

THE POWER OF UNITED STATES COURTS TO DENY FORMER HEADS OF STATE IMMUNITY FROM JURISDICTION

INTRODUCTION

A number of lawsuits have recently been filed in the federal district courts of Hawaii,¹ California² and New York³ against the deposed president of the Republic of the Philippines, Ferdinand E. Marcos,⁴ for acts he committed during his reign. In each case, Marcos has claimed immunity from jurisdiction in the United States courts.⁵ Although Marcos is no longer recognized by the United States as the lawful president of the Philippines⁶ and the

1. Republic of the Philippines v. Marcos, civil no. 86-0213 (D. Hawaii July, 18, 1986); Sison v. Marcos, civil no. 86-0225 (D. Hawaii July 18, 1986); Trajano v. Marcos, civil no. 86-0207 (D. Hawaii July 18, 1986); Hilao v. Marcos, civil no. 86-390 (D. Hawaii July 18, 1986).

2. Ortigas v. Marcos, civil no. c-86-0975-sw (N.D. Cal. July, 1986); Clemente v. Marcos, civil no. c-86-1449-sw (N.D. Cal. July 1986); Guinto v. Marcos, civil no. 86-0737 R(CM) (S.D. Cal. Sept. 22, 1986). *Ortigas* and *Clemente* have been consolidated with *Sison*, *Trajano* and *Hilao* (See *supra* note 1) for the purposes of appeal to the Ninth Circuit. See *Sison v. Marcos*, civil no. 86-2496 (9th Cir. 1987), Appellant's Brief.

The United States, in response to a request by the Ninth Circuit, filed an Amicus Curia brief in support of dismissal of the actions. The United States's main argument was that 28 U.S.C. § 1350 (see *infra* note 115 and accompanying text) did not give the district courts subject matter jurisdiction over a suit by a foreign national plaintiff against a foreign government official based on acts occurring in a foreign country. See *Trajano*, *supra*, brief for the United States as Amicus Curiae, at 3. In response, a group of international law professors will be submitting an Amicus Curia brief in support of granting jurisdiction on the issues of 28 U.S.C. § 1350 and the Act of State Doctrine. The Ninth Circuit had not rendered a decision at the date of the publication of this Comment.

3. Republic of the Philippines v. Marcos, 640 F. Supp. 737 (S.D.N.Y. *aff'd*, 806 F.2d 344 (2d Cir. 1986).

4. The Philippines were ruled by Marcos for 20 years, 13 of which were under martial law. In February, 1986, an election was held. Opposition leader, Corazon Aquino, the widow of slain former Senator Benigno Aquino, lost. The election was "tainted by ballot stealing and bloodshed." Tift, *Rebelling Against Marcos*, TIME, March 3, 1986, at 38. Then, in March, the people of the Philippines revolted and Aquino became president. And according to the government, 343 deaths occurred as a result of Aquino's taking office; 32 less than the average of 375 casualties each month during the last year of the Marcos regime. Iyer, *Purging Marcos' Legacy*, TIME, April 7, 1986, at 32.

5. See *supra* note 1.

6. In February of 1986, Secretary of State, George Shultz announced the following to U.S. Embassies around the world: "The president (of the United States) is pleased with the peaceful transition to a new government of the Philippines. The United States extends recognition to this new government headed by President Aquino. . . ." *Ortigas*, *supra* note 2, Plaintiff's Points and Authorities in Opposition to defendant Marcos' Motion to Dismiss, at 4 (citing U.S. Dept. of State unclassified cable no. 57827 (Feb. 25, 1986)).

State Department has made no Suggestion of Immunity,⁷ the courts have dismissed actions against the former head of state. Their reasoning is based on the judicially created Act of State Doctrine,⁸ which states that courts will not sit in judgment on the acts of a foreign government done within its own territory,⁹ leaving the issue of immunity blurred.

Today there is no universally accepted standard under which heads of state may be granted immunity from United States jurisdiction.¹⁰ The United States courts' difficulty in resolving this issue stems from the tensions between the functions of the judicial and executive branches of government.¹¹ As a result of the unsettled doctrine of head of state immunity, United States courts are struggling to solve the difficult issue of whether former heads of state are entitled to immunity from jurisdiction.¹²

This Comment first traces the origins of head of state immunity through sovereign immunity, which, until about 1900, was based internationally on an absolute theory.¹³ In 1952 the United States adopted the restrictive theory of sovereign immunity.¹⁴ This limited the grant of immunity from jurisdiction to foreign states in litigation arising from public acts.¹⁵

Next, this Comment discusses how, prior to the enactment of the FSIA,¹⁶ the United States courts applied the Act of State Doc-

7. Records of the U.S Department of State do not state that Marcos is entitled to any immunity. *Id.* See *infra* note 43 and accompanying text for an explanation of "Suggestions of Immunity."

8. The United States Supreme Court developed the Act of State Doctrine in order to address the issue of immunity when the courts lack guidance from the State Department. Note, *Resolving the Confusion Over Head of State Immunity: The Defined Rights of Kings*, 86 COLUM. L. REV. 169, 176 (1986) [hereinafter Note]. For details see *infra* notes 52-60 and accompanying text.

9. Lengel, *The Duty of Federal Courts to Apply International Law: A Polemical Analysis of the Act of State Doctrine*, 1982 B.Y.U.L. L. REV. 61 [hereinafter Lengel]; *Underhill v. Hernandez*, 168 U.S. 250 (1987).

10. Note, *supra* note 8. The judicial branch's function of supplying due process and the executive branch's function of conducting foreign affairs.

11. *Id.*

12. *Id.*

13. J. SWEENEY, C. OLIVER & N. LEECH, *THE INTERNATIONAL LEGAL SYSTEM* 288-89 (2d ed. 1981) [hereinafter SWEENEY, OLIVER, & LEECH] (A government cannot be subjected to the jurisdiction of another against its will.)

14. *Id.* at 305. The Tate Letter stated that the State Department would follow the restrictive theory of sovereign immunity from jurisdiction in the United States.

15. *Id.* at 289. See *infra* note 90 and accompanying text.

16. 28 U.S.C. § 1330, *et. seq.* (1976). The FSIA was enacted mainly to define (1) the jurisdiction of United States courts in suits against foreign states and (2) the circumstances in which foreign states are immune from suit in the United States. Carl, *Suing Foreign Governments In American Courts: The United States Foreign Sovereign Immunities Act in Practice*, 33 Sw. L. J. 1009, 1068 (1979). Until 1976 when Congress enacted the FSIA,

trine¹⁷ to issues of immunity in an effort to avoid conflicts with the executive branch. Although judicial and legislative exceptions to this doctrine were later created, the guidelines for granting head of state immunity were still unclear. The FSIA attempted to provide United States courts with a clearer standard and has since determined issues of states' sovereign immunity.

Moreover, this Comment will show that although the FSIA failed to establish guidelines for head of state immunity,¹⁸ a flexible interpretation of its language along with an analysis of United States case law may provide courts with a workable standard.

Finally, this Comment analyzes recent United States court decisions and proposes a guideline for the courts in deciding when former heads of state should be granted immunity. This proposal categorizes the acts of the former head of state who is found within the United States territory into three parts: (1) public or official acts designed to support a private interest and committed while the ruler was acting head of state; (2) commercial and private acts designed to support a private interest and committed while the ruler was acting head of state; and (3) any acts committed in violation of United States laws by a foreign head of state who is no longer in power and no longer recognized as a foreign sovereign by the United States. The difficulty lies in categorizing the acts of the former head of state.

To simplify the analysis, this Comment encourages the application of the FSIA so that the resolution of the issue is left to the courts instead of the executive branch.¹⁹ If the acts fall within the first category, the former head of state should be granted immunity from jurisdiction. In the reverse, if the acts fall within categories two or three, immunity should be denied. Further analysis of this proposal appears later. In conclusion, when the acts committed by a former head of state either violate his own states' laws or international law and foreign affairs concerns of reciprocity are no longer

American Courts relied on the State Departments Suggestions of Immunity. Note, *supra* note 8 at 171; see *infra* note 43 for State Department procedures. Briefly, a Suggestion of Immunity is a letter requesting that the court refrain from adjudicating the matter.

