constitution requires us to assume that all pertinent considerations have been taken into account by the Secretary of State in reaching his conclusion.[145]

By recommending dismissal of this lawsuit even though it concerned a foreign nation engaged in commercial activity, the

[138] *See Verlinden*, 461 U.S. at 487.
[139] *Id.*
[140] 295 F.2d 24 (4th Cir. 1961).
[141] *Id.* at 25.
[142] *Id.*
[143] *Id.*
[144] *Id.*
[145] *Id.* at 26.

executive branch failed to follow the philosophy of restrictive immunity. Monroe Leigh, a legal advisor working for the State Department,[146] wrote that the *Rich* case "represented a retreat by the Kennedy Administration from Tate letter principles."[147] Mr. Leigh indicated that prior to the *Rich* case the United States and Cuba had entered an agreement "for the mutual return of hijacked ships and planes."[148] Mr. Leigh argued that the Kennedy Administration made its recommendation for immunity based on the political calculation that the lawsuit against Cuba could jeopardize its agreement to exchange the hijacked ships and planes.[149]

The *Rich* case demonstrates that the executive branch did not strictly adhere to the principles of restrictive immunity. This idea was further emphasized by the *Verlinden* Court, which stated that "sovereign immunity determinations were . . . subject to a variety of factors, sometimes including diplomatic considerations. Not surprisingly, the governing standards were neither clear nor uniformly applied."[150] In order to relieve the political pressure exerted on the executive branch, and to clarify the doctrine of sovereign immunity, the legislature set out to codify the restrictive doctrine of sovereign immunity.[151]

C. The Enactment of the FSIA (1976–present)

In 1976, the U.S. Congress passed the FSIA. The legislative history indicates that the purpose of this law was to "set[] forth the sole and exclusive standards to be used in resolving questions of sovereign immunity raised by foreign states before Federal and State courts in the United States."[152] In the text of the statute, the FSIA provides that a "*foreign state* shall be immune from the jurisdiction of the courts of the United States."[153] The issue before the court in the *Yousuf* case is whether an individual foreign official fits the definition of a "foreign state." Section 1603(a) of

[146] Verlinden B.V. v. Cent. Bank of Nig., 461 U.S. 480, 487 n.10 (1983).

[147] Monroe Leigh, *Sovereign Immunity—The Case of the "Imias"*, 68 AM. J. INT'L L. 280, 289 (1974).

[148] *Id.*

[149] *Id.*

[150] *Verlinden*, 461 U.S. at 488.

[151] *Id.*

[152] H.R. REP. NO. 94-1487, at *6 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6610.

[153] 28 U.S.C. § 1604 (2006) (emphasis added).

the statute defines a "foreign state" as a "political subdivision of a foreign state or an agency or instrumentality of a foreign state."[154] Section 1603(b) states that an agency or instrumentality of a foreign state means anything:

> (1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and (3) which is neither a citizen of a State of the United States as defined in section 1332 (c) and (e) of this title, nor created under the laws of any third country.[155]

Before analyzing the court of appeals' decision in *Yousuf*, it is important to evaluate the Seventh Circuit's decision in *Enahoro* and the Second Circuit's decision in *In re Terrorist Attacks on September 11, 2001*.[156] These cases demonstrate the judicial divide over the question of whether an individual qualifies as an "agency or instrumentality" of a foreign state under the statute.

1. *Enahoro v. Abubakar*

In *Enahoro*, the plaintiffs alleged that the military junta in Nigeria perpetrated torture against them.[157] The defendant in that case was General Abubakar who served as a "member of the junta and was Nigeria's head of state for the last year of the junta's reign."[158] The plaintiffs brought their lawsuit against General Abubakar under the ATS and the TVPA. Conversely, General Abubakar argued that the court lacked subject matter jurisdiction to hear the plaintiffs' claims because he was due sovereign immunity under the FSIA. General Abubakar argued that the FSIA protected him from suit because any actions alleged by the plaintiffs were undertaken in his "official capacity," and therefore, he qualified as an "agency or instrumentality" of a foreign state under 1603(a)–(b) of the statute.[159] The court framed the issue is that case by stating:

> No one contends that an exception to immunity applies. If Abubakar is covered by the FSIA, he is immune; no exception is

[154] *Id.* § 1603(a).
[155] *Id.* § 1603(b).
[156] 538 F.3d 71 (2d Cir. 2008).
[157] Enahoro v. Abubakar, 408 F.3d 877, 879 (7th Cir. 2005), *cert. denied*, 546 U.S. 1175 (2006).
[158] *Id.*
[159] *Id.* at 892–93 (Cudahy, J., dissenting).

