OUR ALLIES HAVE RIGHTS, TOO:
JUDICIAL DEPARTURE FROM IN PERSONAM CASE LAW TO INTERFERENCE IN INTERNATIONAL POLITICS

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This Comment brings to light the startling role the courts play in U.S. foreign policy and their influence in the international domain. Under the guise of using the Foreign Sovereign Immunities Act to bring justice to U.S. citizens injured or killed in foreign states, the reasoning and motive of many circuit court decisions are now in question. Departing from the case law prerequisite of according "fair play and substantial justice" to defendants, many courts have stripped foreign state defendants of due process protections and lifted restrictions on judicial power to hale these nations to court. This Comment reveals the lack of foundation for these court decisions and urges the Supreme Court to affirm foreign state's rights to due process to limit courts' injurious interference in international politics and U.S. bilateral relations.

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INTRODUCTION

In 1983, suicide bombers from Hezbollah, believed to have been supported by the Iranian regime, bombed the U.S. Marine Corps barracks in Beirut, Lebanon, murdering 241 American servicemen.[1] In 2007, in a consolidated action of nearly one thousand petitioners, including the victims and their families, the D.C. District Court entered a default judgment against Iran of more than $2 billion in damages. The petitioners were unable to obtain their award until the Supreme Court affirmed the turnover of $1.75 billion of seized assets from an account belonging to the Central Bank of Iran in 2016.[2] One way to view this litigation is through the lens of the agony and prolonged injustice suffered by the families of the victims of the attack. However, these drawn out, ghastly proceedings also promulgate concern about the role this judgment, along with many other substantial damages awards,[3] played in the

[1] *Beirut Marine Barracks Bombing Fast Facts*, CNN NEWS (Nov. 2, 2016), http://www.cnn.com/2013/06/13/world/meast/beirut-marine-barracks-bombing-fast-facts/index.html.
[2] *See* Bank Markazi v. Peterson, 136 S. Ct. 1310, 1320 (2016).
[3] Even after the almost $2 billion payout, Iran still owes around $53 billion for outstanding judgments for numerous terrorist attacks occurring throughout the past 30 years, including the Pan Am Lockerbie bombing. Orde Kittrie, *Iran Still Owes $53 Billion in Unpaid U.S. Court Judgments to American Victims of Iranian Terrorism*, FOUND. FOR DEF. OF DEMOCRACIES (May 9, 2016), http://www.defenddemocracy.org/media-hit/orde-kittrie-after-supreme-court-decision-iran-still-owes-53-billion-in-unpaid-us-cour/.

continuous failed diplomatic relations with Iran over the past 30 years.

In light of the rising tensions in the Middle East, strong relations with Middle Eastern countries are essential to our national security, especially in the context of fighting *Da'esh* and other regional terrorists.[4] Federal courts' refusals to treat foreign states the same constitutional protections as U.S. citizens, aliens, and corporate defendants when subject to civil suits under U.S. laws may prove an irritant in bilateral relations with our allies. These systematic refusals also potentially carry significant and unforeseen political consequences on the international scale, particularly in light of the enactment of the Justice Against State Terrorism Act ("JASTA").[5]

With the enactment of JASTA, federal courts wield greater influence in the international realm and in the current state of court doctrine, pose a formidable threat to U.S. bilateral relations. Denying foreign states constitutional protections to which other defendants are entitled when subject to the jurisdiction of a U.S. court is not only an insult to foreign states, but it is also a direct contravention of the constitutional limits on judicial power and constitutional due process protections for defendants. The Supreme Court, therefore, needs to affirm that foreign state defendants are constitutionally entitled to due process protections in Article III courts.

This Comment will discuss the historical deference accorded to foreign states. Once enjoying absolute immunity from U.S. court jurisdiction, the enactment of the Foreign

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[4] *See, e.g.*, *Pak-Afg-US tripartite meeting to counter Daesh held in Kabul*, NATION (Sep. 14, 2017), http://nation.com.pk/national/14-Sep-2017/pak-afg-us-tripartite-meeting-to-counter-daesh-held-in-kabul-ispr; Mostafa, Mohamed, *Islamic State militants deliver menace to Kuwait in latest video*, IRAQI NEWS (Aug. 5, 2017), http://www.iraqinews.com/arab-world-news/islamic-state-militants-deliver-menace-kuwait-latest-video/.

[5] 28 U.S.C. § 1605B. Courtesy of Congress, foreign states no longer have to be designated as state sponsors of terrorism to be sued for acts of terrorism. Thus, all countries, including U.S. allies, are subject to suit if a petitioner seeks money damages against a country for injury caused by an act of international terrorism. *Id.*

Sovereign Immunities Act ("FSIA") in 1976 carved out exceptions to this immunity. The gradual decline in deference to foreign states has led several circuit courts in recent years to interpret the personal jurisdiction provisions of the FSIA to preclude due process protections for foreign state defendants, allowing the courts easier access to foreign states. This Comment asserts that denying foreign states due process protections violates the principles of the U.S. Constitution and established case law on personal jurisdiction. Foreign states are entitled to due process protections because they are subject to civil suit under the FSIA. Continuing to deny foreign states due process is an impropriety that will inevitably strain relations with allies and inhibit the formation of new diplomatic relations.

I. BRIEF HISTORY AND TEXT OF THE FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976

Foreign countries historically enjoyed absolute immunity from civil suits in the United States.[6] In the early 1900s, however, the globalization of the economy prompted courts to reconsider the absolute immunity of foreign states in a market where U.S. citizens could be injured and left without remedy.[7] Reluctant to interfere in the State Department's domain of international affairs, courts deferred to the judgment of the State Department on a case-by-case basis to determine if the immunity of the foreign state should be waived.[8] The State Department

[6] Absolute deference to foreign states was conclusively affirmed by the Court in the landmark case of The Schooner Exchange v. McFaddon, 11 U.S. 116, 137 (1812). The Schooner Exchange was a vessel previously owned by Americans McFaddon and Williams and taken by Frenchmen operating under the orders of Napoleon. McFaddon and Williams sued for the return of their vessel. "The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction." *Id.* at 136.

[7] *See* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 711-14 (1976) (Letter from Jack B. Tate, Acting Legal Adviser of the Dep't of State).

[8] *See Ex parte* Republic of Peru, 318 U.S. 578, 586-89 (1943) (the petitioner, "following the accepted course of procedure . . . sought recognition by the State Department of petitioner's claim of immunity."); Joseph W. Dellapenna,

accordingly adopted a policy that aimed to balance the need to provide a redress for injuries to U.S. citizens by foreign states, while maintaining respect for the sovereignty of these nations.[9]

Due to the subsequent confusion in the courts concerning the application of the policy,[10] in 1973, the State Department urged Congress to pass legislation that would establish uniform criteria for determining whether a foreign state was entitled to immunity and to transfer the power to make this determination entirely to the judiciary.[11] The State Department desired to "make the question of a foreign state's entitlement to immunity . . . justifiable by the courts, without participation by the Department of State" so that the State Department would be "free . . . from the pressures by foreign states" and effect consistency in U.S. laws.[12] Congress subsequently enacted the Foreign Sovereign Immunities Act in 1976 establishing exceptions to foreign state immunity from civil suits.[13]

The FSIA provides the only opportunity under domestic law for U.S. citizens to sue foreign states.[14] The Act is purposed to "serve the interests of justice" and "protect the rights of both foreign states and litigants in United States courts."[15] Thus, the

Interpreting the Foreign Sovereign Immunities Act: Reading or Construing the Text?, 15 LEWIS & CLARK L. REV. 555, 559-560 (2011).