17. The Act of State doctrine simply means that the courts of the United States would not sit in judgment on the acts of a foreign government which were done within its own territory. See also *infra* notes 52-60 and accompanying text.

18. Note, *supra* note 8, at 171.

19. Suggestions of Immunity are made by the State Department through both a political and administrative process. Commonly by letter, the State Department informs the Department of Justice that immunity should be granted to the sovereign. The Justice Department then forwards it to the court hearing the case. Note, *supra* note 8 at 176.

at issue, that former ruler should not be afforded the privilege of immunity.

I. HISTORICAL BACKGROUND

A. Doctrinal Origins of Head of State Immunity

Head of state immunity evolved from the international law doctrine of sovereign immunity.²⁰ Until about 1900, the international law of sovereign immunity was absolute.²¹ The doctrine was based on the theory that the ruler and the state were one.²² Therefore, acts committed by the ruler were considered acts committed by the state. This entitled a head of government to immunity for any acts done in his official capacity if the suit was one brought against the state.²³

Because governments universally recognized reciprocal independence as fundamental to international law, one government could not subject another government to its jurisdiction against its will.²⁴ States declined to exercise their territorial, personal jurisdiction over a sovereign because of international comity.²⁵ Comity induced sovereign states to respect the independence and dignity of others.²⁶

In the United States, Chief Justice Marshall first explained the absolute sovereign immunity doctrine in *The Schooner Exchange v. M'Fadden*:²⁷

A foreign sovereign is not understood as intending to subject himself to a jurisdiction incompatible with his dignity, and the dignity of his nation, and it is to avoid this subjection that the license (exemption from arrest or detention) has been obtained. . . . This security, however, need not be expressed; it is implied from the circumstances of the case. . . . A second case, standing on the same principles as the first, is the immunity which all civilized nations allow to foreign ministers.²⁸

20. Note, *supra* note 8, at 171. SWEENEY, OLIVER & LEECH, *supra* note 13, at 288.

21. *Id.*

22. See Statute of International Court of Justice art. 34 § 1, 59 Stat. 10-55, T.S. No. 993 (1945); 1 D. O'CONNELL, INTERNATIONAL LAW 80-81 (2d ed. 1970).

23. SWEENEY, OLIVER & LEECH, *supra* note 13, at 296.

24. *Id.* at 288.

25. The Ninth Circuit explained international comity and reciprocal independence by stating, "We do not wish to challenge the sovereignty of another nation, the wisdom of its policy, or the integrity and motivation of its action." *Timberland Lumber Co. v. Bank of America, N.T. and S.A.*, 549 F.2d 597, 607 (9th Cir. 1976).

26. *Id.*

27. 11 U.S. (7 Cranch) 116 (1812).

28. *Id.* at 137-38.

American courts refused to adjudicate any controversy to which a foreign sovereign was a necessary party.²⁹ In a sense, heads of state were granted a blanket immunity for their acts. When heads of state began to act privately, the doctrine changed.

B. A More Restrictive Doctrine Develops

During the early 1900s, some states³⁰ developed the judicial practice of denying a foreign state immunity from jurisdiction in cases involving commercial or private acts.³¹ Restricting the application of the doctrine of absolute sovereign immunity resulted from increased government activity in commercial enterprise.³² The reasoning of the states that favored the restriction was that the traditional rule of immunity did not extend to acts other than those of a public nature.³³ More recently the Second Circuit Court of Appeals, in support of the restrictive theory, stated that by denying immunity to foreign states in cases involving commercial activities, courts may accommodate two opposing interests: those of individuals doing business with foreign governments in having their legal rights determined by the courts; and those of foreign government in being free to perform certain political acts without undergoing the embarrassment or hinderance of defending such acts before foreign courts.³⁴ The courts of socialist states typically have not drawn the same distinction, extending immunity despite the nature of the act involved.³⁵

29. 1979 Dig. U.S. Prac. Int'l L. 897; civ. no. c-78-291 (N.D. Ohio Dec. 7, 1978).

30. The restrictive theory of immunity began in civil law systems. See SWEENEY, OLIVER & LEECH *supra* note 13 at 189. The United States adhered to the absolute theory until 1952, when the Tate Letter stated that when acting on requests for sovereign immunity, the State Department would follow the restrictive theory of immunity. They would grant immunity only for official public acts. Note, *supra* note 8 at 173.

31. SWEENEY, OLIVER & LEECH, *supra* note 13 at 189. In 1903, the Supreme Court of Belgium in *Societe Anonyme des Cheminis de Fer Liegeois Luxemborgeois v. the Netherlands* made a distinction between public and commercial acts as follows:

Sovereignty is involved only when political acts are accomplished by the state . . . however, the state is not bound to confine itself to a political role, and can, for the needs of the collectively, but, own, contract, become creditor or debtor, and engage in commerce. . . . In the discharge of these functions, the state is not acting as a public power, but does what private persons do, and as such, is acting in a civil and private capacity.

(1903) Pas. 1, 294, 301.

32. *Petrol Shipping Corp. v. Kingdom of Greece*, 360 F.2d 103, 106 (2d Cir. 1966); *Victory Transports, Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354, 357 (2d Cir. 1964).

33. SWEENEY, OLIVER & LEECH, *supra* note 31.

34. *Victory Transports, Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354, 357 (2d Cir. 1964).

35. Socialist states are committed to the absolute theory of sovereign immunity. They

Today, heads of state are no longer viewed as one with the state.³⁶ Yet because they perform diplomatic duties for their state, the issue of their immunity may be based on principles similar to diplomatic immunity.³⁷ Still, there is no universally recognized basis for head of state immunity, which makes the resolution of former head of state immunity even more difficult.³⁸ The United States courts have deferred the issue, whenever possible, to the executive branch.

II. UNITED STATES' APPROACH TO HEAD OF STATE IMMUNITY AND ITS APPLICATION TO FORMER HEADS OF STATE

A. Judiciary's Reliance on the Executive

American courts relied on the State Department's decisions on sovereign immunity from the mid-1930s until 1977,³⁹ when the FSIA went into effect.⁴⁰ In *Ex Parte Republic of Peru*,⁴¹ and *Republic of Mexico v. Hoffman*,⁴² the United States Supreme Court stated that Suggestions of Immunity, submitted by the State Department,⁴³ bind federal courts. These decisions required the judiciary to accept a Suggestion of Immunity as a "conclusive determi-

look upon the denial of immunity in cases involving commercial activities as an unwarranted interference with their trade abroad. SWEENEY, OLIVER & LEECH, *supra* note 13, at 292.

36. *Id.* at 296.

37. Note, *supra* note 8, at 170 n. 10. Prior to 1978, the existing statute on United States diplomatic immunity was the Act of April 30, 1970, ch. 90, 1 Stat. 1217. This Act was replaced by the Diplomatic Relations Act of 1978, Pub. L. No. 95-393, 92 Stat. 808 (codified at 22 U.S.C. §§ 245a-254e and 28 U.S.C. §§ 1251, 1351, 1364), which established the Vienna Convention on Diplomatic Relations, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95 (April 18, 1961), as the "sole United States law on the subject." S. Rep. No. 393, 95th Cong. 2d Sess. 1, reprinted in 1978 U.S. Code Con. & Admin. News 1935. Article 31 of the Vienna Convention provides that a diplomatic agent shall be immune from the civil jurisdiction of the "receiving" state's court.

38. Note, *supra* note 8, at 170.

39. *Id.* at 171. See Carl, *supra* note 16, at 1012, n. 17. It is suggested that such judicial deference is compelled by the constitutional Political Question Doctrine, which maintains that judicial determinations would interfere with the powers of the executive branch in conducting foreign affairs.