> relevant; and the suit would have to be dismissed. Therefore, the only issue is whether the statute applies to individuals, who are connected with the government, as opposed to the state itself and its agencies.[160]

In answering this question, the court highlighted the fact that section 1603(b) of the statute stated that a "separate legal person" shall be considered a foreign state.[161] The court reasoned that if the legislature meant for the FSIA to apply to an individual, they would have listed a "natural person" as well.[162] Instead, Congress used the term "separate legal person," denoting a government corporation or a government agency, and not an individual government official.[163] Therefore, the *Enahoro* court argued that the text of Section 1603(a)–(b) implicitly disqualified an individual from being afforded the opportunity to receive immunity under the FSIA.

2. *In re Terrorist Attacks on September 11, 2001*

The case, *In re Terrorist Attacks on September 11, 2001*, involved a claim against members of the Saudi royal family. This claim was filed as a result of the horrific attacks against the U.S. with passenger airplanes on 9/11.[164] Fifteen of the nineteen hijackers who carried out the attacks on 9/11, and Osama Bin Laden the supreme leader of Al-Qaeda, were all of Saudi Arabian descent.[165] "Thousands of people on the planes, in the buildings, and on the ground were killed in those attacks, countless others were injured, and billions of dollars of property was destroyed."[166] As a result of this attack, "three thousand survivors, family members, and representatives of victims, and insurance carriers [sought] to hold responsible for the attacks the persons and

[160] *Id.* at 881 (majority opinion).
[161] *Id.* at 881–82.
[162] *Id.* at 881.
[163] *Id.* at 881–82 ("Given that the phrase 'corporate or otherwise' follows on the heels of 'separate legal person,' we are convinced that the latter phrase refers to a legal fiction—a business entity which is a legal person. If Congress meant to include individuals acting in the official capacity in the scope of the FSIA, it would have done so in clear and unmistakable terms.").
[164] *In re* Terrorist Attacks on Sept. 11, 2001, 349 F. Supp. 2d 765, 779 (S.D.N.Y. 2005), *aff'd*, 538 F.3d 71 (2d Cir. 2008).
[165] Rachel Bronson, *Rethinking Religion: The Legacy of the U.S.-Saudi Relationship*, 28:4 WASH. Q. 121, 121 (2005).
[166] *Terrorist Attacks*, 349 F. Supp. 2d at 779.

entities that supported and funded al Qaeda."[167] The plaintiffs brought tort claims against four Saudi Princes (in their individual capacities). The plaintiffs alleged that the Princes "provided financial and logistical support to al Qaeda in the runup to the attacks."[168] This alleged funding occurred as a result of the Princes' association with charities such as the Saudi High Commission ("SHC") (connected to the Bosnian Islamic Movement) and the Saudi Joint Relief Committee of Kosovar Refugees ("SJRC"), which is a recognized financial tool of Al Qaeda.[169] In their defense, the Saudi Princes claimed that the court lacked subject matter jurisdiction to hear the case because they were due immunity under the FSIA. The court agreed with the Saudi Princes, and held that the FSIA applied to individual government officials acting in their official capacity. The court relied upon the Fourth Circuit's decision in *Velasco* and the Ninth Circuit's decision in *Chuidian* to reach this conclusion.[170] Both of these cases asserted that the purpose of the FSIA is to set forth the "exclusive standards to be used in resolving questions of sovereign immunity," and that this purpose would be frustrated if the statute did not apply to individuals acting in their official capacity. The court also relied upon the legislative history to the FSIA to advocate this position:

> Moreover, the FSIA's "legislative history does not even hint of an intent to exclude individual officials," but does contain "numerous statements [suggesting] that Congress intended the Act to codify the existing common law principles of sovereign immunity." Prior to the FSIA's passage, those principles "expressly extended immunity to individual officials acting in their official capacity."[171]

Therefore, because the Saudi Princes were allegedly participating in these charities in their official capacities as members of the Saudi government, the Second Circuit held that they were entitled to FSIA immunity.

