

No. 08-1555

---

---

**In the Supreme Court of the United States**

---

MOHAMED ALI SAMANTAR, PETITIONER

*v.*

BASHE ABDI YOUSUF, ET AL.

---

*ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT*

---

**BRIEF FOR THE UNITED STATES  
AS AMICUS CURIAE SUPPORTING AFFIRMANCE**

---

ELENA KAGAN  
*Solicitor General  
Counsel of Record*

TONY WEST  
*Assistant Attorney General*

EDWIN S. KNEEDLER  
*Deputy Solicitor General*

GINGER D. ANDERS  
*Assistant to the Solicitor  
General*

DOUGLAS N. LETTER  
SHARON SWINGLE  
LEWIS S. YELIN  
*Attorneys  
Department of Justice  
Washington, D.C. 20530-0001  
(202) 514-2217*

HAROLD HONGJU KOH  
*Legal Advisor*  
JONATHAN B. SCHWARTZ  
*Deputy Legal Adviser  
Department of State  
Washington, D.C. 20520*

---

---

## QUESTIONS PRESENTED

1. Whether the immunity from suit of officials of foreign governments acting in their official capacity is governed by the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1330, 1602 *et seq.*, which applies to acts by a foreign state, or whether immunity of foreign government officials from suit instead continues to be governed by common law principles of immunity articulated by the Executive Branch, informed by customary international law, in the exercise of its constitutional authority over foreign affairs.

2. If the FSIA were found to govern the immunity from suit of foreign government officials acting in their official capacity, whether such officials lose immunity from suit if the officials are sued after leaving office.

**TABLE OF CONTENTS**

	Page
Interest of the United States .....	1
Statement .....	2
Summary of argument .....	6
Argument:	
I. Principles adopted by the Executive Branch, in- formed by customary international law, govern the immunity of foreign officials acting in their official capacity .....	8
A. The Foreign Sovereign Immunities Act was enacted against the backdrop of judicial def- erence to suggestions and principles of im- munity articulated by the Executive Branch for foreign states and foreign officials .....	8
B. The FSIA does not govern the immunity of foreign officials from private damages actions ...	13
C. The FSIA did not abrogate the long- recognized immunity from suit of foreign offi- cials, rooted in the Executive Branch’s consti- tutional authority to conduct foreign affairs .....	27
II. If the FSIA governs the immunity from suit of sit- ting foreign government officials for actions in an official capacity, they generally retain that immunity after leaving office .....	28
Conclusion .....	32

**TABLE OF AUTHORITIES**

Cases:

<i>Alfred Dunhill of London, Inc. v. Republic of Cuba</i> , 425 U.S. 682 (1976) .....	9
<i>Argentine Republic v. Amerada Hess Shipping Corp.</i> , 488 U.S. 428 (1989) .....	2

IV

Cases—Continued:	Page
<i>Arrest Warrant of 11 Apr. 2000 (Dem. Rep. Congo v. Belgium)</i> , 2002 I.C.J. 3 (Feb. 14) . . . . .	11
<i>Belhas v. Ya’alon</i> , 515 F.3d 1279 (D.C. Cir. 2008) . . . . .	29
<i>Boos v. Barry</i> , 485 U.S. 312 (1988) . . . . .	12
<i>Chuidian v. Philippine Nat’l Bank</i> , 912 F.2d 1095 (9th Cir. 1990) . . . . .	20, 29
<i>Cicippio-Puleo v. Islamic Republic of Iran</i> , 353 F.3d 1024 (D.C. Cir. 2004) . . . . .	16
<i>Dole Food Co. v. Patrickson</i> , 538 U.S. 468 (2003) . . . . .	5, 17, 30
<i>Enahoro v. Abubakar</i> , 408 F.3d 877 (7th Cir. 2005), 546 U.S. 1175 (2006) . . . . .	17, 18, 28
<i>Estate of Marcos, Human Rights Litig., In re</i> , 25 F.3d 1467 (9th Cir. 1994), cert. denied, 513 U.S. 1126 (1995) . . . . .	25
<i>Federal Land Bank v. Bismarck Lumber Co.</i> , 314 U.S. 95 (1941) . . . . .	18
<i>Greenspan v. Crosbie</i> , No. 74 Civ. 4734 (GLG), 1976 WL 841 (S.D.N.Y. Nov. 23, 1976) . . . . .	10, 13, 22
<i>Hafer v. Melo</i> , 502 U.S. 21 (1991) . . . . .	12
<i>Hatch v. Baez</i> , 14 N.Y. Sup. Ct. 596 (1876) . . . . .	11, 12
<i>Heaney v. Government of Spain</i> , 445 F.2d 501 (2d Cir. 1971) . . . . .	11
<i>Isbrandtsen Co. v. Johnson</i> , 343 U.S. 779 (1952) . . . . .	28
<i>Isbrandtsen Tankers, Inc. v. President of India</i> , 446 F.2d 1198 (2d Cir.), cert. denied, 404 U.S. 985 (1971) . . . . .	9
<i>Jaffe v. Miller</i> , 13 O.R.3d 745 (1993), reprinted in 95 I.L.R. 446 . . . . .	13