40. SWEENEY, OLIVER & LEECH, *supra* note 13, at 310. See Note, *supra* note 8, at 169; Congress enacted the FSIA in order to transfer the authority to determine when Nations are immune from United States jurisdiction from the State Department to the Judiciary. However, this legislation failed to establish head of state immunity guidelines.

41. 318 U.S. 578, 588-89 (1942).

42. 324 U.S. 30, 36 (1945).

43. See *supra* note 7 and accompanying text. Suggestions of Immunity are made by the State Department through a political and administrative process. Yet, these recommendations taken together fail to create a stable body of law. First, the State Department determines whether an official is entitled to immunity. Then usually by letter, the State Department informs the Department of Justice, who forwards it to the court that is hearing the case. Note, *supra* note 8, at 176.

nation by the political arm of the government” that retaining jurisdiction would jeopardize foreign relations.⁴⁴ The practice of allowing the State Department to control the grant of immunity was followed only by the United States.⁴⁵

The State Department used international law authorities⁴⁶ and principles derived from diplomatic immunity⁴⁷ in making determinations as to whether it should issue Suggestions of Immunity. In *Carrera v. Carrera*,⁴⁸ the United States Court of Appeals for the District of Columbia held that immunity attached to a foreign sovereign as long as the case met the following conditions: (1) an ambassador had requested immunity;⁴⁹ (2) the State Department had recognized that person, for whom it was requested, was entitled to it;⁵⁰ and (3) that the Department’s recognition had been communicated to the court.⁵¹

Yet, the State Department did not always recommend immunity. The United States courts developed what is now known as the Act of State Doctrine to determine whether immunity should attach to a foreign head of state.

B. Application of the Act of State Doctrine

In the absence of recognition of the claimed immunity by the executive branch, the United States courts must independently decide whether immunity will attach to the foreign state.⁵² Thus, when the courts lack guidance from the State Department, they have authority to decide immunity cases involving heads of state.⁵³ The issue of whether to invoke this judicial doctrine “is ultimately and always a judicial question.”⁵⁴ Although the Act of State Doctrine is based on the same principles of immunity, the two doctrines

44. *Ex Parte Republic of Peru*, *supra* note 41, 318 U.S. at 589-590.

45. SWEENEY, OLIVER & LEECH, *supra* note 13, at 301. (No other foreign state considered Suggestions of Immunity binding by the courts.)

46. Note, *supra* note 8, at 176, n. 30.

47. Note, *supra* note 8, at 176.

48. 174 F.2d 496, 497 (D.C. Cir. 1949). (*Carrera* was one of many decisions compiled in a list by the State Department from May 1952 to January 1977; see 1977 DIG. U.S. Prac. Int’l L. 1017.)

49. *Carrera*, 174 F.2d 496.

50. *Id.*

51. *Id.*

52. *Mexico v Hoffman*, 324 U.S. 30, 34-35 (1945); *Victory Transports, Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354, 358-59 (2d Cir. 1964). *Ex Parte Republic of Peru* 318 U.S. 578, 588-89 (1942).

53. Note, *supra* note 8, at 181.

54. *Republic of the Philippines v. Marcos*, 806 F.2d 344 at 358 (2d Cir. 1986).

are separate and distinct.

The United States Supreme Court developed the Act of State Doctrine from the international rule that one sovereign cannot be sued in the courts of another without the sovereign's consent.⁵⁵ Because every sovereign must respect the independence of every other sovereign, the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.⁵⁶ This doctrine derives from the judiciary's concern for its possible interference with conduct of foreign affairs.⁵⁷ United States law does not require "blindly giving effect to the act of a foreign sovereign without having due regard to the rights of its own citizens, or of other persons who are under the protection of its laws."⁵⁸ Thus, the doctrine has been both legislatively⁵⁹ and judicially⁶⁰ narrowed.

1. *Legislative Narrowing*—The doctrine was legislatively narrowed by the Hickenlooper⁶¹ Amendment in response to *Banco Nacional de Cuba v. Sabbatino*.⁶² In *Sabbatino*, the Court made its most important judicial pronouncement concerning the United States' posture toward international law.⁶³ *Sabbatino* extended sovereign immunity and comity principles to persons who were not direct agents of the sovereign.⁶⁴

In *Sabbatino*, Banco Nacional, a financial agent for the Cuban government, claimed title to certain sugar by virtue of the Cuban government's nationalization of Compania Azucarera Vertientes-Cameguy de Cuba's (C.A.V.) property. C.A.V. was the company

55. Lengel, *supra* note 9.

56. *Id.*

57. Traditionally in international law, this principle existed and was termed *ratione personae*. It applied only where a sovereign or its agent was the respondent in any legal proceeding. This doctrine expanded the scope of protection accorded a sovereign. *Id.*

58. *In re Grand Jury Proceedings Bank of Nova Scotia*, 740 F.2d 817 (11th Cir. 1984).

59. *See infra* notes 61, 75-76 and accompanying text.

60. *See infra* notes 79-89 and accompanying text.

61. 22 U.S.C. § 2370 (e) (2) (1976). In large part, the second Hickenlooper Amendment reiterates Justice White's dissent in *Sabbatino* and mandates that the courts decide cases effecting a title or right to property that has been confiscated in violation of international law. Lengel, *supra* note 9, at 65. This rule was reiterated again in *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500 (1984), where the court held that expropriation of any United States citizen's property by any country when no compensation is given within six months is in violation of international law.

62. 193 F. Supp. 375 (S.D.N.Y. 1961), *aff'd* 307 F.2d 845 (2d Cir. 1962), *rev'd* 376 U.S. 398 (1964).

63. *Id.*

64. Lengel, *supra* note 9, at 64. (*See also, supra* notes 30 and 49 and accompanying text.)

that shipped the sugar.⁶⁵

Farr, Whitlock & Co. (Farr) had contracted to purchase sugar from a subsidiary of C.A.V. The sugar, intended for Farr, was put on a German ship, which was later detained by the Cuban government pursuant to the nationalization order. In order to get the shipment released, Farr entered into a new agreement with a government-owned corporation to buy the sugar under the same terms. Upon presentation of the paperwork in New York, Farr sold the sugar and did not pay the proceeds to Banco Nacional de Cuba.⁶⁶

The Federal District Court for the Southern District of New York held that the United States no longer recognized sovereignty and comity when the act of a foreign state violated the standards imposed by international law.⁶⁷ The court concluded that the expropriation of C.A.V.'s property was discriminatory because it applied only to the United States.⁶⁸ Furthermore, it was without just compensation and in violation of international law.⁶⁹

Justice Harlan, writing for the majority of the Supreme Court reversed, stating:

The judicial branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of the suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violated customary international law.⁷⁰

Justice White was the only dissenter. He stated that he did not believe that the Act of State Doctrine required American courts to decide cases in disregard of international law.⁷¹ After tracing the history of the Act of State Doctrine, White wrote that the case law did not imply that the court “woodenly apply” the Act of State Doctrine and “grant enforcement to a foreign act” where the act was clearly a violation of international law.⁷² Citing *The Paquete Habana*,⁷³ White concluded that international law was part of the

65. 193 F. Supp. 376.

66. *Id.*

67. *Id.* at 381.

68. *Id.* at 386.

69. *Id.*

70. 376 U.S. 428.

71. *Id.* at 439.

72. *Id.* at 443.