[9] *Alfred Dunhill of London*, 425 U.S. at 713 (Letter from Jack B. Tate, Acting Legal Adviser of the Dep't of State). The State Department declared it would hold a nation immune from all suits involving "public" acts, but immunity would be waived in cases involving "private" acts, such as ownership of most types of real property in the United States. *Id.* at 711, 714.

[10] The State Department gave no guidelines to the courts on how to distinguish between "public" and "private" acts. Courts thus attempted generally to limit foreign states' immunity to "public and non-commercial purposes." Dellapenna, *supra* note 8, at 559-60 (citing Victory Transport, Inc. v. Comisaria General de Abastecimento y Transportes, 336 F.2d 354, 358-60 (2d Cir. 1964). Despite attempts to categorize public and private acts, courts were unable to produce consistent opinions. *See Victory Transport*, 336 F.2d at 358.

[11] Dellapenna, *supra* note 8, at 561 (citing 119 Cong. Rec. 2215 (1973) (letter from William P. Rogers, Sec'y of State to the President of the Senate).

[12] *Id.*

[13] *See generally* 28 U.S.C. §§ 1331-2, 1601 *et seq.*

[14] *See, e.g.*, Aryeh S. Portnoy et al., *The Foreign Sovereign Immunities Act: 2012 Year in Review*, 20 L. & BUS. REV. OF THE AMS. 565, 567 (2012).

[15] 28 U.S.C. § 1602 (1976).

text and structure of the FSIA maintain the presumption of a foreign state's immunity from suit unless the petitioner can prove that one of the Act's enumerated exceptions applies.[16]

A foreign state may waive its immunity either explicitly or implicitly.[17] Immunity is waived in circumstances

in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.[18]

A foreign state will not be immune in certain cases involving disputes over property rights where the property is located in, or connected with a commercial activity performed in, the United States;[19] money damages for certain tortious conduct of an "official or an employee of that foreign state while acting within the scope of his office or employment";[20] and enforcement of agreements "concerning a subject matter capable of settlement by arbitration under the laws of the United States" between the foreign state and a private party,[21] among other circumstances.[22] Further, even if the court has jurisdiction over a case involving a foreign state, the court must also establish

[16] *Id.* § 1604.
[17] *Id.* § 1605(a)(1). The definition of a "foreign state" includes a "political subdivision" or "agency or instrumentality" of the foreign state if it is an "organ" of the foreign state, or if the political subdivision was created under the laws of that country. 28 U.S.C. § 1603(a), (b)(2)-(3).
[18] 28 U.S.C. § 1605(a)(2).
[19] *Id.* § 1605(a)(3)-(4).
[20] *Id.* § 1605(a)(5).
[21] *Id.* § 1605(a)(6). Subject to certain conditions, including the requirement that "the arbitration takes place or is intended to take place in the United States." *See id.* §§ 1605 (a)(6)(A) to (C), 1607.
[22] *See id.* § 1605 (b)-(d) (2008) (addressing suits in admiralty, maritime liens, and foreclosures of preferred mortgages).

jurisdiction over assets of the foreign state to enforce a judgment against the state.[23]

In 2008, Congress added a "terrorism exception" to the FSIA.[24] Under this provision, immunity is waived in cases seeking money damages against the defendant foreign state for personal injury or death caused by "an act of torture, extrajudicial killing, aircraft sabotage, hostage taking," or material support by the foreign state in the implementation of such acts.[25] While this exception only applies to foreign states who have been designated as state sponsors of terrorism,[26] in September 2016, Congress added section 1605B, as part of JASTA, to abrogate the immunity of *any* foreign state in cases in which money damages are sought for personal injury or death "occurring in the United States" and caused by "an act of international terrorism in the United States."[27]

II. PERSONAL JURISDICTION REQUIREMENTS AND THE FSIA

For the past 70 years, courts have haphazardly shifted and modified the requirements of personal jurisdiction over a defendant in an effort to provide adequate limitations on the scope of judicial power and to ensure procedural justice to defendants.[28] Notwithstanding the requirements of any law, statute, or regulation, courts may only exercise jurisdiction over the party if it is consistent with Fifth Amendment due process

[23] 28 U.S.C. § 1609 (1976) (" . . . the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in section 1610 and 1611 of this chapter."). The issue judgment enforcement is outside the scope of this Comment; this Comment focuses exclusively on the court's exercise of personal jurisdiction over the defendant.
[24] *Id.* § 1605A(a)(1).
[25] *Id.*
[26] *Id.* § 1605A(a)(2); *see generally* 28 U.S.C. § 1605A (2008).
[27] 28 U.S.C. § 1605B(b); 28 U.S.C. § 1605A (2008). This also includes certain tortious acts committed by the foreign state.
[28] *See generally* Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945); Gosia Spangenberg, *The Exercise of Personal Jurisdiction over some Foreign State Instrumentalities must be Consistent with Due Process*, 81 WASH. L. REV. 447, 450-51 (2006).

guarantees.[29] However, a defendant must be a "person" under the Constitution to be afforded due process.[30] Accompanying the waning deference to foreign states, some courts began to doubt not only if foreign states should be accorded absolute immunity, but if they were even "persons" under the Constitution.[31] Other courts continue to faithfully ensure that foreign states are accorded due process as defendants in a civil suit.[32]

The disparity is significant: holding a foreign state is not a person under the Constitution enables a court to exercise jurisdiction over the defendant foreign state if the petitioner can show that he provided sufficient service of process on the defendant,[33] and that the dispute arises from one of the exceptions enumerated in the FSIA.[34] In addition to the above requisites, due process requires that a defendant has sufficient contacts within the United States before being haled into a federal court. Despite federal courts' inconsistent treatment of foreign sovereigns, the Supreme Court has yet to decide the issue.[35]

A. In Personam Analysis and According Due Process

For a federal court to hear a case, the statutory requirements for personal and subject matter jurisdiction must be met.[36] Beyond the applicable statutory requirements for establishing jurisdiction over the defendant, courts cannot exercise jurisdiction where it violates the defendant's due