Cases—Continued:	Page
<i>Jarecki v. G.D. Searle &amp; Co.</i> , 367 U.S. 303 (1961) .....	18
<i>Jones v. Le Tombe</i> , 3 U.S. (3 Dall.) 384 (1798) .....	10
<i>Jones v. Ministry of Interior</i> , [2006] UKHL 26, [2007] 1 A.C. 270 (H.L. 2006) (appeal taken from Eng.) .....	25, 26
<i>Matar v. Dichter</i> , 563 F.3d 9 (2d Cir. 2009) .....	25, 29, 30, 31
<i>Oetjen v. Central Leather Co.</i> , 246 U.S. 297 (1918) .....	21
<i>Paul v. Avril</i> , 812 F. Supp. 207 (S.D. Fla. 1992) .....	26
<i>Permanent Mission of India to the U.N. v.</i> <i>City of N.Y.</i> , 551 U.S. 193 (2007) .....	2, 9, 30
<i>Peru, Ex parte</i> , 318 U.S. 578 (1943) .....	9, 28
<i>Regina v. Bow St. Metro. Stipendiary Magistrate</i> , [1999] UKHL 17, [2000] 1 A.C. 147 (H.L. 1999) (appeal taken from Eng.) ( <i>Ex parte Pinochet</i> ) .....	12
<i>Republic of Iraq v. Beatty</i> , 129 S. Ct. 2183 (2009) .....	2
<i>Republic of Mexico v. Hoffman</i> , 324 U.S. 30 (1945) .....	2, 9
<i>Tachiona v. United States</i> , 386 F.3d 205 (2d Cir. 2004), cert. denied, 547 U.S. 1143 (2006) .....	17
<i>Terrorist Attacks on Sept. 11, 2001, In re</i> , 538 F.3d 71 (2d Cir. 2008), cert. denied, 129 S. Ct. 2859 (2009) .....	16
<i>The Schooner Exchange v. McFaddon</i> , 11 U.S. (7 Cranch) 116 (1812) .....	6, 8, 9, 10, 12

VI

Cases—Continued:	Page
<i>Underhill v. Hernandez:</i>	
168 U.S. 250 (1897) .....	10
65 F. 577 (2d Cir. 1895), aff'd, 168 U.S. 250 (1897) .....	6, 11, 12, 21
<i>United States v. Noriega</i> , 117 F.3d 1206 (11th Cir. 1997), cert. denied, 523 U.S. 1060 (1998) .....	
	12, 28
<i>United States v. Texas</i> , 507 U.S. 529 (1993) .....	21, 29
<i>United States v. Williams</i> , 128 S. Ct. 1830 (2008) .....	18
<i>Verlinden B.V. v. Central Bank of Nigeria</i> , 461 U.S. 480 (1983) .....	
	6, 9, 13
<i>Waltier v. Thomson</i> , 189 F. Supp. 319 (S.D.N.Y. 1960) ..	11
<i>Ye v. Zemin</i> , 383 F.3d 620 (7th Cir. 2004), cert. denied, 544 U.S. 975 (2005) .....	11, 28
Treaties, statutes and rules:	
Vienna Convention on Consular Relations, <i>done</i> Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 .....	
	26
Pmbl., 21 U.S.T. 79, 596 U.N.T.S. 262 .....	26
Vienna Convention on Diplomatic Relations, <i>done</i> Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95:	
Pmbl., 23 U.S.T. 3230, 500 U.N.T.S. 96 .....	26
Art. 32(1), 23 U.S.T. 3241, 500 U.N.T.S. 112 .....	26
Art. 39(2), 23 U.S.T. 3245, 500 U.N.T.S. 118 .....	11, 29
Alien Tort Statute, 28 U.S.C. 1350 .....	3
Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221(a)(1)(C), 110 Stat. 1241 (28 U.S.C. 1605(a)(7) (Supp. II 1996)) .....	
	2