73. 176 U.S. 677, 700 (1900) *The Paquete Habana* is a well known case supporting the principle that customary international law is part of the law of the United States. Justice Gray, writing for the majority, stated:

International law is part of our law, and must be ascertained and administered by

law of the United States and must be followed by the United States courts.⁷⁴ As a result of *Sabbatino*, Congress narrowed the Act of State Doctrine by passing the Foreign Assistance Act of 1964.⁷⁵ Portions of the Act focused on the Act of State Doctrine, and they are now known as the second “Hickenlooper Amendment.”⁷⁶ This reads:

Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect the principles of international law in a case in which a claim of title or other right to property is asserted by any party including a foreign state . . . based upon . . . a confiscation or other taking . . . by an act of state in violation of the principles of international law, including the principles of compensation. . . .⁷⁷

2. *Judicial Narrowing*—The *Bernstein* exception⁷⁸ is one way in which the doctrine was judicially narrowed. In *Bernstein v. N.V. Nederlandsche Amerikaansche Etc.*,⁷⁹ a case dealing with the confiscation, by force, of an American’s property by Nazi officials, the State Department advised the Second Circuit Court of Appeals by letter that the Act of State Doctrine should not be applied to bar consideration of the claim.⁸⁰ The court held that where the executive publicly advises the court that the Act of State Doctrine need not be applied, the court should proceed to examine the legal issues raised by the act of a foreign sovereign within its own territory as it would any other legal question.⁸¹ This rule became known as the *Bernstein* exception.

For the first time, a plurality of three justices of the United

the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs an usages of civilized nations, and as evidence of these, to the works of jurists and commentators. . . .

74. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 453 (1964).

75. Pub. L. No. 88-633, 78 Stat. 1009 (codified at 22 U.S.C. § 2370 (1976)). Congress’ amendment to the Foreign Assistance Act, which came to be known as the Hickenlooper Amendment, laid down a set of standards to what Congress assumed customary international law requires of a state that nationalizes the economic interests of an American citizen or corporation. SWEENEY, OLIVER & LEECH, *supra* note 13, at 391.

76. Lengel, *supra* note 9, at 65.

77. 22 U.S.C. § 2370 (c) (2) (1976). See also, *supra* note 61.

78. The *Bernstein* exception was created as a result of *Bernstein v. N.V. Nederlandsche Amerikaansche Etc.* 210 F.2d 375 (2d Cir. 1954).

79. 210 F.2d 375 (2d Cir. 1954).

80. *Id.* at 376.

81. *Id.*

States Supreme Court adopted and approved the *Bernstein* exception in *First National City Bank v. Banca Nacional de Cuba*.⁸² The petitioner, First National City Bank, had loaned \$15 million to a predecessor of respondent Banco Nacional.⁸³ The loan was secured by a pledge of United States Government bonds.⁸⁴ Meanwhile, the Castro government came to power in Cuba, and the Cuban militia, pursuant to decrees of the Castro government, seized all of a petitioner's offices in Cuba.⁸⁵ A week later, the bank retaliated by selling the collateral.⁸⁶ Respondent sued petitioner in Federal District Court to recover the amount petitioner had gained from the sale.⁸⁷ Petitioner counterclaimed, asserting damages as a result of the expropriation of its Cuban property.⁸⁸

Since the State Department notified the court that it should proceed to decide the case on its merits, citing *Bernstein*, Justice Rehnquist concluded:

Where the Executive Branch, charged as it is with primary responsibility for the conduct of foreign affairs, expressly represented to the court that application of the act of state doctrine would not advance the interests of American foreign policy, that doctrine should not be applied by the courts. In so doing, we of course adopt and approve the so called *Bernstein* exception to the act of state doctrine.⁸⁹

The Act of State Doctrine was further narrowed, by limiting the grant of immunity to acts which are *jure imperii*,⁹⁰ or public, in *Alfred Dunhill of London, Inc. v. Cuba*.⁹¹ A plurality of the United States Supreme Court held that in order for there to be an act of

82. 406 U.S. 759 (1972).

83. *Id.* at 760.

84. Five million was paid and the balance was later renewed for one year. *Id.*

85. *Id.* at 761.

86. Almost \$1.8 million over the principal and unpaid interest was realized from the sale. *Id.* at 761.

87. *Id.* at 761.

88. *Id.*

89. *Id.* at 768.

90. The distinction between acts which are *jure imperii* (public) and those which are *jure gestionis* (private and not afforded immunity) has never been adequately defined. The Second Circuit Court of Appeals in *Victory Transports, inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354, 360 (2d Cir. 1964), adopted the following:

jure imperii would be limited to the following:

- (1) internal administrative acts;
- (2) legislative acts;
- (3) acts concerning the armed forces;
- (4) acts concerning diplomatic activity;
- (5) public loans.

91. 425 U.S. 682 (1976).

state immunity, the act in question must be public and not commercial.⁹² The Act of State Doctrine, like sovereign immunity, should not immunize foreign sovereigns when they have acted in a commercial capacity because such acts could be conducted by private individuals or entities.⁹³ In other words, commercial acts do not further a state's public interest and are therefore not protected political acts.⁹⁴

The "private act" exception is also explained in *Jimenez v. Aris-teguieto*.⁹⁵ There the fifth circuit created an exception to the Act of State Doctrine in cases where the executive branch does not oppose inquiry by American courts into the legality of foreign acts.⁹⁶ This case, which deals with a former head of state, reflects the theory that when former heads of state act outside the scope of their official authority in that they are in no way directed at a public interest, immunity should not attach and the Act of State Doctrine should not apply.⁹⁷

In *Jimenez*, the Republic of Venezuela filed an international extradition proceeding for the return to Venezuela the former president, appellant Marcos Perez Jimenez, who was charged with several financial crimes.⁹⁸ The court held that even though he was characterized as a dictator, appellant was not the sovereign government of Venezuela. He was a chief executive, and only when foreign officials act in an official capacity does the Act of State Doctrine apply.⁹⁹

The court held that acts constituting the financial crimes of embezzlement, fraud, breach of trust, and receiving money knowing it to have been unlawfully obtained were not acts of Venezuela sovereignty and were in fact "as far from being an act of state as rape."¹⁰⁰ The Act of State Doctrine did not bar the adjudication of the claim because his acts were of a private nature.¹⁰¹ The court

92. See *supra* notes 31 and 91 and accompanying text.

93. *Kalamazoo Spice Extraction v. Provisional Mil. Gov.*, 729 F.2d 422, 425 (1984). See also, *The Schooner Exchange v. M'Fadden*, 11 U.S. (7 Cranch) 116 (1812).

94. See *supra* note 31 for a distinction between public and private acts.

95. 311 F.2d 547 (1963).

96. SWEENEY, OLIVER & LEECH, *supra* note 13, at 371. (This exception was recognized by the court 10 years before the U.S. Supreme Court officially adopted and approved the *Bernstein* exception in *First National City Bank v. Banca Nacional de Cuba* 406 U.S. 759 (1972). (See *supra* note 55, 56 and 59 and accompanying text).

97. SWEENEY, OLIVER & LEECH, *supra* note 13, at 371.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 372.

also stated that the executive branch manifested its intent to allow the judiciary to decide the case on its merits.¹⁰²

In addition, the Sixth Circuit held in *Kalamazoo Spice Extraction v. Provisional Mil. Gov.*,¹⁰³ that a treaty provides an exception to the Act of State Doctrine. The United States and Ethiopia signed a 1953 Treaty of Amity and Economic Relations which provided that property of nationals would not be taken except for a public purpose; nor would such property be taken without just compensation.¹⁰⁴ Because the treaty gave the court jurisdiction under 28 U.S.C. § 1331, “federal question jurisdiction,”¹⁰⁵ it was able to decide whether the Act of State Doctrine would bar the claim from being heard.¹⁰⁶

Jimenez and *Kalamazoo Spice* stand for the proposition that United States courts have jurisdiction to adjudicate claims arising under the laws and treaties of the United States. In the absence of the executive branch’s express intent to have the judiciary decide the case on its own merits such a decision is solely up to the judiciary.¹⁰⁷ When a court merely passes judgment on traditional questions of law and fact, it should not be divested of jurisdiction to hear the claim.¹⁰⁸ Regardless of political context, issues of conversion and breach of fiduciary duty do not involve “political dogma so as to divest the court of jurisdiction.”¹⁰⁹

102. *Id.* Because the United States had an agreement with Venezuela for the extradition of persons charged with crimes such as embezzlement, the court had a legitimate rule of law to apply. In the absence of a treaty, extradition would not be allowed. (See *supra* notes 84 and accompanying text and *infra* note 161 and accompanying text.)