III. *YOUSUF V. SAMANTAR*: DECISION OF THE FOURTH CIRCUIT COURT OF APPEALS

When the court of appeals heard *Yousuf*, the judges were well aware of the split in the federal circuits. In issuing its ruling, the

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[167] *Id.*
[168] *In re* Terrorist Attacks on Sept. 11, 2001, 538 F.3d 71, 75 (2d Cir. 2008).
[169] *Id.* at 77–78.
[170] *Id.* at 81–82.
[171] *Id.* at 83.

court of appeals accepted the minority rationale advocated by the *Enahoro* court and held that the FSIA does not apply to individuals (overruling the decision of the district court). In reaching this conclusion, the court of appeals relied upon the purpose, text, and legislative history of the statute. The court also addressed the question of whether a former foreign official is due immunity under the FSIA. In reliance upon *Dole Food Co. v. Patrickson*[172] and the text of the statute, the court held that former officials should not be granted immunity.

A. The FSIA was Passed for the Purpose of Codifying Restrictive Immunity and the Statute does not Encompass the Common law Doctrines of Head of State or Act of State Immunity

The court of appeals began its analysis by addressing the purpose of the FSIA. The court stated that the enactment of the FSIA "shift[ed] responsibility for deciding questions of foreign sovereign immunity from the Executive Branch to the Judicial Branch."[173] The court further elaborated on this point by stating "[t]he FISA essentially codifies the *restrictive theory* of foreign sovereign immunity under which a 'foreign state' is 'immune from the jurisdiction of the courts of the United States."[174] Prior to the codification of the FSIA, there were three common law doctrines that governed sovereign immunity litigation: (1) head of state doctrine, (2) act of state doctrine, and (3) restrictive immunity. The head of state doctrine and act of state doctrine applied specifically to individual government officials, while the theory of restrictive immunity applied to foreign states. Therefore, by holding that the FSIA only encompassed the doctrine of restrictive immunity, the court explicitly excluded the head of state and act of state doctrines from coverage under FSIA. This rationale supports the court of appeals' argument that the FSIA only provides immunity to foreign states and not individuals.

B. The Text of the FSIA Precludes its Application to Individual Foreign Officials

The court of appeals continued its analysis of the FSIA by

[172] 538 U.S. 468 (2003).

[173] Yousuf v. Samantar, 552 F.3d 371, 377 (4th Cir. 2009), *aff'd*, 130 S. Ct. 2278 (2010).

[174] *Id.* (emphasis added).

evaluating the text of the statute. In determining whether an individual could qualify as a "agency or instrumentality" of a foreign state, the court focused on section 1603(b)(1) of the statute. This section states that an "agency or instrumentality" is a "separate legal person."[175] Like the majority opinion in *Enahoro*, the court of appeals reasoned that use of the term "separate legal person" implies that "corporations or other business entities [are due immunity], but not natural persons."[176] The court stated that "[i]f it was a natural person Congress intended to refer to, it is hard to see why the phrase 'separate legal person' would be used."[177] Additionally, the court also focused on the text of 1603(b)(3). This section of the statue attempts to "ensure that an 'agency or instrumentality' seeking the benefits of sovereign immunity is actually connected to a 'foreign state' [and] the FSIA requires that the 'entity' be 'neither a citizen of a State of the United States . . . nor *created* under the laws of any third country.'"[178] The court asserted that this specific language expressly disqualifies an individual from being covered under the FSIA because "it is nonsensical to speak of an individual . . . [as] being 'created' under the laws of a country."[179]

C. Legislative History Makes Clear that an Individual was not Intended to Qualify as an Agency or Instrumentality of a Foreign State

In addition to its textual arguments, the court specifically relied upon the statute's legislative history to hold that the FSIA does not apply to individual officials. The court focused on the different examples set forth by Congress in House Report No. 94-1487 that qualify as an "agency or instrumentality." These examples include: "a state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel company . . . a governmental procurement agency or a department or ministry."[180] The court noted that Congress did not list an individual official as an entity that would qualify as an "agency or instrumentality." The court held that the House

[175] *Id.* at 380.
[176] *Id.*
[177] *Id.*
[178] *Id.*
[179] *Id.*
[180] *Id.* at 381 (quoting H.R. REP. NO. 94-1487, at *16 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6614).