[29] *See, e.g.*, Marbury v. Madison, 5 U.S. 137, 177 (1803) ("It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it.").
[30] Spangenberg, *supra* note 28, at 451.
[31] *See infra* Part II.B.
[32] *See infra* Part II.A.
[33] 28 U.S.C. § 1608 (1976). For service of process to be sufficient, the defendant foreign state, or its agency or instrumentality, must have received adequate notice of the nature of the suit.
[34] *See id.* §§ 1604-1607.
[35] *See* Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 619 (1992) (assuming, but not deciding, that a foreign state is a "person" for the purposes of due process).
[36] *See* 28 U.S.C. §§ 1330-32, 1605, 1295; Fed. R. Civ. P. 12.

process protections.[37] Thus, a court may only obligate a defendant to show up in court if the plaintiff can establish that the defendant has sufficient connections, or contacts, with the forum such that haling the defendant to court would not violate the plaintiff's due process guarantees.[38]

Due process is satisfied if the nonresident defendant maintains "minimum contacts" with the forum such that subjecting the defendant to suit in the forum does not offend "traditional notions of fair play and substantial justice."[39] While the Supreme Court has not specified the amount of "minimum contacts" needed to satisfy due process, it established several "benchmarks" to limit the analysis: *no* contacts with the forum is not sufficient; the defendant's contacts must be related to the cause of action, and not randomly connected to the forum; and the contacts must be substantial.[40] These "minimum contacts" include assets in the forum, dealings with a citizen who resides

[37] *See infra* notes 39 to 62 and accompanying text. "[A] statute cannot grant personal jurisdiction where the Constitution forbids it." *See also* Price v. Socialist People's Libyan Arab Jamahiriya, 294 F.3d 82, 95 (D.C. Cir. 2002); Creighton Ltd. v. Government of Qatar, 181 F.3d 118, 124 (D.C. Cir. 1999); Gilson v. Republic of Ireland, 682 F.2d 1022, 1028 (D.C. Cir. 1982); Harris Corp. v. National Iranian Radio & Television, 691 F.2d 1344, 1353 (11th Cir. 1982).

[38] U.S. CONST. amend. V. The Fifth Amendment states: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . " *See* Spangenberg, *supra* note 28, at 450-51.

[39] Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945); *See* David G. Thomas, *Personal Jurisdiction in the Nebulous Regions of Cyberspace: A Call for the Continued Relaxation of Due Process and Another Debilitating Blow to Territorial Jurisdiction*, 31 SUFFOLK U.L. REV. 507, 513, 515-16 (1997-98). To satisfy the second prong of the test, "fair play and substantial justice" of obligating the party to come to court, several factors are considered: the inconvenience for the defendant of being haled into court in a particular forum, the interest of the plaintiff in obtaining relief in that forum, the interest of the forum state in protecting the interests of its citizens, and the general interest of furthering specific "substantive social policies" and providing effective relief. *See also* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476-77 (1985); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980).

[40] Thomas, *supra* note 39, at 513-14; *Int'l Shoe*, 326 U.S. at 318-320. Even if the defendant's contacts in the forum are unrelated to the alleged injury, if the contacts are "continuous and systematic" such that the defendant is "at home" in the forum, the defendant will be subject to suit in that forum. Daimler AG v. Bauman, 134 S. Ct. 746, 761 (2014) (citing Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011)).

in the forum, or other deliberate activities in the forum.[41] "[T]he defendant's conduct and connection with the forum State [must be] such that he should reasonably anticipate being haled into court there."[42]

Even where the defendant lacks physical contacts in the forum, such as property or other tangible assets, if the defendant has "deliberately" engaged in activities or "purposefully directed" his actions towards residents in the forum, the forum state has personal jurisdiction over the defendant.[43] For example, *Republic of Argentina v. Weltover, Inc.* involved a breach of contract claim between a country and petitioner bank (collectively "Argentina"), and respondent bondholders, a Swiss bank and two Panamanian corporations.[44] The Supreme Court held that the breach of contract, the rescheduling of the bonds, had a "direct effect in the United States" pursuant to section 1605(a)(2) of the FSIA because Argentina was contractually

[41] *See Int'l Shoe*, 326 U.S. at 320 (maintaining a business and thus subject to the "benefits and protection of the laws of the state," establishes sufficient minimum contacts in the forum). When a foreign defendant is subject to suit under the FSIA, "the relevant area in delineating contacts is in the entire United States, not merely the forum state." *Altmann*, 317 F.3d at 970 (quoting Richmark Corp. v. Timber Falling Consultants, Inc., 937 F.2d 1444, 1447 (9th Cir. 1991)).

[42] *Burger King Corp.*, 471 U.S. at 474 (quoting *World Wide Volkswagen Corp.*, 444 U.S. at 297).

[43] *Id.* at 476-77 (quoting Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774-5, 781 (1984)). As an example: Burger King brought suit in the Southern District of Florida against a nonresident franchisee, alleging breach of franchisee obligations. *Id.* at 468. The franchise was located in Detroit, Michigan, and the cause of action arose from a breach of contract at this location, but the governing contracts of all Burger King franchisees "provide that the franchise relationship is established in Miami and governed by Florida law," and all required payments are to be sent to the Miami headquarters. *Id.* at 466. Because the franchisee Rudzewicz voluntarily agreed to a contract with a Florida corporation that "envisioned continuing and wide-reaching contacts with Burger King in Florida" and because his refusal to make the required payments inflicted foreseeable injuries to the corporation in Florida, he had sufficient minimum contacts in Florida. *Id.* at 480.

[44] *See generally* Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 609-10 (1992).

obligated to deliver money to a bank account in New York.[45] The issuance of the bonds constituted a "commercial activity" having a "direct effect" on the United States, and the rescheduling of the maturity dates of the bonds was "in connection with" the commercial activity.[46] Argentina had thus "purposefully availed itself of the privilege of conducting activities within the [United States]," thereby subjecting Argentina to suit without offending due process.[47]

For due process to be satisfied, the nonresident defendant must "purposefully avail itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protection of its laws."[48] In *Altmann v. Republic of Australia*, an heiress sued Australia and the state-owned Gallery Museum for the return of paintings expropriated by the Nazis during World War II.[49] The Gallery had not only marketed several publications and the paintings at issue to attract U.S. citizens to the Gallery, but had also established additional contacts with the United States with its promotion and sponsorship of tourism.[50] Accordingly, the Ninth Circuit held that the foreign country's targeted marketing of paintings in the

[45] *Id.* at 617-18. In efforts to stabilize its currency, Argentina agreed to issue bonds in various locations in the U.S., including New York, in exchange for a predetermined amount of U.S. dollars to repay its foreign debts when the bonds matured. However, when Argentina did not possess sufficient U.S. dollars to satisfy its contractual obligations, it asked respondents to reschedule the bonds. The respondents refused and sued Argentina for breach of contract when Argentina subsequently refused to pay.

[46] *Id.* at 619-20. (stating the "direct effect" provision, requiring the carrying out of commercial activities related to the cause of action pursuant to § 1605(a)(2) of the FSIA, "might be construed as embodying the "minimum contacts" test of *International Shoe*").