103. 729 F.2d 422 (1984).

104. *Id.*

105. “The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States.” 28 U.S.C. § 1331.

106. The court recognized a “treaty exception” to the Act of State Doctrine. *Kalamazoo*, 729 F.2d 422.

107. *Republic of the Philippines v. Marcos*, 806 F.2d at 357, 358 (2d Cir. 1986).

108. *Islamic Republic of Iran v. Pahlavi*, 464 N.Y.S. 2d 487, 495 (A.D. 1 Dept. 1983) (Fein, J., dissenting).

109. *Id.* For an extreme view on which branch of government should impose the doctrine of former head of state immunity see Note, *Ex-Head of State Immunity: A Proposed Statutory Tool of Foreign Policy*, 97 YALE L.J. 299 (1987). There, the author suggests that the doctrine be employed by the President “to encourage embattled foreign leaders to leave their home countries swiftly and perhaps more peacefully than they otherwise would.” The Note can not be supported by any authority which vests such a power in the Presidential office or which grants the Legislature the authority to confer such power to the President. Further, the author puts too much weight on the need for swift and peaceful foreign leader transitions to the United States and not enough weight on individual plaintiffs’ rights to seek redress for harm caused by ex-leaders and the duty of all nations to uphold, not violate, international norms.

C. Jurisdictional Aspects

The issues of Act of State and former head of state immunity may never be reached if a United States court finds that there is no jurisdiction. Since United States courts have been struggling with these jurisdictional problems,¹¹⁰ it is necessary to explain the jurisdictional aspects before continuing with the immunity and Act of State doctrines. Many of the recent cases dealing with former head of state Ferdinand Marcos¹¹¹ concern acts committed by the deposed President while he was in reign in the Philippines. Although personal jurisdiction was found over him because he was living in Hawaii, subject matter jurisdiction posed a problem with the courts.¹¹²

Subject matter jurisdiction may be had if the case is a civil action arising under the Constitution, laws or treaties of the United States,¹¹³ or if the case is a civil action where the matter in controversy exceeds \$10,000 and is between citizens of the United States and citizens or subjects of a foreign state.¹¹⁴ The district courts may also have original jurisdiction over any civil action by an alien for a tort only committed in violation of the law of nations or a treaty of the United States.¹¹⁵

In cases where there is no diversity of citizenship, an alien plaintiff who is suing a former, foreign head of state must get jurisdiction under 28 U.S.C. section 1331 (federal question jurisdiction), on a theory that international law is part of our law¹¹⁶ or 28 U.S.C. section 1350 (alien tort jurisdiction or the Alien Tort Claims Act). The United States circuit courts are struggling with the issue of whether the Alien Tort Claims Act should extend jurisdiction to suits between aliens or to private actions for violations of international law.¹¹⁷

Even if a United States court found jurisdiction under any one of

110. See *supra* note 2; *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); *Amerada Hess Shipping Corp. v. Argentine Republic*, civil no 86-7602, 7603 (Sept. 11, 1987) where the *Filartiga* rationale was reiterated: "if an alien brings a suit for a tort only, that sufficiently alleges a violation of the law of nations, then the district court has jurisdiction."

See also, *Tel-Oren v. Libyan Arab Republic* 726 F. 2d 774 (D.C. Cir. 1984); *cert. denied*, 470 U.S. 1003 (1985) for an opposing view from *Filartiga*.

111. See *supra* notes 1 and 2.

112. *Id.*

113. 28 U.S.C. § 1331 (1982).

114. 28 U.S.C. § 1332 (1982).

115. 28 U.S.C. § 1350 (1982).

116. See *supra* note 73.

117. See *supra* note 2 and see *infra* note 133 and accompanying text.

the above sections, there maybe cases where comity dictates protecting the foreign act because it is not clearly condemned under generally accepted principles of international law.¹¹⁸ United States courts are competent to apply international law¹¹⁹ which provides an ascertainable standard for adjudicating the validity of some foreign acts.

III. MODERN APPLICATION OF FORMER HEAD OF STATE IMMUNITY

A. *Developing Immunity in Recent Case Authority*

In a recent case against Ferdinand E Marcos,¹²⁰ *Republic of the Philippines v. Marcos*,¹²¹ the Central Bank of the Philippines sued Marcos to recover the currency, negotiable instruments and gold which Marcos brought with him to the United States via a United States military aircraft.¹²² The plaintiff founded jurisdiction upon 28 U.S.C. section 2463 (ownership dispute jurisdiction)¹²³ and section 1331 (federal question jurisdiction).¹²⁴

The court held that ownership dispute jurisdiction under 28

118. *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1512 (1984); *Allied Bank Intern. v. Banco Credito Agricolo de Catago*, 757 F.2d 516, 521-22 (1985). Principles of international law may be found in the convention on the Prevention and Punishment of the Crime of Genocide of December 9, 1948, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant of Economic, Social and Cultural Rights and others. (See SWEENEY, OLIVER & LEECH *supra* note 13, Documentary Supplement 56, 60, 66 and 87).

119. Treaties and executive agreements between two countries also provide an ascertainable standard for adjudicating the validity of foreign acts (see *supra* note 84 and accompanying text, for example).

120. See *supra* notes 4-6 and accompanying text.

121. *Republic of the Philippines v. Marcos*, civ. no. 86-0213 (D. Hawaii July 18, 1986).

122. In March, 1986, Marcos fled to the United States into a \$1.5 million estate in eastern Honolulu, Hawaii. The Philippines does not have an extradition treaty with the United States, so having Marcos brought back to the Philippines is another problem plaintiffs must overcome. Presently the items are in the custody of the United States Customs Service. Iyer, *Purging Marcos' Legacy*, TIME, April 7, 1986, at 32, 33.

As a result of Customs' detention of the goods, Ramon Azurini, Marcos' assistant, sought a writ on mandamus to compel the customs service to release the property. The United States District Court for the District of Hawaii granted the writ, and the customs service appealed. The ninth circuit in reversing the district court's decision in *Azurini v. Von Arab*, 803 F.2d 993, 25 E.R.C. 1431 (9th Cir. 1986) that since the customs service did not have a clear ministerial duty to ignore the dispute over the legal ownership of the property, the writ could not be upheld.

123. "All property taken or detained under any revenue law of the United States shall not be replevable, but shall be . . . subject only to the orders . . . of the courts of the United States having jurisdiction thereof."

124. "The district courts shall have original jurisdiction of all civil actions arising under the constitution, law or treaties of the United States."

U.S.C. § 2463 allowed the court to decide the dispute of ownership of the property.¹²⁵ The court rejected Central Bank's argument that its claim, that Marcos violated Philippine currency laws, was cognizable under the federal question jurisdiction.¹²⁶ Its reasoning indicated that although the United States may be willing to respect the effect of foreign currency laws, such laws do not raise a claim founded on federal common law, which is necessary to give the court federal question jurisdiction.¹²⁷ In addition, the court briefly discussed the issue of former head of state immunity¹²⁸ by recognizing the fact that the issue was unresolved.¹²⁹

Head of state immunity arises from principles of international comity, not common law privilege.¹³⁰ After discussing the Act of State doctrine and its application to heads of state, the court concluded that the acts committed by Marcos in this case were not performed in his official capacity, but were for his private financial benefit.¹³¹ Such acts do not fall within the definition of an act of state.¹³²

Another way to acquire federal subject matter jurisdiction over former heads of state is through 28 U.S.C. § 1350, which gives the courts jurisdiction over any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.¹³³ The 1970 Declaration of Principles of International Law Concerning Friendly Nations and Cooperation Among Nation States¹³⁴ recognizes that the human rights obligations contained within the United Nations Charter are now mandatory, and they are in fact a "duty" of the states.¹³⁵ Since the United Nations Charter itself is a treaty, a violation of the fundamental rights of humans would clearly be a violation of international law.¹³⁶

125. *Republic of the Philippines*, civ. no. 86-0213.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* The courts reasoning reflects the holdings in both *Kalamazoo Spice Extraction v. Provisional Mil. Gov.*, 729 F.2d 422 (1984) and *Victory Transports, Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354 (2d Cir. 1964).