Report clearly demonstrates that Congress did not intend for an individual government agent to be covered by the FISA. Instead, an "agency or instrumentality" would be a larger entity, such as a state trading corporation or a state agency.[181]

D. The FSIA does not Apply to Former Government Officials

After concluding that the FSIA did not apply/cover individuals, the court of appeals engaged in a hypothetical exercise. Assuming *arguendo* that the FSIA applies to individuals, the court analyzed the question of whether the FSIA could provide immunity for former government officials.[182] In evaluating this question, the court relied upon the *Dole Food* opinion. In *Dole Food*, the "Dead Sea Companies corporation claimed immunity under the FSIA as an instrumentality of the State of Israel" because Israel owned a majority share in this company "at the time of the events being litigated."[183] However, at the time the lawsuit was filed against the Dead Sea Companies, Israel no longer owned a majority share in the company.[184] The *Dole Food* court held that the text of the FSIA is written in the present tense, requiring "that instrumentality status be determined at the time suit is filed.'"[185] Therefore, the Dead Sea Companies could not claim immunity because at the time of the lawsuit Israel no longer owned a majority of shares in their company. The court of appeals adopted the rationale of *Dole Food* and additionally noted that:

> The FSIA preserves [the] basic purpose of sovereign immunity, which "has never been to permit foreign states and their instrumentalities to shape their conduct in reliance on the promise of future immunity from suit," but instead "aims to give foreign states . . . some *present* protection from the inconvenience of suit as a gesture of comity."[186]

This statement, as well as the court's reliance on the *Dole Food* case, demonstrates that the text and policy underlying the FSIA do not allow for protection of former government officials.

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[181] *Id.*
[182] *Id.*
[183] *Id.*
[184] *Id.*
[185] *Id.*
[186] *Id.* at 383.

IV. CRITICAL ANALYSIS OF THE FOURTH CIRCUIT COURT OF APPEALS' DECISION IN *YOUSUF*

A. The Fourth Circuit Court of Appeals Erred in Holding that the FSIA does not Apply to Individual Government Officials

The decision of the Fourth Circuit Court of Appeals is flawed for several reasons. First, the court incorrectly assumed that the FSIA only codified the restrictive doctrine of sovereign immunity. Prior to 1976, the executive branch was criticized for injecting politics into its determinations of whether a foreign state or foreign official should be due immunity. The Kennedy government's departure from Tate Letter principles in the *Rich* case provides one example of how politics were polluting the judicial process. Congress explicitly stated in the legislative history to the FSIA (House Report No. 94-1487) that this statute would "transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations."[187] If the FSIA does not encompass the head of state or act of state doctrines, like the court of appeals assumes, then the executive branch (State Department) would still be responsible for making immunity determinations whenever a foreign official is sued. This rationale would contravene the express statement made by the legislature in House Report No. 94-1487. Several scholars have also disagreed with the court of appeals' interpretation of the FSIA. One scholar noted that "[t]he court in *Yousuf* incorrectly interpreted the FSIA because it disregarded legislative intent by . . . transferring the job of determining immunity back to the Executive Branch."[188] The court of appeals' interpretation of the statute would also fail to remove politics from immunity determinations. For example:

> Litigants who doubted the influence and diplomatic ability of their sovereign adversary would choose to proceed against the official, hoping to secure State Department support, while litigants less

[187] H.R. REP. NO. 94-1487, at *2 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6606.

[188] Elizabeth Mills Viney, *Foreign Sovereign Immunity—Fourth Circuit Disregards Congressional Intent by Holding that the Foreign Sovereign Immunities Act Does Not Apply to Individuals Acting Within the Scope of Their Official Duties*, 63 SMU L. REV. 265, 269 (2010).

> favorably positioned would be inclined to proceed against the foreign state directly, confronting the Act as interpreted by the courts without the influence of the State Department.[189]

The historical context in which the statute was passed (*Rich* decision) and the legislative history of the statute, prove that the court of appeals erred when it concluded that the FSIA only codified the restrictive theory of immunity. Rather, the FSIA codified (1) head of state immunity, (2) act of state immunity, and (3) the restrictive theory of immunity. By codifying all three common law doctrines, the judiciary, and not the executive, has the sole power for determining questions of foreign immunity.[190] Scholars reinforce this point by referring to the FSIA's legislative history which states that the statute is designed to "discontin[ue] the practice of judicial deference to suggestions of immunity from the executive branch."[191] If the FSIA did not encompass act of state or head of state immunities, then immunity determinations would still require executive branch suggestions, failing to "'depoliticize'" the process.[192]

The second flaw in the court of appeals' holding is that it renders the FSIA meaningless. A plaintiff can now simply circumvent the restrictions of the FSIA by altering their pleadings.[193] Instead of naming a foreign state or agency or instrumentality of that foreign state as a defendant, all the plaintiff needs to do is name an individual government official and the FSIA will not apply. Only a plaintiff with a "bad lawyer" who files improper pleadings would subject their client to the risk of their case being dismissed on FSIA grounds.[194]

The strongest argument advanced by the court of appeals supporting its conclusion that the FSIA does not apply to an individual is based on a list in the FSIA's legislative history. This list defines/characterizes an "agency or instrumentality" as something more than an individual, such as a corporation or organization.[195] However, this list is not exhaustive, and it does not expressly exclude an individual from qualifying as an "agency or instrumentality" of a foreign state. Therefore, since this list

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189 Chuidian v. Phil. Nat'l Bank, 912 F.2d 1095, 1102 (9th Cir. 1990).