[47] *Id.* at 620 (citing *Burger King Corp.*, 471 U.S. at 475) (citations omitted).

[48] *Burger King Corp.*, 471 U.S. at 475 (citing Hanson v. Denckla, 357 U.S. 235, 253 (1958); *see also* Thomas, *supra* note 39, at 518 (citing Hanson v. Denckla, 357 U.S. 235, 251 (1958)) (explaining that the purpose of this limitation is both to protect nonresident defendants from having to travel to inconvenient forums and to limit state power).

[49] *See generally* Altmann v. Republic of Australia, 317 F.3d 954, 970 (9th Cir. 2002).

[50] *Id.*

United States established sufficient minimum contacts to comport with due process.[51]

The Fifth Circuit in *Kelly v. Syria Shell Petroleum* also adhered to the principle that the defendant's actions must be both intentional and related to the cause of action before the court could exercise jurisdiction over the defendant.[52] Here, the defendant Syrian companies entered into two contracts that required the other party to the contract to engage in services in the United States.[53] The petitioner's claim, however, arose out of a tortious act by the Syrian companies on foreign soil.[54] The court held that because the petitioner's claim did not arise out of the contacts associated with the contracts, the court could not exercise jurisdiction over the defendants.[55]

While only U.S. citizen defendants are entitled to all constitutional rights, case precedent reveals that defendants in civil suits are "persons" entitled to due process protections for the purposes of establishing personal jurisdiction.[56] For instance, courts require that domestic corporations, privately-owned foreign corporations, and even aliens have sufficient "minimum contacts" related to the dispute before it may hale them to court.[57] As an example, in *Helicopteros Nacionales v. Hall*,[58] the defendant, a Colombian corporation, cashed checks

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[51] *Id.*

[52] Kelly v. Syria Shell Petroleum Dev. B.V., 213 F.3d 841, 855 (5th Cir. 2000).

[53] *Id.* at 844-45, 854-55.

[54] *Id.*

[55] *Id.*

[56] *See, e.g.*, *Int'l Shoe*, 326 U.S. at 316-9 (according due process to a domestic corporation); Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 111-13 (1987) (extending due process to foreign defendant corporation); Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 418-19 (1984); Mwani v. Osama Bin Laden, 417 F.3d 1, 8 (D.C. Cir. 2005) (in discussing the rights of Bin Laden, an alien, the court must provide not only notice to the defendant, but also ensure the defendant is properly served and there is a "constitutionally sufficient relationship between the defendant and the forum.") (quoting Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., 484 U.S. 97, 103-4 (1987)) (citations omitted).

[57] *See id.*

[58] *See generally* Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984).

drawn on a bank in Texas, but the cause of action arose out of a helicopter crash unrelated to the corporation's contacts with Texas. Because the corporation's contacts were slight and unrelated to the suit, the Supreme Court held it was immune from the suit.[59]

Following precedent[60], many courts have limited exercising jurisdiction over a foreign country to only circumstances where the requirements of the FSIA and constitutional due process are met.[61] This practice is consistent with the requirement that courts have long upheld: to only

[59] *Id.* at 409-416.

[60] In re Terrorist Attacks on September 11, 2001, 538 F.3d 71, 80 (2nd Cir. 2008); Altmann v. Republic of Australia, 317 F.3d 954, 970 (9th Cir. 2002); See transport Wiking Trader Schiffarhtsgesellschaft MBH & Co., Kommanditgesellschaft v. Navimpex Centrala Navala, 989 F.2d 572, 580 (2nd Cir. 1993) (agency); Callejo v. Bancomer, S.A., 764 F.2d 1101 n.5 (5th Cir. 1985); De Sanchez v. Banco Central de Nicaragua, 770 F.2d 1385, 1390 n. 4 (5th Cir. 1985); Siderman de Blake v. Republic of Argentina, 965 F.2d 699, n.4 (9th Cir. 1992); In re Chase, 835 F.2d 1341, 1344-45 (11th Cir. 1988) (stating that service of process should meet the requirements of the applicable statute, but that the requirements of due process "constrains a federal court's power to acquire personal jurisdiction"). For another example, see the landmark case of Texas Trading & Milling Corp., 647 F.2d 300 (2nd Cir. 1981). This case concerned the repudiation of a contract by Nigeria. In light of its "breakneck speed" of development due to exports of oil, Nigeria contracted with numerous countries to import cement, (wrongly) assuming that many would repudiate on their contracts. *Id.* at 302-3. Nigerian ports soon became overloaded with numerous vessels carrying vast amounts of cement. *Id.* Nigeria subsequently repudiated on many of the contracts, labeled as "one of the most enormous commercial disputes in history," thus bringing to the Southern District of New York four claims arising from breach of contract with American companies. *Id.* The Second Circuit stated that Nigeria and Central Bank would certainly expect to be "haled" into court in the United States after having "invoked the benefits and protections of (American) laws." *Id.* at 315 (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958); Shaffer v. Heitner, 433 U.S. 186, 216 (1977)). The defendants had stored "large cash balances" in an account in New York, thus choosing "American law and process as their protectors." *Id.*

[61] "[S]ubject matter jurisdiction plus service of process equals personal jurisdiction. But, the Act cannot create personal jurisdiction where the Constitution forbids it." Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 308 (2nd Cir. 1981) (internal citation omitted). *See* Fed. R. Civ. P. 4(k) (service of summons establishes personal jurisdiction over the defendant when it is authorized by federal statute *and* "exercising jurisdiction is consistent with the United States Constitution and laws.").

subject a defendant to suit when doing so would not offend "traditional notions of fair play and substantial justice."[62] However, after the Supreme Court's decision in *Weltover*, many lower courts began to depart from precedent and deny foreign states due process protections.

B. The "Logic" Behind the Denial of Due Process to Defendant Foreign States

Courts consistently affirm that "a statute cannot grant personal jurisdiction where the Constitution forbids it."[63] However, there is a circuit court split on whether a foreign state or its instrumentality is a "person" under the Constitution such that it is entitled to due process protections. Before *Weltover*, it was widely presumed that the process due to foreign states was sovereign immunity.[64] The Supreme Court in *Weltover* assumed, "without deciding," that a foreign state was a "person" for the purposes of due process.[65] The Court compared this assertion in *Weltover* to its decision in 1966, in *South Carolina v. Katzenbach*.[66] *Katzenbach* involved a suit brought by South Carolina challenging the constitutionality of the Voting Rights Act of 1965.[67] South Carolina argued that several provisions of the Act abridged due process by precluding judicial review of findings by the State Attorney General, among other things.[68] The Supreme Court summarily dismissed this assertion in a single line: "The word 'person' in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union, and to our knowledge this has never been done by any court."[69] The Court further stated that "a State [cannot] have