132. *Id.* For definition of act of state (or public act in terms of the restrictive theory of immunity) see *supra* notes 31 and 79 and accompanying text.

133. See *supra* note 1 for cases using this approach.

134. See *infra* note 140 at 882, quoting from the Universal Declaration of Human Rights.

135. Paust, *Do Standards of International Rights Have a Place in American Courts? The Answer May Surprise You*, 10 HUM. RTS. J. 41, 42 (Winter 1982).

136. *Id.*

Currently, no nation dissents from the view that the human rights guaranteed to all by the United Nations Charter include the right to be free from torture.¹³⁷ This has become a part of customary international law,¹³⁸ and in many case opinions there is a consistent and growing use of human rights norms. In addition to the United Nations Charter, courts are using treaties to which the United States is not a signatory as binding authority.¹³⁹

In a recent case, *Filartiga v. Pena-Irula*,¹⁴⁰ the Second Circuit obtained jurisdiction over a foreign official based on the above human rights principles. In *Filartiga*, the court held that deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights.¹⁴¹ Thus, whenever an alleged torturer is found and served with process by an alien within our borders, federal jurisdiction is met as a universal basis of jurisdiction.¹⁴²

The same approach has been recently applied in *Ortigas v. Marcos*.¹⁴³ The plaintiffs there alleged torture, murder and prolonged arbitrary arrest and detention by Ferdinand Marcos when he was acting president.¹⁴⁴ They further alleged that although Marcos did not personally administer the torture, as did the official in *Filartiga*,¹⁴⁵ international law should not immunize those in position of power and responsibility.¹⁴⁶

In *Sison v. Marcos*,¹⁴⁷ the Hawaii Federal District court held that although our country recognizes the Aquino government as the lawful government of the Philippines and jurisdiction could be

137. See *supra* note 101 and accompanying text.

138. *Id.*

139. Paust, *supra* note 135, at 42.

140. 630 F.2d 876 (2d Cir. 1980); see *supra* note 110 and accompanying text.

141. 630 F.2d at 878. The Universal Declaration of Human Rights, see Note, *supra* note 8. Article 5 expressly prohibits torture. The essential characteristic of crimes of universal interest is outlined *supra* in text accompanying note 100.

142. *Id.* The "Alien Tort Claims Acts" 28 U.S.C. § 1350.

143. Civ. no. c-86-0975-sw (N.D. Cal. July, 1986).

144. *Id.*

145. 630 F.2d at 876, see text accompanying note 140 *supra*.

146. *Id.* This case is still pending in the Ninth Circuit. The district court granted defendant's motion to dismiss and plaintiffs appealed to the Ninth Circuit. All parties filed their briefs, and the Ninth Circuit heard oral arguments for this case and a similar case filed by the A.C.L.U., *Sison v. Marcos* civ. no. 86-0225 (D. Hawaii July 18, 1986). (see *infra* note 194 and accompanying text), on about June 10, 1987. As a result, the court invited the Justice Department to file an amicus brief, within sixty days, on all issues, but primarily the issue of the Act of State Doctrine. By requesting the Justice Department to file a brief, the court was, in essence, deferring to the executive branch (or more specifically, the State Department). See also, *supra* note 2.

147. Civ. no. 86-0225 (D. Hawaii July 18, 1986).

found under 28 U.S.C. section 1350¹⁴⁸ the court is precluded from inquiring into the validity of the public acts of a recognized foreign sovereign power committed within its own territory.¹⁴⁹

Even though our laws provide the courts with jurisdiction over a former, or acting, head of state in claims involving violations of internationally accepted human rights,¹⁵⁰ the lower courts continue to rely on the Act of State Doctrine to take the issue out of their control because of their fear of conflicting with the executive branch. Another case decided recently in the Southern District Court of California, *Guintos v. Marcos*,¹⁵¹ represents the Court's hesitance in putting less importance in the Act of State Doctrine. The issue in *Guinto* was whether First Amendment rights are an internationally accepted human right for the purposes of the alien tort jurisdictional provision.¹⁵²

During the 1970s, plaintiffs were making a film based on the Marcos regime. They alleged that Marcos had the film confiscated and then fabricated a felony against plaintiffs, to force them to flee from the Philippines. Plaintiffs alleged diversity federal questions and alien tort jurisdiction. The diversity claim was dismissed because both Guinto, the plaintiff, and Marcos, the defendant, were citizens of the Philippines. The court also stated that in order for the plaintiffs to gain access to the defendant and his assets under federal question jurisdiction, alien tort jurisdiction first had to be shown. Because no other applicable United States law was alleged, it was necessary to show a violation of international law.¹⁵³

In analyzing the alien tort section, the court noted that although our country strongly upholds First Amendment rights, a violation of free speech does not rise to the level of a universally recognized right.¹⁵⁴ Therefore Marcos' acts did not constitute a violation of the Law of Nations.¹⁵⁵ As a result, the action was dismissed and no appeal has been filed. *Guinto*¹⁵⁶ shows that jurisdictional issues may be more problematic for plaintiffs, who bring suit against former heads of state, than immunity issues.

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

149. *Id.*

150. *See* *Filartig v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

151. Civ. no. 86-0737 R(CM) (S.D. Cal. Sept. 22, 1986).

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

An argument that was not presented in that case may be made through the FSIA. In fact, future plaintiffs may find that the FSIA provides a basis for jurisdiction over former heads of state.

B. *The FSIA*

The United States advanced its view of principles of international law in the FSIA. By codifying and adopting the restrictive theory of sovereign immunity, which restricts a state's immunity to its public or governmental acts, the FSIA provides the courts with another exception to the Act of State Doctrine.¹⁵⁷ Section 1602 of the FSIA provides that foreign state's claims of immunity should be decided by United States federal and state courts, in conformity with the principles set forth in the Act.¹⁵⁸ Thus, the issue would be removed from the hands of the executive branch.

The FSIA disallows granting immunity in litigation involving the private acts of a sovereign.¹⁵⁹ "Foreign state," as defined by the FSIA, is the state, its agencies¹⁶⁰ and instrumentalities.¹⁶¹ Legislative history does not address the issue of head of state immunity, so it is uncertain whether heads of state could be included in the definition of a foreign state.¹⁶² If heads of state were interpreted as being "an agency or instrumentality of a foreign state," which is a separate legal person and which is an organ of a foreign state,¹⁶³ the FSIA would apply to heads of state.¹⁶⁴ The United States courts have not yet applied this interpretation to heads of state, nor to former heads of state.¹⁶⁵

Since the FSIA provides that federal and state courts have original jurisdiction of any nonjury civil action against a foreign state as

157. Note, *supra* note 8 at 173, n. 19.

158. Pub. L. No. 94-583, 90 Stat. 2891 (codified at 28 U.S.C. § 1602 (1982)).

159. Note, *supra* note 8 at 173, n. 15.

160. An agency or instrumentality of a foreign state is defined as any entity,
(1) which is a separate legal person, corporation 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 . . . or created under the laws of any third country. 28 U.S.C. § 1603 (b).

161. *Id.*

162. Note, *supra* note 8, at 169.

163. 28 U.S.C. § 1603; *see supra* note 160 and accompanying text.