190 *See id.*

191 Viney, *supra* note 188, at 270.

192 *Id.*

193 *See Chuidian*, 912 F.2d at 1102.

194 Oral Argument, *supra* note 18, at 31.

195 *See* H.R. REP. NO. 94-1487, at *16 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6614.

within the legislative history is not conclusive, limiting the statute's application to exclude individual officials "would be entirely inconsistent with the purposes of the Act."[196] The proper rule that the court of appeals should have adopted is the majority rationale advocated by several of its sister circuits. Under the majority rationale, a foreign official should generally be afforded sovereign immunity, unless this official acted outside the scope of his official capacity/duties.

B. Reconciling the FSIA and the TVPA

The claims asserted by the plaintiffs in *Yousuf* were filed under the TVPA. The TVPA states: "An individual who, under actual or apparent authority, or color of law, of any foreign nation – (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual."[197] Therefore, this statute allows a plaintiff to file suit against a foreign government official who committed torture. Jurisdictions that accept the majority interpretation of the FSIA (which was advocated by the trial court in the Eastern District of Virginia) argue that the FSIA limits the application of the TVPA. In these jurisdictions, if a plaintiff sues an individual official for torture, his suit will be precluded by the FSIA if it is found that the government agent was acting in his official capacity. The process for deciding whether an agent acted in their "official capacity" was explained by the *Belhas* and *Matar* decisions. In these cases, the state of Israel provided letters to the court stating that their government agents were acting in their official capacities when they engaged in their alleged unlawful acts. The courts gave these letters "great weight," deferred to the wishes of Israel, and granted the officials immunity.[198] Therefore, an individual sued for torture under the TVPA could claim FSIA immunity if their home country "authorized" their alleged torture. Conversely, the Fourth Circuit Court of Appeals removed the TVPA's FSIA limitation, opening up the courts for more human rights litigation. While the Fourth Circuit's decision allows for broader powers under the TVPA, the decision also severely restricts the power of the FSIA.

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[196] *Chuidian*, 912 F.2d at 1101.

[197] Torture Victim Protection Act of 1991, 28 U.S.C. § 1350(2)(a)(1) (2006).

[198] Yousuf v. Samantar, No. 1:04cv1360, 2007 WL 2220579, at *10 (E.D. Va. Aug. 1, 2007), *rev'd*, 552 F.3d 371 (4th Cir. 2009), *aff'd*, 130 S. Ct. 2278 (2010).

The proper way to reconcile these two statutes, which has not been done by a majority of courts or achieved by the Fourth Circuit Court of Appeals, is best demonstrated by looking at *Filartiga v. Pena-Irala*[199] and *Cabiri v. Assasie-Gyimah*.[200]

In *Filartiga*, the plaintiffs (citizens of Paraguay) filed a lawsuit against Americo Norberto Pena-Irala, the commissioner of police in Asuncion, Paraguay.[201] The plaintiffs alleged that Pena-Irala severely tortured and unlawfully killed one of their close relatives while serving as police commissioner in Paraguay. The plaintiffs relied upon the ATS to assert that the court had jurisdiction to hear the case. The ATS provides courts with original jurisdiction to hear a claim if a plaintiff can assert a cause of action that alleged (1) a violation of the law of nations (international law) or (2) a violation of a treaty of the United States.[202] Because Congress had not yet passed the TVPA at the time this lawsuit was filed, the plaintiffs stated their cause of action under the "U.N. Charter; the Universal Declaration on Human Rights; [and] the U.N. Declaration Against Torture."[203] Pena-Irala argued that the court lacked subject matter jurisdiction to hear the case because the term "law of nations" did not encompass the "law which governs a state's treatment of its own citizens."[204] The Second Circuit declined to accept Pena-Irala's narrow definition of "law of nations" and held that:

> In light of the universal condemnation of torture in numerous international agreements, and the renunciation of torture as an instrument of official policy by virtually all of the nations of the world (in principle if not in practice), we find that an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations.[205]