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[62] *See generally* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).
[63] Gilson v. Republic of Ireland, 682 F.2d 1022, 1028 (DC Cir. 1982); *accord* Harris Corp. v. National Iranian Radio & Television, 691 F.2d 1344, 1353 (11th Cir. 1982).
[64] *See supra* Part II.A.
[65] Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 619 (1992).
[66] *Id.*
[67] *See generally* South Carolina v. Katzenbach, 383 U.S. 301 (1966).
[68] *Id.* at 323.
[69] The only supporting citation was a footnote from what can be termed as the "other" International Shoe case which was litigated in Louisiana state court. *Id.*

standing as the parent of its citizens to invoke these constitutional provisions against the Federal Government, the ultimate *parens patriae* of every American citizen."[70] While the Court's statement summarily denying states of personhood under the Constitution is devoid of analysis, it has caused a pronounced shift in court scrutiny of constitutional rights of foreign states in the courtroom.[71]

The District of Columbia ("D.C.") Circuit Court in *Price v. Socialist People's Libyan Arab Jamahiriya* was the first to apply the reasoning in *Katzenbach* to foreign states in its personal jurisdiction analysis under the FSIA.[72] The court concluded that, if States of the Union were not entitled to due process, foreign states could certainly not be entitled to the same.[73] Moreover, after the 1996 amendments to the FSIA, providing for abrogation of immunity in suits of money damages arising from injury or death from certain terrorist acts,[74] the court asserted that "the antiterrorism amendments changed [the] statutory framework [of the FSIA]."[75] The court concluded that the plain language of the statute as amended did not implicate a due process

at 324 (citing Int'l Shoe v. Cocreham, 246 La. 244, 255, 266 n.5 (1964) ("Indeed, it may well be doubted that the parties here are entitled to raise this question [that the law discriminates local or intrastate business concerns and denies Fifth Amendment due process by making broad classifications of the businesses]. The rights protected by the Fifth Amendment are in favor of persons, not States, and the alleged injured firms are not parties to the litigation."). This case centered on the constitutionality of a federal act that prohibited states from taxing businessmen or corporations engaged in interstate commerce soliciting business only in that state.

[70] *Katzenbach*, 383 U.S. at 323-24.

[71] *See* Stephen J. Leacock, *The Commercial Activity Exception Under the FSIA, Personhood under the Fifth Amendment and Jurisdiction over Foreign States: A Partial Roadmap for the Supreme Court in the New Millennium*, 9 WILLIAMETTE J. INT'L L. & DISP. RESOL. 41, 47 (2001).

[72] Price v. Socialist People's Libyan Arab Jamahiriya, 294 F.3d 82, 87-90 (D.C. Cir. 2002). This case arose out of claims of two Americans against Libya for hostage taking and torture occurring in Libya in 1980. The court had subject matter jurisdiction over the defendant Libya, pursuant to section 1605(a)(7) [current version at 1605A(a)(1)] because Libya was designated as a state sponsor of terrorism. *Id.*

[73] *Id.* at 96-97.

[74] 28 U.S.C. § 1605(a)(7) (current version at 1605A (2008)).

[75] *Price*, 294 F.3d at 90.

requirement because the overlap of "minimum contacts" language of due process and the "direct effects" language of section 1605(a)(2) had been effectively undermined by a provision that did not require direct effects in the United States for the FSIA to apply.[76] "Under its plain terms, the new law extends extraterritoriality much further than the traditional reach of the *International Shoe*."[77] Thus, the D.C. Circuit held that establishing subject matter jurisdiction and service of process on the defendant, the foreign state of Libya, were alone sufficient to hale the foreign state into a U.S. district court.[78]

Following suit, in *TMR Energy v. State Property Fund of Ukraine*, the plaintiff filed a petition with the D.C. District Court for confirmation of an arbitral award coming out of an arbitration proceeding in Sweden against the State Property Fund of Ukraine ("SPF") for breach of contract.[79] The court held that SPF was subject to its jurisdiction because, using the reasoning from *Price*, "in common usage, the term 'person' does not include the sovereign," and foreign states should not be accorded due process if "States of the Union" are not entitled to due process.[80] The court stated that the foreign state must look to "international law and to the comity among nations" rather than the due process clause to find "protection in the American legal system."[81]

The court in *TMR Energy* also held that because the SPF is an "agent of the State," it also is not entitled to due process: "there is no reason to extend to the SPF [as an agent of the state that is not a distinct juridical entity] a constitutional right that is denied to the sovereign itself."[82] While the dispute was clearly within the FSIA provision concerning awards from arbitrations

[76] *Id.*
[77] Id. at 90 (quoting Lee M. Caplan, The Constitution and Jurisdiction over Foreign States: The 1996 Amendments to the Foreign Sovereign Immunities Act in Perspective, 41 VA. J. INT'L L. 369, 408 (2001)).
[78] Id.
[79] TMR Energy Ltd. V. State Property Fund of Ukraine, 411 F.3d 296, 298-99 (D.C. Cir. 2005).
[80] *Id.* at 300.
[81] *Id.*
[82] *Id.* at 301.

governed under international law, there was no evidence to indicate that the SPF had any contact at all with, or any property within, the United States.[83]

As seen above, denying foreign states due process protections enables courts to easily acquire "power" over sovereign nations, including U.S. allies. Courts have begun to obligate nations to come to court, often resulting in default judgments against them because nations often refuse to appear, while at the same time allowing aliens and foreign corporations with a similar amount of contacts to escape liability.[84] Not only is this disconcerting from a diplomacy standpoint, but it also raises questions regarding the motives of the courts who would summarily deny foreign states due process for jurisdictional purposes and willingly depart from case precedent.

III. *KATZENBACH* REASONING CANNOT EXTEND TO FOREIGN STATES

"In *Weltover*, the U.S. Supreme Court unavoidably approved the application of a minimum contacts analysis as the basis for determining that a U.S. court has jurisdiction over a foreign state."[85] However, many courts have relied on the lone statement in *Katzenbach* with little to no outside support for their assertion that foreign states are not entitled to due process.[86] While the veracity of the Court's assertion in *Katzenbach* will not be questioned here, courts have wrongly

[83] *Id.* at 299-300.

[84] *See supra* notes 54 to 57. Nations almost never respond to the summons or interrogatories, much less show up to court. This often results in substantial money awards against the defendant nations. *See* 28 U.S.C. § 1608(e); *see e.g.*, Rux v. Republic of Sudan, 495 F. Supp. 2d 541, 567-69 (E.D. Va. 2007) (awarding $7.9 million in damages); Harrison v. Republic of Sudan, 882 F. Supp. 2d 23, 51 (D.D.C. 2012) (awarding petitioners over $78.5 million in compensatory damages and $236 million in punitive damages) Rimkus v. Islamic Republic of Iran, 750 F. Supp. 2d 163, 185 (D.D.C. 2010) (awarding over $5 million in punitive damages); Moradi v. Islamic Republic of Iran, 77 F. Supp. 3d 57, 69-72 (D.D.C. 2015) (awarding over $6 million for pain and suffering, $4 million for solatium damages, and over $10 million for punitive damages).