164. *See note, supra* note 8, at 172, n. 15. Heads of state have, in the past, been treated as diplomats for the purposes of immunity (*see supra* note 31 and accompanying text). Since diplomats may fall under this definition, it follows that heads of state may also be considered an instrumentality of a foreign state.

165. Note, *supra* note 8, at 175.

to any claim for relief where the foreign state is not entitled to immunity,¹⁶⁶ United States courts could analyze head of state immunity in terms of the Act. If such were the case, immunity would be denied to heads of state and former heads of state in the following cases: (1) in which the foreign state has waived its immunity;¹⁶⁷ (2) in which the action is based upon commercial activity carried on in the United States in connection with a commercial activity of a foreign state elsewhere, and that act causes a direct effect in the United States;¹⁶⁸ (3) in which rights in property taken in violation of international law are at issue;¹⁶⁹ (4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are at issue;¹⁷⁰ or (5) in which money damages are sought against a foreign state for personal injury, death or damage to property occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that state while acting within the scope of his employment or office.¹⁷¹

Most of the exceptions created in the FSIA reflect United States case law.¹⁷² Each provides principles for use in deciding when heads of state should be immune from jurisdiction in the United States. Once the courts apply this interpretation to heads of state, the same argument may be made for former heads of state. In addition, section 1604 of the FSIA states that “subject to existing international agreements . . . a foreign state shall be immune.” The ambiguity of this phrase allows for a broad interpretation. It may be read to include a general exception to immunity for a human rights violation.¹⁷³ In fact, “existing international agreements” may also create a general exception for violations of a foreign sovereign of interna-

166. 28 U.S.C. § 1330.

167. 28 U.S.C. § 1605 (a)(1). In other words, where a foreign state has allowed itself to be subject to the jurisdiction of United States Courts.

168. *Id.* at subsection (2). This reflects the restrictive theory of immunity. *See supra* notes 31 and 91, and accompanying text.

169. *Id.* at subsection (3). *See, for example, supra* note 64 and accompanying text.

170. *Id.* at subsection (3). Here jurisdiction is based on the fact that the res in dispute is within the territory of the United States.

171. *Id.* at subsection (5). Although this exclusion is limited to torts committed in the United States, crimes of international law provides an exclusion for crimes of universal interest. The essential characteristic is that a state may participate in the repression of crimes of universal interest even though: (1) they were not committed in its territory, (2) were not committed by one of its nationals, or (3) were not otherwise within its jurisdiction to prescribe and enforce. These crimes may include piracy, genocide, slave trade, war crimes or acts of violence against diplomats. SWEENEY, OLIVER & LEECH, *supra* note 13, at 120-21.

172. *See supra* notes 167-170 and accompanying text.

173. Paust, *supra* note 135, at 43.

tional laws, whether or not human rights are involved.¹⁷⁴

The FSIA may also provide courts with another basis of jurisdiction.¹⁷⁵ In *Verlinden B.V. v. Central Bank of Nigeria*,¹⁷⁶ the central question presented to the United States Supreme Court was whether Congress exceeded the scope of Article III by granting federal subject matter jurisdiction over non-federal causes of action between aliens and foreign states.¹⁷⁷ Chief Justice Burger first construed section 1330¹⁷⁸ of the FSIA to allow suits by aliens against foreign states.¹⁷⁹ Although the Act itself did not mention suits by aliens, it applies to “any nonjury civil action against a foreign state . . . with respect to which the foreign state is not entitled to immunity.”¹⁸⁰ By holding that a suit against a foreign state under the Act necessarily raises questions of substantive federal law, the Supreme Court makes clear for the first time that such a suit indisputably falls within even a narrow reading of the “arising under” language of Article III.¹⁸¹ Application of this rationale and an interpretation that the FSIA includes heads of state within its definition provides the United States courts with a solution to the jurisdictional problem.

IV. A PROPOSED GUIDELINE FOR UNITED STATES COURTS TO RESOLVE THE ISSUE OF FORMER HEADS OF STATE IMMUNITY

The historical aspects and purposes of the doctrine of Sovereign Immunity are as important today as they were one hundred years ago.¹⁸² Internationally, reciprocal independence is upheld. The United States, as well as other foreign countries, grants foreign sovereigns immunity from jurisdiction within its territory so that later it may also be free from the jurisdiction of foreign states.¹⁸³ As

174. *Id.* This section may contain the customary international law violation exception to immunity. See *supra* notes 73, 119, 141 and accompanying text.

175. See *supra* note 166 and accompanying text.

176. 461 U.S. 480 (1983).

177. *Id.* at 1970.

178. “The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state . . . as to any claim for relief . . . with respect to which the foreign state is not entitled to immunity. . . .”

179. *Verlinden B.V.* 461 U.S. 480, 489.

180. *Id.* at 489.

181. Note, *Jurisdiction—Foreign Sovereign Immunity—An Action Brought by An Alien Against A Foreign Sovereign Under the Foreign Sovereign Immunities Act “Arises Under” Federal Law*, 24 VA. J. INT’L L. 201, at 209 (1983).

182. See *Kilrov v. Windsor* (Prince Charles, the Prince of Wales, et. al.), Civ. Action No. C-78-29 (N.D. Ohio 1978).

183. Carl, *supra* note 39, at 1010.

time passed, the United States found itself considering other compelling interests such as the adjudication of the claims of its citizens who were doing business with foreign governments.¹⁸⁴ The United States has extended its concerns to that of violations of internationally accepted human rights.¹⁸⁵

This comment, keeping the above concerns in mind, outlines a categorized approach to resolving issues of former head of state immunity. Because the issue rests upon the type of activity the foreign state or sovereign is involved in, it is necessary to put them into three categories. These categories are 1) public or official acts while acting head of state; 2) private and commercial acts while acting head of state, and 3) all acts committed after resignation, deposition, impeachment or the like.

First, there are public or political acts which the former head of state committed while he was the acting ruler. Following the principles behind the Act of State Doctrine,¹⁸⁶ public or official acts, in pursuit of a state's legitimate public purpose, must be protected. Thus, the United States should not judge the political actions of a foreign head of state. Not only would it be judging the head of state but it would also be judging the foreign government. Foreign policies are within the executive branch's control, and United States courts would over-step their bounds in adjudicating these matters.¹⁸⁷

The definition of "public" or "official" acts may change, depending upon the political belief of the one who is attempting to define it. Various factors must be considered. These are:

- 1) the form of government the head of state represents;
- 2) the laws of the foreign country the head of state represents; and
- 3) internationally accepted laws.

To illustrate this point, the facts of *Sison v. Marcos*¹⁸⁸ are helpful. In *Sison*, plaintiffs were victims of personal representatives of victims of torture, arbitral arrest, prolonged detention without trial, disappearance and presumed summary execution during the period of 1966 to 1986 in the Republic of the Philippines.¹⁸⁹ At that time,

184. See *supra* note 34 and accompanying text.

185. See *supra* notes 140-142 and accompanying text.

186. See *supra* notes 55-60 and accompanying text.

187. See *supra* notes 55-57 and accompanying text.

188. See *supra* note 1.

189. *Sison*, *supra* note 1, Plaintiff's Complaint, at 2.