Additionally, the *Filartiga* court further supported its argument by stating that "no government has asserted a right to torture its own nationals. Where reports of torture elicit some credence, a state usually responds . . . asserting that the conduct was unauthorized."[206] Because an act of torture violated the law of

[199] 630 F.2d 876 (2d Cir. 1980).
[200] 921 F. Supp. 1189 (S.D.N.Y. 1996).
[201] *Filartiga*, 630 F.2d at 878.
[202] *Id.* at 880.
[203] *Id.* at 879.
[204] *Id.* at 880.
[205] *Id.*
[206] *Id.* at 884.

nations, the Second Circuit ruled that the court did have subject matter jurisdiction under the ATS, effectively rejecting Pena-Irala's argument.

In *Cabiri*, the plaintiff brought an action under the TVPA against the defendant, a Commander of the Navy in Ghana. The plaintiff alleged that he was imprisoned (under the direction of the defendant) in Ghana for a year where he was subjected to "ongoing physical and mental abuse, in violation of his basic human rights."[207] The defendant argued that he was due immunity under the FSIA and that the case should be dismissed. The court accepted the majority rationale that the FSIA does apply to individual foreign officials acting in their official capacity.[208] However, citing both *In re Estate of Ferdinand Marcos Human Rights Litigation*[209] and *Kadic v. Karadzic*,[210] the court stated that if an individual official is found to be acting "beyond the scope of [their] authority,'" the FSIA will not provide immunity for this official.[211] Relying upon the rationale in *Filartiga*, the court held that the torture allegedly committed by the defendant could not "fall within the scope of his authority" because "no state claims a sovereign right to torture," and no state can lawfully authorize torture by its officials.[212]

The rationale advanced by the *Filartiga* and *Cabiri* courts presents the correct way of reconciling the TVPA and the FSIA. The *Cabiri* court properly held that the FSIA should apply to foreign government agents acting in their official capacity. Additionally, the *Filartiga* court established that torture violates customary international law and is renounced "by virtually all of the nations of the world."[213] Therefore, a foreign official who engages in torture cannot be acting within their official capacity, and cannot claim FSIA immunity. Furthermore, scholars and international courts and tribunals "have increasingly asserted that human rights violations committed by state officials are not

[207] Cabiri v. Assasie-Gyimah, 921 F. Supp. 1189, 1191 (S.D.N.Y. 1996).

[208] *Id.* at 1197.

[209] 978 F.2d 493, 497 (9th Cir. 1992) (holding "that an official is not entitled to immunity for acts which are not committed in an official capacity").

[210] 70 F.3d 232, 239 (2d Cir. 1995) (holding that "certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals").

[211] *Cabiri*, 921 F. Supp. at 1197 (quoting Chuidian v. Phil. Nat'l Bank, 912 F.2d 1095, 1106 (9th Cir. 1990)).

[212] *Id.* at 1198 (quoting Siderman de Blake v. Republic of Arg., 965 F.2d 699, 717 (9th Cir. 1992)).

[213] Filartiga v. Pena-Irala, 630 F.2d 876, 880 (2d Cir. 1980).

legitimate acts of state."[214] In *Prosecutor v. Furundzija*, a case before the International Criminal Tribunal for the former Yugoslavia, the court held that crimes against humanity and torture "can never be part of an individual's official duties as an agent of the state."[215] Moreover, as stated in both *Filartiga* and *Cabiri*, all nations renounce the use of torture, and no nation should be able to authorize (through letter writing or otherwise) acts of torture committed by their government agents. Therefore, under this rationale, the TVPA will not be limited by the FSIA, and the FSIA will remain the sole instrument for determining questions of foreign immunity as intended by Congress.

C. The Fourth Circuit Properly Held that the FSIA does not Provide Immunity for Former Government Officials

The Fourth Circuit Court of Appeals did not need to address this issue. By deciding that the FSIA did not apply to individuals, there was no need to figure out whether it would apply to former government officials. In fact, in a two paragraph concurring opinion written by Judge Duncan, the Judge criticized the majority for engaging in this hypothetical argument.[216] However, because the FSIA should apply to individual officials (as stated above), the rationale set forth by the court of appeals is instructive.