VII

Statutes and rules—Continued:	Page
Foreign Sovereign Immunities Act of 1976:	
28 U.S.C. 1330 .....	1
28 U.S.C. 1602 <i>et seq.</i> .....	1
28 U.S.C. 1603(a) .....	<i>passim</i>
28 U.S.C. 1603(b) .....	5, 6, 17, 20, 30
28 U.S.C. 1604 .....	2, 7, 13, 14, 22, 23
28 U.S.C. 1605(a) .....	23
28 U.S.C. 1605(a)(2) .....	2, 22
28 U.S.C. 1605(a)(3) .....	22
28 U.S.C. 1605(a)(5) .....	2, 15, 18
28 U.S.C. 1606 .....	23, 24
28 U.S.C. 1608(a) .....	24
28 U.S.C. 1608(b) .....	24
28 U.S.C. 1608(b)(2) .....	24
28 U.S.C. 1610 .....	23
28 U.S.C. 1610(a) .....	24
28 U.S.C. 1610(b) .....	24
National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 3:	
Section 1083(a)(1), 122 Stat. 338:	
§ 1605A, 122 Stat. 338 (to be codified at 28 U.S.C. 1605A (Supp. II 2008)) .....	2, 3, 16
§ 1605A(a), 122 Stat. 338 (to be codified at 28 U.S.C. 1605A(a) (Supp. II 2008)) ....	2, 16
§ 1605A(a)(1), 122 Stat. 338 (to be codified at 28 U.S.C. 1605A(a)(1) (Supp. II 2008)) .....	16

VIII

Statutes and rules—Continued:	Page
§ 1605A(c), 122 Stat. 339 (to be codified at 28 U.S.C. 1605A(c) (Supp. II 2008)) . . . . .	16
§ 1083(b)(1)(A)(iii), 122 Stat. 341 . . . . .	2
Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (28 U.S.C. 1350 note) . . . . .	3
§ 2(a), 106 Stat. 73 . . . . .	20, 21
28 U.S.C. 1332(c) . . . . .	17
28 U.S.C. 1332(e) . . . . .	17
28 U.S.C. 1391(f)(3) . . . . .	20
Fed. R. Civ. P.:	
Rule 4 . . . . .	24
Rule 4(e) . . . . .	24
Rule 4(f) . . . . .	24
Rule 4(h)(1)(B) . . . . .	24
Miscellaneous:	
<i>Actions Against Foreigners</i> , 1 Op. Att’y Gen. 81 (1797) . . . . .	10
J.L. Brierly, <i>The Law of Nations</i> (Humphrey Waldock ed., 6th ed. 1963) . . . . .	14
Bureau of African Affairs, U.S. Dep’t of State, <i>Back-         ground Note: Somalia</i> (Jan. 2010) < <a href="http://www.state.gov/r/pa/ei/bgn/2863.htm">http://www. state.gov/r/pa/ei/bgn/2863.htm</a> > . . . . .	4
Hillary Rodham Clinton, Secretary of State, <i>Remarks         with Somali Transitional Federal Government         President Sheikh Sharif Sheikh Ahmed</i> (Aug. 6, 2009) (visited Oct. 15, 2009) < <a href="http://www.state.gov/secretary/rm/2009a/08/126956.htm">http://www. state.gov/secretary/rm/2009a/08/126956.htm</a> > . . . . .	4
H.R. Rep. No. 1487, 94th Cong., 2d Sess. (1976) . . . . .	18, 19, 20, 27



## IX

Miscellaneous—Continued:	Page
H.R. Rep. No. 367, 102d Cong., 1st Sess. Pt. 1 (1991) . . . .	20
William Edward Hall, <i>A Treatise on International Law</i> (A. Pearce Higgins ed., 8th ed. 1924) . . . . .	14
<i>Immunities of Foreign States: Hearing on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the House Comm. on the Judiciary, 93d Cong., 1st Sess. (1973)</i> . . . . .	19
Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep't of State, to Philip B. Perlman, Acting Att'y Gen. (May 19, 1952), reprinted in <i>Alfred Dunhill of London, Inc. v. Republic of Cuba</i> , 425 U.S. 682 App. (1976) . . . . .	9
1 <i>Oppenheim's International Law</i> (Robert Jennings & Arthur Watts, eds., 9th ed. 1996) . . . . .	11
<i>Report of the International Law Commission on the Work of its Forty-Third Session</i> , U.N. Doc. A/46/10(Supp.) (Sept. 1, 1991) . . . . .	12
S. Rep. No. 249, 102d Cong., 1st Sess. (1991) . . . . .	20, 21
Staffs of the House Comm. on Foreign Affairs & the Senate Comm. on Foreign Relations, 101st Cong., 2d Sess., <i>Country Reports on Human Rights Practices for 1989</i> (Joint Comm. Print 1990) . . .	3
<i>Suits Against Foreigners</i> , 1 Op. Att'y Gen. 45 (1794) . . . . .	10
Theodore Dwight Woolsey & Theodore Salisbury Woolsey, <i>Introduction to the Study of International Law</i> (6th ed. 1901) . . . . .	15

**In the Supreme Court of the United States**

---

No. 08-1555

MOHAMED ALI SAMANTAR, PETITIONER

*v.*

BASHE ABDI YOUSUF, ET AL.