Ferdinand E. Marcos was the president.¹⁹⁰ General Fabian C. Ver was Military Chief of Staff.¹⁹¹ Plaintiff Jose Maria Sison was widely regarded as an outspoken opponent to the Marcos administration and the leader of Nationalist Youth, a political organization that was established in 1964.¹⁹²

Because Mr. Sison was a leader against the Marcos regime, he was subjected to arrest, harassment and assassination attempts in the Philippines and finally went into hiding in 1968.¹⁹³ In 1977, he and his family were arrested without a warrant, taken to a Military Security Unit of the Philippine Army and later beaten and interrogated. This continued until he was released by order of President Corazon Aquino following the departure of Marcos in February, 1986.¹⁹⁴

In this case the Philippines government, although lead by a military regime during the Marcos years, was governed by a Constitution.¹⁹⁵ The Constitution contained a bill of rights, which was modeled after that of the United States.¹⁹⁶ In those bill of rights it stated that “no person shall be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws.”¹⁹⁷ Moreover, the law of nations prohibits torture, arbitrary arrest, prolonged detention without trial and summary execution of individuals.¹⁹⁸ This Comment assumes that the Sison facts are true and Marcos was responsible for these acts for the purposes of this discussion. Based on these laws, it can be reasonably concluded that the acts committed against Mr. Sison were not public or official acts in pursuit of a states’ legitimate public purpose. The fact that Marcos departed and a new president took over infers that the Philippine citizens determined that Marcos was acting for his own benefit, and outside the scope of his official capacity. If Marcos was not breaking the laws of the Philippine Constitution and was acting to protect the public from Mr. Sison, then his acts would be immune. Under the circumstances set out above, Marcos’ acts do not fall under the first category.

A general definition of “public acts”, which leaves room for in-

190. *Id.*

191. *Id.*

192. *Id.* at 4.

193. *Id.* at 5.

194. *Id.* at 8.

195. E. Fernando, *THE BILL OF RIGHTS*, at 276 (1970).

196. *Id.* at 264.

197. *Id.* Article III § 1(1)

198. *See supra* note 189.

terpretation, may be those acts, committed by a sovereign who is acting as a public power, that are designed to give effect to a state's public interest.¹⁹⁹ The Second Circuit in *Victory Transports v. Comisaria Generalde Abstecimientos y Transportes*,²⁰⁰ specified five situations which it defined as public acts,²⁰¹ which may be analyzed in conformity with the above definition.

Another way of determining public acts is to distinguish them from private and commercial acts, which leads us to the second category: private and commercial acts which the former head of state committed while he was the acting ruler. Here, foreign relations concerns are not as compelling as those of individuals who privately interact with foreign rulers.²⁰² If it is determined, through the analysis below, that the former ruler would not have been entitled to immunity for the acts he committed at the time he was acting as the recognized head of state, then immunity would not attach after he was retired, deposed, impeached or the like.

Generally, private acts may be defined as those acts, committed by a sovereign who is acting outside an official capacity, that are designed to further a private interest. Included in this definition are commercial acts, which are reiterated in the FSIA,²⁰³ acts committed in violation of the sovereign's own laws,²⁰⁴ and acts which violate internationally accepted laws.²⁰⁵

In the *Sison* example, Marcos' actions against Sison were arguably done in furtherance of his regime. If the laws of the Philippine Constitution reflect what was "for the public good," then Marcos acted in a private capacity to protect his position and maintain power because he violated the laws of the Philippines. In addition, the acts were in violation of the law of nations.

By interpreting the FSIA to include heads of state in the definition of "agency or instrumentality,"²⁰⁶ the courts may use the FSIA as a guideline for establishing commercial acts. Acts commit-

199. See *supra* notes 94, 100 and accompanying text; see also *Sharon v. Time, Inc.*, 599 F. Supp. 538, at 544 (S.D.N.Y. 1984).

200. 336 F.2d 354 (2d Cir. 1964).

201. See *supra* note 90.

202. See *supra* notes 61, 76, 92 and 100 and accompanying text.

203. 28 U.S.C. §§ 1330, 1602, 1603, 1605 (1982); see also, *supra* notes 167-171 and accompanying text.

204. In *U.S. v. Lee*, 106 U.S. 196, the Supreme Court Stated: "No man in this country is so high that he is above the law. No office of the law may set that law at defiance, with impunity. All the officers of the government from the highest to the lowest are creatures of that law and are bound to obey it."

205. See *supra* note 61, 95, 108-109, 118-119, 133-141 and accompanying text.

206. See *supra* note 160.

ted in violation of the sovereign's own laws should not be protected because this would contradict all policy arguments in favor of reciprocity and comity.²⁰⁷ The problem with this is that courts may have to scrutinize the laws of a foreign state. But in the alternative, if none of the compelling interests, stated above, are present, this argument is irrelevant to the issue of immunity.²⁰⁸ For example, Corazon Aquino is the recognized president of the Philippines. The Philippines waived immunity in Marcos' case.²⁰⁹ Concerns of comity and reciprocity are not in issue because the Philippines, as a sovereign state, will not be embarrassed politically if the United States heard the claim against Marcos.

Recently, United States courts have been refusing to grant immunity in cases where international law has been violated.²¹⁰ Since the United States incorporates international law as its law, violations of it may not be protected. Again, the FSIA may help the courts in analyzing acts in violation of international law.²¹¹

The third category is all acts which are subject to the laws of the United States, committed by the former head of state, who is no longer the acting head of state nor recognized by the United States as such. If the former head of state is within the territory of the United States and is acting in a private status here, s/he should be treated as if s/he had never been a sovereign. Hence, the laws of the United States should apply equally to her/him as they would to any other citizen. Immunity should not attach to the *person*. Only *acts* of foreign sovereigns should be protected. Of course, these arguments apply provided that the courts of the United States have jurisdiction over the former head of state's person and/or properties. The facts of *Sison* would not fall under this category since the claim arose in the Philippines, before Marcos was deposed and before he came to the United States.

The above proposal simplifies the issue of former head of state immunity and is open to interpretation. The central idea is to avoid supposing that "every case of controversy which touches foreign re-

207. See *supra* note 89 and accompanying text. If a ruler violates the laws of his country, he is not acting in furtherance of the public interest. Therefore, granting him immunity would not advance the interests of American foreign policy.

208. Forum non conveniens and other doctrines of the court may be a more appropriate means for discussing this issue.

209. Republic of the Philippines v. Marcos, 806 F.2d 344 (2d Cir. 1986).

210. See *supra* notes 72, 100 and 140 and accompanying text.

211. Section IV B of this comment provides an analysis. See *supra* notes 173-181 and accompanying text.

lations lies beyond judicial cognizance.”²¹²

CONCLUSION

Today, United States courts face many problems concerning head of state immunity. In all of the recent cases against Ferdinand Marcos, the courts struggle to find standards which allow courts to hear these claims without infringing upon the executive branch’s power to regulate foreign affairs. The FSIA and United States case law provide viable solutions to the United States jurisdictional problems regarding former heads of state found within its territory. For example, because torture is a universally recognized human rights violation and therefore a United States law, our courts have jurisdiction to decide the issue of immunity. This is supported with a great deal of recent case authority. Yet in the case of *Sison*, the federal district court refused to recognize the Law of Nations.²¹³ It chose instead to apply the Act of State Doctrine.

Ferdinand Marcos was once recognized by the United States as the lawful president of the Philippines. That is no longer true, and many lawsuits are being brought against him for numerous violations. Those violations of international law, Philippine law and basic human rights violations should not go unnoticed. Since case law does not provide courts with a standard in which to justly adjudicate these claims against Marcos, and future former heads of state, attorneys must use arguments not yet considered. This Comment’s proposal may simplify the issue.

The immunity issue is only one in which the courts must overcome. Even if the courts denied immunity to former heads of state, jurisdiction, statute of limitations, forum non conveniens and other issues must be resolved. So if the United States courts decided to make a brightline rule that former heads of state should be denied immunity from jurisdiction, the claim could still be dismissed because the acts were committed beyond the statutory time limit or because the foreign state would be a more appropriate forum.

*Lisa J. Damiani**

212. *Japan Whaling Ass’n v. American Cetacean Society*, 106 S. Ct. 2860 (1986) (quoting from *Baker v. Carr*, 369 U.S. 186, 211 (1962)).

213. *See supra* note 146. The question of whether the district court prematurely granted defendant’s motion to dismiss is pending before the ninth circuit.

* The author would like to thank Randy Scarlett of the Law office of Melvin M. Belli, and Paul Hoffman of the American Civil Liberties Union Foundation of Southern California.