The court of appeals principally relied upon the text of the FSIA and the *Dole Food* case to hold that a former foreign official should not be given immunity under the FSIA. This "sound analysis" which has been described *supra* need not be repeated in this section. In addition to the text of the statute and the *Dole* case, the legislative history of the TVPA (Senate Report 102-249) also confirms that the FSIA does not provide protection to former government officials. This Senate Report states that the "[the Senate] committee does not intend these immunities [(FSIA and diplomatic immunities)] to provide former officials with a defense to a lawsuit brought under this legislation."[217] Additionally, the purpose of sovereign immunity is the "preservation of amicable

[214] Graham Ogilvy, Note, Belhas v. Ya'Alon*: The Case for a Jus Cogens Exception to the Foreign Sovereign Immunities Act*, 8 J. INT'L BUS. & L. 169, 177 (2009).

[215] *Id.*

[216] Yousuf v. Samantar, 552 F.3d 371, 384 (4th Cir. 2009) (Duncan, J., concurring), *aff'd*, 130 S. Ct. 2278 (2010).

[217] S. REP. NO. 102-249, at *8 (1991).

international relations."[218] Once a foreign official has left government service and lives as a private citizen, providing this person with immunity would not have an effect on international relations. Therefore, there is no reason to extend immunity to Samantar (a former official who is now a private citizen). Furthermore, the Siad Barre government (and the Democratic Republic of Somalia) no longer exists. Granting defendant Samantar immunity would do nothing to preserve "amicable international relations," because it is not possible to preserve international relations with a government that has dissolved.

V. NATIONAL SIGNIFICANCE AND CONCLUSION

On March 3, 2010, the U.S. Supreme Court heard oral arguments in *Samantar v. Yousuf*. The Court granted certiorari to the plaintiffs in this case to resolve the split in the federal circuits on two issues: (1) whether the FSIA applies to individual government officials acting in their official capacity, and if it does (2) whether the FSIA applies to former government officials. The decision of the Fourth Circuit Court of Appeals would likely open U.S. courts to an influx of litigation filed against individual government officials. This decision would also make U.S. courts a friendly forum for human rights litigation. With these points in mind, the U.S. Supreme Court should affirm in part and reverse in part the decision of the Fourth Circuit Court of Appeals.

On the first issue, the Supreme Court should reverse the ruling of the court of appeals. The Court should hold that the FSIA applies to individual officials acting in their official capacity. The Court should qualify the term "official capacity" by holding that a foreign nation may not authorize, as an official act, torture perpetrated by its government agents. The Court should support this argument by citing *Filartiga*, which Justice Ginsburg referred to twice during oral arguments at the U.S. Supreme Court.[219]

Regarding the second issue, the Court should affirm the ruling of the court of appeals. There is no reason for defendant Samantar to claim immunity as a former foreign official. The government he previously worked for no longer exists. There can be no preservation of international comity/relations in this case.

[218] *Yousuf*, 552 F.3d at 383.

[219] Oral Argument, *supra* note 18, at 5.

Therefore, defendant Samantar should not be due FSIA immunity because he is a former foreign official.

Finally, it is important to remember that there are five plaintiffs in this case that have allegedly been killed or suffered serious torture. If the Supreme Court accepts the ruling of the Fourth Circuit Court of Appeals, these plaintiffs will find justice, but at the expense of causing the FSIA to be meaningless. If the Supreme Court accepts the majority rationale, then defendant Samantar will likely be able to achieve immunity under the statute, denying the plaintiffs the justice they seek. However, if the Court accepts the rationale advanced by this paper, then the plaintiffs will be able to bring their lawsuit against defendant Samantar, and the FSIA will still retain its purpose.

ADDENDUM**

I. THE U.S. SUPREME COURT UNANIMOUSLY AFFIRMED THE RULING OF THE FOURTH CIRCUIT COURT OF APPEALS

On June 1, 2010, the U.S. Supreme Court rejected the majority interpretation of the FSIA by issuing a ruling that unanimously affirmed the decision of the Fourth Circuit Court of Appeals. In reaching its decision, the Court held that the FSIA does not provide immunity for individuals.[220] Writing for the majority, Justice Stevens stated "the FSIA does not govern the determination of petitioner's immunity from suit."[221] Therefore, the Court remanded the action to the Eastern District of Virginia to decide the question of whether defendant Samantar is due immunity under the common law doctrines of "head of state" or "act of state immunity."[222] As stated *supra*, this determination will be made at the suggestion of the executive branch through the U.S. Department of State.

** Following this comment's submission for publication, the U.S. Supreme Court issued its ruling in Samantar v. Yousuf, 130 S. Ct. 2278 (2010).