[85] Leacock, *supra* note 71, at 46.

[86] *See supra* Part II.B.

extended *Katzenbach* reasoning in finding that because States of the Union cannot be accorded due process, foreign states are also not entitled to due process.

Katzenbach logic cannot be applied to FSIA cases for the following reasons. First, South Carolina as the plaintiff used due process protections to invalidate a federal legislation, whereas foreign states assert due process as a procedural *defense* against being haled to court "as unwilling defendants."[87] Thus, "*Katzenbach* represented an attempt at overreaching by an individual state as it sought to use the Due Process Clause . . . as a *sword* rather than as a *shield*."[88] Further, States of the Union have "broad procedural immunity" under the Eleventh Amendment.[89] The constitutional provision of due process seeks to protect the defendant from *state* oppression.[90] The Fourteenth Amendment obligates States to afford all of their citizens due process of law.[91] Since States are obliged to give due process, States themselves cannot be granted due process.[92]

On the rare occasions when a state is a defendant, as a "subcomponent of the United States, the state will always have minimum contacts with the forum" such that a violation of due process would never be questioned.[93] Unlike the States of the Union, the question of connections to the forum for nonresident defendants, corporations, and foreign states will always be present; "absent consent to personal jurisdiction, there must be some connection between the parties to the litigation and the judicial forum, regardless of the sovereign status of the

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[87] Leacock, *supra* note 71, at 48 n.32 (citing Victoria A. Carter, Note, *God Save the King: Unconstitutional Assertions of Personal Jurisdiction over Foreign States in U.S. Courts*, 82 Va. L. Rev. 357, 362 (1996).

[88] Leacock, *supra* note 71, at 48 (emphasis sustained).

[89] U.S. CONST. amend. XI. *See* Leacock *supra* note 71, at 48.

[90] U.S. CONST. amend. XIV. This prohibits States from depriving their citizens of "life, liberty, or property without due process of law."

[91] *Id.*

[92] *Id.*

[93] *Katzenbach* involved a State that characteristically had substantial contacts with the United States. Leacock, *supra* note 71, at 48 n.32 (quoting Carter, *supra* note 88, at 362).

parties."[94] Since the United States is a "person" in international law,[95] a subcomponent of the United States cannot be a person, much like an organ of a biological person cannot be a "person."[96] While *Katzenbach* supports this "conceptual paradigm," "the intellectual force of this conception spontaneously disintegrates when applied to foreign states because they are not sub-components of a state in the way in which each of the 50 states is a sub-component of the United States."[97]

The D.C. Circuit in *Price* held "it would be highly incongruous to afford greater Fifth Amendment rights to foreign nations, who are entirely alien to our constitutional system , than are afforded to the states, who help make up the very fabric of that system."[98] As established above, these due process rights are not greater, but entirely distinct from those at issue in *Katzenbach*, as South Carolina was not asserting a due process defense for being subject to suit, but in fact consented to the Court's jurisdiction as the plaintiff challenging the constitutionality of a federal law.

Courts' denial of foreign states as "persons" under the Constitution thus lacks foundation.[99] The subsequent ease with which courts can subject a foreign state to a civil suit in the United States has played an impactful role in U.S. foreign policy and bilateral relations. Concluding that the FSIA personal jurisdiction provision requires due process to be accorded to foreign states is fundamental to not only ensure courts treat foreign states as they treat corporate or alien defendants, but also to restrain courts from interfering in international politics.

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[94] *Id.*

[95] The traditional view was that "only fully sovereign states could be persons in international law." *Id.* at 49-50 (quoting LOUIS HENKIN ET AL., INTERNATIONAL LAW 241 (3d ed. 1993)).

[96] *Id.*

[97] *Id.* at 50.

[98] Price v. Socialist People's Libyan Arab Jamahiriya, 294 F.3d 82, 96 (D.C. Cir. 2002).

[99] *See supra* Part II.B.

IV. A FOREIGN STATE IS A "PERSON" FOR THE PURPOSES OF DUE PROCESS

"[F]oreign countries' links to the United States . . . are to be tested under the Fifth . . . Amendment to the Constitution (as well as under the F.S.I.A)."[100] Courts that have held a foreign state is not a "person" have failed to give any sustainable constitutional or textual basis for this reasoning.[101] A foreign state is made subject to civil suit by the FSIA, and for this reason, the defendant foreign state is entitled to due process. While not all constitutional protections are available to foreign defendants, all defendants, including aliens, are entitled to due process when subject to U.S. law in Article III courts.[102] Due process protections have also been routinely accorded to privately-owned foreign corporations, despite their limited constitutional protections.[103]

Upholding due process protections to defendant foreign states does not necessarily connote that they are entitled to all benefits of the Constitution, but rather that as defendants subject to Article III courts,[104] they are entitled to procedural protections

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[100] Leacock, *supra* note 71, at 43 n.7 (quoting Andreas F. Lowenfeld, *Nationalizing International Law: Essay in Honor of Louis Henkin*, 36 COLUM. J. TRANSNAT'L L. 121, 138-39 (1997)).

[101] *See supra* Parts II.B., Part III.

[102] *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 261 (1990) (holding that a nonresident alien is not protected by the Fourth Amendment). However, "all of the trial proceedings [were] governed by the Constitution. All would agree, for instance, that the dictates of the Due Process Clause of the Fifth Amendment protect the defendant." *Id.* at 278 (Kennedy, J., concurring). *See also* Boumediene v. Bush, 553 U.S. 723, 732 (2008) (holding that alien detainees at Guantanamo Bay had a constitutional right to the writ of habeus corpus); *In re* Terrorist Attacks on Sept. 11, 2001, 538 F.3d 71, 93 (2d. Cir. 2008); Mwani v. Bin Laden, 417 F.3d 1, 12-14 (D.C. Cir. 2005) (holding that contacts with the United States must be established before it could exercise jurisdiction over defendant Osama Bin Laden); Spangenberg, *supra* note 28, at 457-59.

[103] *See* Daimler AG v. Bauman, 134 S. Ct. 746, 761 (2014); Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 111-13 (1987); Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 418-19 (1984).

[104] *See* U.S. CONST. art. III, § 2.

embodied within our judiciary system.[105] Withholding due process protections from a defendant foreign state naturally removes a constitutionally-set limitation on judicial power. Enabling courts to decide who is afforded due process takes away the limiting nature of due process on judicial power and instead turns it into a tool of the judiciary.

A. Because Foreign Corporations are Accorded Due Process, Foreign States are Entitled to the Same

According foreign corporations due process while denying foreign states the same is both inconsistent with the requirements of the FSIA and with case law. Court precedent holds that all corporations, domestic and foreign, are "persons" for the purposes of due process.[106] Moreover, the FSIA defines the foreign state as including any "political subdivision of a foreign state or an agency or instrumentality of a foreign state," which includes state-owned corporations.[107] As discussed in *Weinstein v. Islamic Republic of Iran*: "[T]he purpose of the [Terrorist Risk Insurance Act] was to override the presumption of independence of agencies and instrumentalities from their foreign state owners."[108] Because corporations, whether domestic or foreign, are accorded due process protections, and because the FSIA regards foreign states the same as state-owned corporations, logically, foreign states should also be accorded the same protections as corporations. Further, attempting to distinguish between privately-owned and state-owned corporations, in an effort to remain consistent with the reasoning that foreign states are not constitutional "persons," is beyond the proper scope and expertise of the court.