[220] Once the Court decided that the FSIA does not apply to individuals, it was unnecessary for the Court to address the issue of whether the FSIA applies to former government officials.

[221] *Samantar*, 130 S. Ct. at 2282.

[222] John R. Crook, *U.S. Supreme Court Rules FSIA Does Not Shield Government Officials*, 104 AM. J. INT'L L. 491, 491 (2010).

A. The U.S. Supreme Court's Textual Analysis of the FSIA

The Supreme Court's decision was largely premised upon its analysis of the text of the FSIA. The Court noted that under section 1603 of the Act an "agency or instrumentality of a foreign state" includes (1) a separate legal person, (2) an organ of the foreign state, or (3) an entity that is not created under the laws of any third country.[223] The Court reasoned that these three categories apply awkwardly to a natural person (an individual government official).[224] Additionally, the Court further stated that in other sections of the FSIA "Congress expressly mentioned [individual] officials when it wished to count their acts as equivalent to those of the foreign state, which suggests that officials are not included within the unadorned term 'foreign state.'"[225] In effect, the Court reiterated the textual rationale used by the Fourth Circuit Court of Appeals.

B. U.S. Supreme Court holds that the Purpose of the FSIA is not Frustrated by its Holding

In an argument not addressed by the Fourth Circuit Court of Appeals, the U.S. Supreme Court held that its reading of the FSIA will not allow "artful pleading" to make the FSIA "optional."[226] The Court supported its holding by stating:

> Even when a plaintiff names only a foreign official, it may be the case that the foreign state itself, its political subdivision, or an agency or instrumentality is a required party, because that party has "an interest relating to the subject of the action" and "disposing of the action in the person's absence may . . . as a practical matter impair or impede the person's ability to protect the interest." Fed. Rule Civ. Proc. 19(a)(1)(B). If this is the case, and the entity is immune from suit under the FSIA, the district court may have to dismiss the suit, regardless of whether the official is immune or not under the common law.[227]

The Court concluded that this limited circumstance would prevent plaintiffs from being able to use skilled lawyering to

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[223] *Samantar*, 130 S. Ct. at 2286.

[224] *Id.* 2286–87.

[225] *Id.* at 2288 (citing Kimbrough v. U.S., 552 U.S. 85, 103 (2007) ("Drawing meaning from silence is particularly inappropriate . . . [when] Congress has shown that it knows how to [address an issue] in express terms.")).

[226] *Id.* at 2292.

[227] *Id.*

circumvent the application of the FSIA and seek adjudication under the common law doctrines of sovereign immunity.[228]

II. THE U.S. SUPREME COURT'S DECISION IS FLAWED

The U.S. Supreme Court's decision is flawed because, like the Fourth Circuit Court of Appeals' decision, it violates the purpose of the statute and renders the FSIA meaningless. Under the current standard, if a plaintiff chooses to sue an individual government official, then the defendant cannot rely upon FSIA immunity, unless the case is a limited circumstance when Federal Rule of Civil Procedure 19 applies. In all other situations, the plaintiff can avoid the restrictions of the FSIA, proceeding under common law immunity determinations subject to political considerations within the executive branch. The vast majority of lawsuits against individual foreign officials will now be subject to the common law immunity determinations. The purpose of the FSIA was to remove the executive branch from immunity decisions, and now today, the executive branch will become active in making recommendations on common law immunities to the judicial branch.

The most recent commentary on the FSIA disagrees with the holding of the U.S. Supreme Court. One legal commentator recently advocated that individual government officials should be "entitled to foreign sovereign immunity [under the FSIA]" but the courts should "recognize[e] an exception for human rights cases brought under the TVPA."[229] The U.S. Supreme Court's decision disagreed with a majority of federal circuit's as well as current legal scholarship on the interpretation of the FSIA. The weakest aspect of this decision is that the Court has now put the plaintiffs in *Yousuf* (and other cases) at the mercy of the executive branch and its political considerations. If the Court accepted the rationale advanced by this comment (or other current legal scholarship), the plaintiffs would be assured that defendant Samantar could not claim immunity for his alleged human rights violations. Instead, the plaintiffs (and many other plaintiffs in the future) could be denied access to justice when they sue foreign

[228] *Id.*

[229] Heather L. Williams, Comment, *Does an Individual Government Official Qualify for Immunity Under the Foreign Sovereign Immunities Act?: A Human Rights-Based Approach to Resolving a Problematic Circuit Split*, 69 MD. L. REV. 587, 588 (2010).

officials because of executive branch politics.