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[105] *See generally* Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945); *see supra* Part II.A.

[106] *See supra* notes 56-62 and accompanying text.

[107] 28 U.S.C. § 1603.

[108] Frederick Watson Vaughan, *Foreign States are Foreign States: Why Foreign State-Owned Corporations are Not Persons Under the Due Process Clause*, 45 GA. L. REV. 913, 940 (2011). The *Bancec* presumption of independent status concerned the enforceability of judgments and "had nothing to do with the rendering of the judgment itself." Weinstein v. Islamic Republic of Iran, 609 F.3d 43, 51 (2d. Cir. 2010).

In applying the FSIA, courts that do not accord due process to foreign states try to distinguish between state-owned corporations that, like their state owners, will be haled to court if their actions fit into one of FSIA's exceptions, and foreign corporations entitled to due process.[109] However, attempts to distinguish between the state control and regular business activity of foreign corporations have resulted in an ambiguous judicial test: the personhood of the corporation depends on the amount of control the foreign state exerts over it.[110] If the court finds the foreign state maintains "sufficient control" over the corporation, then the court will hold that the corporation is not jurisdictionally distinct from the foreign state and thus will not require minimum contacts to be established in the forum.[111] Not only does the ambiguous definition of "sufficient" promulgate confusion and inconsistency in case law, but it also allows the courts to step out of their constitutionally-assigned roles as interpreters of the law and into the realm of international business and politics.[112]

Instead of examining the extent to which a corporation is controlled by a foreign state and subsequently the policies and practices of the business to determine if it is a "person" under the constitution or a foreign sovereign, many courts have summarily accorded all defendant enterprises and agencies due process.[113] While there may be a distinction between foreign corporations and foreign state-owned corporations, the ambiguity in the distinction and the practical realities of the limitations of the court should effectively remove the issue from the domain of the courts. Not only has case precedent established that foreign

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[109] *See, e.g.*, I.T. Consultants, Inc. v. Islamic Republic of Pakistan, 351 F.3d 1184, 1186, 1189-91 (D.C. Cir. 2003).

[110] Vaughan, *supra* note 108, at 916.

[111] Frontera Res. Azer. Corp. v. State Oil Co. of the Azerbaijan Republic, 582 F.3d 393, 400 (2nd Cir. 2009).

[112] *See* Vaughan, *supra* note 108, at 937. The commentator noted that the court, to determine if the Cuban corporation was jurisdictionally distinct from Cuba, examined if its activities were commercial rather than "government functions." The distinction between the two are concerningly ambiguous. *Id.* (citing Empresa Cubana Exportadora de Alimentos y Productos Varios v. U.S. Dep't of Treas., 606 F. Supp. 2d 59, 76-77 (D.D.C. 2009).

[113] *See supra* notes 100-105 and accompanying text.

corporations, and necessarily foreign states, be given due process protections, but the provisions of the FSIA also provide for these constitutional protections.

B. The Text and Structure of the FSIA Embody Congress' Intent for Courts to Accord Due Process to All Defendants

With its enactment, "Congress sought to ensure that 'the requirements of minimum jurisdictional contacts and adequate notice are embodied in the provision [of the FSIA].'"[114] The service of process,[115] commercial activities provision,[116] and the terrorism amendments[117] all embody the due process protections afforded to all defendants in Article III courts.

The "commercial activities" exceptions embody these protections. The immunity of a foreign state is waived in any case "in which the action is based upon a *commercial activity . . .* ,"[118] or in any case where property rights are disputed and the property is present in the United States.[119] The "commercial activities" exception also requires that the activity has a "direct

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[114] Leacock, *supra* note 71, at 43 fn. 7 (quoting H.R. REP. NO. 94-1487, *reprinted in* 1976 U.S.C.C.A.N. 6604, 6612). "Congress intended that substantive sovereign immunity law, *in personam* jurisdiction and Due Process minimum contacts analysis be determined coextensively and interdependently." *Id.* at 43 (quoting Stephen J. Leacock, *The Joy of Access to the Zone of Inhibition: Republic of Argentina v. Weltover, Inc. and the Commercial Activity Exception Under the Foreign Sovereign Immunities Act of 1976*, 5 Minn. J. Global Trade 81, 91 (1996)).

[115] The FSIA requirements for service of process on the defendant foreign state ensure that the foreign state has sufficient notice and the opportunity to defend itself in court. *See* 28 U.S.C. § 1608 (1976). Requirements include delivering a copy of the summons and complaint "with any special arrangement for service," or delivering the copies "in accordance with an applicable international convention . . . " *Id.* at (a)(1)-(2). Translations of the copies into the official language of the company may be required, and other methods of delivery may be required to ensure the foreign state has notice of the suit. *Id.* at (a)(3)-(4). Due process also requires that the defendant receives notice of the suit and be given an opportunity to be heard. *See* Spangenberg, *supra* note 28, at 449 fn. 13.

[116] 28 U.S.C. § 1605(a)(2) (2016).

[117] 28 U.S.C. §§ 1605A (2008); 28 U.S.C. § 1605B (2016).

[118] 28 U.S.C.S. § 1605(a)(2) (2016) (emphasis added).

[119] *Id.* at § 1605(a)(3)(2016).

effect" in the United States, is deliberate, and is directly related to the cause of action.[120]

Exceptions to the immunity of a foreign state under the FSIA unavoidably require minimum contacts with the forum related to the cause of action. For example, if a foreign state commits a tort against a person in the U.S., thus statutorily abrogating its immunity, this act necessarily constitutes sufficient contact with the U.S. under case precedent.[121] Also, disputes arising over agreements made pursuant to U.S. laws, or arbitration that "takes place or is intended to take place in the United States," all inevitably require the foreign state to submit to the laws of the U.S.[122]

The terrorism amendments also require that "minimum contacts" be established in the United States. Section 1605B, added most recently as part of JASTA, requires the terrorist act to have occurred in the United States for immunity of a foreign state to be waived.[123] Intentional infliction of injury to a person or property in the forum has long been held to meet the requirements of due process.[124]

In view of economic globalization, practically all countries will have either diplomatic ties or some commercial

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[120] 28 U.S.C. § 1605(a)(2). The cause of action must be "*based upon* a commercial activity . . . " *Id.* (emphasis added). Some commentators have stated that the "direct effects" test imposes even more requirements on courts than the minimum contacts test when establishing jurisdiction over the defendant. *See* Flatow v. Islamic Republic of Iran, 999 F. Supp. 1, 20 (D.D.C. 1998); Leacock, *supra* note 71, at 43-44. Others argue that the "direct effects" test is not as stringent and needs to be reconciled with traditional *in personam* analysis. 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, 701 (2005).

[121] 28 U.S.C. § 1605(a)(5) (2016).

[122] *See id.* at § 1605(a)(6) (2016); *supra* notes 39 to 47 and accompanying text.

[123] 28 U.S.C. § 1605B (2016).

[124] Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774-75, 781 (1984) (relating to defamation); *see also* 28 U.S.C. § 1605B(d) (2016) (limiting exceptions to immunity to intentional acts).

ties to the United States, or both.[125] That the forum for suits arising under the FSIA is the entire United States, rather than a specific location, highlights the need for the requirement of sufficient contacts that *relate to the suit* rather than general contacts with the United States. This is because allowing general jurisdiction over the defendant foreign state would, in effect, vitiate a due process test altogether. It would enable courts to use any inadvertent contact with the U.S., a necessary byproduct of our interdependent globalized economy, to subject foreign states to suit under the guise of affording them due process protections[126]

To interpret the FSIA provisions in light of Congress' intent, courts must require not only that the defendant has contacts with the United States, but that these contacts be related to the suit to appropriately accord the foreign state its due process protections. Requiring that the contacts with the forum relate to the suit does not award foreign states "special treatment" over other defendants, but rather ensures that subjecting the defendant to suit in the specific forum does not offend "traditional notions of fair play and substantial justice."[127] Rather than subjecting our allies to suit for alleged support of terrorist acts, "minimum contacts" must be established in the United States in furtherance of or otherwise related to the terrorist act.[128]

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[125] Morrissey, *supra* note 120, at 692. ("The distinction between general and specific jurisdiction is crucial to consider when contemplating a due process minimum contacts analysis with respect to foreign sovereigns.").

[126] *Id.*

[127] *Int'l Shoe Co.*, 326 U.S. at 316 (1945); *see supra* Part II.A.

[128] *See* Morrissey, *supra* note 120, at 698 ("it is not simply that a defendant's actions should have minimum contacts with the United States, but that those contacts be such that exercising jurisdiction over the defendant *would not offend traditional notions of fairness*.") (emphasis added).

V. POTENTIAL POLITICAL RAMIFICATIONS OF JASTA

In 2002, Libya agreed to a $2.7 billion settlement to the families of the victims of the Pan Am Flight 103 explosion.[129] While voluntary payment by countries in a civil suit is rare, Libya's settlement agreement was contingent on the lifting of both U.N. and U.S. sanctions, as well as its declassification as a state sponsor of terrorism.[130] Only after the United States reinstated diplomatic relations with Libya did the government finish paying the full amount.[131] As this situation demonstrates, the effects of civil suits involving any foreign sovereign, from establishing jurisdiction over the country to the execution of judgment, bear incalculable and ominous influence in the political realm.

With the enactment of JASTA, and U.S. citizens' opportunity to subject our allies to suit, the political ramifications are even more menacing. JASTA forces the Executive to choose between protecting American citizens' interests and expending the political capital necessary to our national security. It compels U.S. officials to protect citizens at the direct cost of relations with our allies.[132] For instance, while Saudi Arabia depends heavily on the United States in supplying military equipment, Saudi Arabia has been one of our oldest allies in the Middle East and a significant aid in counter-terrorism efforts.[133] Crown Prince Muhammed bin Nayef, the object of four assassination attempts by al-Qaeda, is arguably

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[129] Robert S. Greenberger, *Libya Offers $2.7 Billion Settlement To Relatives of Pan Am 103 Victims*, WALL ST. J. (May 29, 2002), http://www.wsj.com/articles/SB1022624328897385720.

[130] *Id.*

[131] Kirit Radia & Maddy Sauer, *Pan Am 103 Families Finally Compensated*, ABCNEWS (Oct. 31, 2008), http://abcnews.go.com/Blotter/story?id=6158491&page=1.

[132] Oleg Svet, *The 9/11 Bill is U.S. Law. Now What?*, THE NAT'L INTEREST (Oct. 7, 2016), http://nationalinterest.org/feature/the-9-11-bill-us-law-now-what-17975.

[133] Bruce Riedel, *What JASTA Will Mean for U.S.-Saudi Relations*, LAWFARE (Oct. 4, 2016), https://www.lawfareblog.com/what-jasta-will-mean-us-saudi-relations.

"the most effective counter-terrorist in the world."[134] When the 9/11 law suits take place, subjecting Saudi royalty to humiliating investigations, "the most likely arena for retaliation may be in the counter-terrorism field, meaning the [JASTA] bill will make Americans less safe."[135] The investigations pursued from these civil suits could reveal U.S. military involvement, allowing victims of U.S. military action to sue the U.S. government as well.[136]

The D.C. Circuit Court, while denying the State of Ukraine due process, remarked that the country could look to "international law and to the comity among nations" to find proper recourse.[137] How can comity exist among nations when one branch of the Federal government refuses to give our allies the same protections, let alone the respect, that it gives to noncitizens and foreign businesses?[138] While Congress has been dominated by political interests and pursuits, the judiciary can help to alleviate tension by according foreign states their constitutional right of due process.

VI. CONCLUSION

According foreign states due process pursuant to the Constitution and the FSIA strikes a balance between ensuring an opportunity for injured U.S. citizens to find justice and respecting foreign sovereigns. In efforts to promote "justice," courts strain to find an easier way to execute judgments against nations that have harmed U.S. citizens. Courts' stubborn refusal to accord foreign states due process has no legal support, and the resulting increase in judgments against nations, including our allies, puts the United States government in awkward situations in the

134 *Id.*

135 *Id.*

136 Layan Damanhouri, *JASTA to dash trust between US and allies*, SAUDI GAZETTE (Sep. 28, 2016), http://live.saudigazette.com.sa/article/164283/JASTA-to-dash-trust-between-US-and-allies.

137 TMR Energy Ltd. V. State Property Fund of Ukraine, 411 F.3d 296, 300-302 (D.C. Cir. 2005) (quoting *The Paquete Habana*, 175 U.S. 677, 700 (1900)).

138 This article limits its scope to the treatment of foreign states by the judicial branch; it refrains from discussing the various ways in which the political branches interact with other nations (i.e., through treaties).

international domain. It is a regrettable departure from the proper role of the courts. By firmly establishing constitutional protections for foreign states, the Supreme Court will not only remedy the "lack of coherence" of circuit court decisions,[139] but also limit court interference in U.S. foreign policy and bilateral relations by restricting courts' ability to obligate countries to court and thus to enter judgments against these countries.

Congress may repeal or amend JASTA in the near future. However, its enactment should impress upon the Supreme Court the ripeness of this issue for review, and the need to firmly protect the constitutional right foreign sovereigns are owed when made subject to U.S. laws by an Article III court.

[139] Leacock, *supra* note 71, at 50.