---

*ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT*

---

**BRIEF FOR THE UNITED STATES  
AS AMICUS CURIAE SUPPORTING AFFIRMANCE**

---

**INTEREST OF THE UNITED STATES**

This case presents the question whether the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1330, 1602 *et seq.*, governs the immunity from suit of officials of foreign governments acting in their official capacity. At the Court's invitation, the United States recently filed a brief as amicus curiae addressing this question. See U.S. Amicus Br., *Federal Ins. Co. v. Kingdom of Saudi Arabia*, 129 S. Ct. 2859 (2009) (No. 08-640) (08-640 U.S. Br.). The United States condemns grave human rights abuses of the kind alleged in the complaint in this case, and it has a strong foreign policy interest in promoting the protection of human rights. In addition, the general question of the amenability of foreign officials to suit has significant implications for the reciprocal treat-

ment of United States officials and for our Nation's foreign relations.

#### STATEMENT

1. For much of our Nation's history, principles adopted by the Executive Branch, which were binding on the courts, determined the immunity of foreign states and their officials in civil suits in courts of the United States. See *Republic of Mexico v. Hoffman*, 324 U.S. 30, 34-36 (1945). In 1976, Congress enacted the FSIA, which now provides the sole basis for obtaining jurisdiction over a foreign state in a civil case brought in a United States court. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434-435 (1989). Under the FSIA, foreign states and their agencies and instrumentalities are "presumptively immune" unless a claim falls within one of the statute's specified exceptions. *Permanent Mission of India to the U.N. v. City of N.Y.*, 551 U.S. 193, 197 (2007) (*Permanent Mission*); 28 U.S.C. 1604. The exceptions permit, *inter alia*, certain actions against a foreign state that arise out of its commercial activities, 28 U.S.C. 1605(a)(2), and certain torts committed in the United States, 28 U.S.C. 1605(a)(5). Congress later amended the Act to include a specific exception for claims of torture, extrajudicial killing, and other terrorism-related acts if the foreign state has been designated as a state sponsor of terrorism, 28 U.S.C. 1605A(a).<sup>1</sup>

---

<sup>1</sup> Congress enacted a prior version of the terrorism exception in 1996. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221(a)(1)(C), 110 Stat. 1241 (28 U.S.C. 1605(a)(7) (Supp. II 1996)). In 2008, Congress repealed that provision and enacted an amended terrorism exception. National Defense Authorization Act for Fiscal Year 2008 (NDAA), Pub. L. No. 110-181, sec. 1083(a)(1), § 1605A, 122 Stat. 338 (to be codified at 28 U.S.C. 1605A (Supp. II 2008)); NDAA § 1083(b)(1)(A)(iii), 122 Stat. 341; see *Republic of Iraq v. Beatty*, 129

2. Respondents are natives of Somalia, several of whom are now citizens of the United States. They brought this suit against petitioner under the Torture Victim Protection Act of 1991 (TVPA), Pub. L. No. 102-256, 106 Stat. 73 (28 U.S.C. 1350 note), and the Alien Tort Statute (ATS), 28 U.S.C. 1350. Petitioner is a former high-ranking official of the Barre regime in Somalia, which took power in a 1969 coup. Pet. App. 2a-3a. Respondents allege that in the 1980s, they or their family members were subjected to systematic torture, extrajudicial killing, and other atrocities by military and intelligence agencies of the governing Supreme Revolutionary Council in Somalia, which targeted the clan to which respondents belong.<sup>2</sup> *Id.* at 3a-4a, 36a-42a. Respondents further allege that petitioner exercised command and effective control over agents of the Somali government during his tenure as Minister of Defense from 1980 to 1986, and as Prime Minister from 1987 to 1990. Respondents assert that petitioner is liable for compensatory and punitive damages because he knew or should have known about, and tacitly approved, the abuses allegedly committed by the government agents, and conspired with or aided and abetted those personnel in committing those wrongs. *Id.* at 5a-6a, 43a; J.A. 75-81, 99.

In January 1991, armed opposition factions drove the Barre regime from power, resulting in the complete col-

---

S. Ct. 2183, 2186-2187 (2009). All references to 28 U.S.C. 1605A are to that section as it will be codified in Supplement II (2008).

<sup>2</sup> At the time, the State Department documented massive human rights violations by the Somali government. See, e.g., Staffs of the House Comm. on Foreign Affairs & the Senate Comm. on Foreign Relations, 101st Cong., 2d Sess., *Country Reports on Human Rights Practices for 1989*, at 321-326 (Joint Comm. Print 1990) (prepared by Dep't of State).

lapse of Somalia's central government. Bureau of African Affairs, U.S. Dep't of State, *Background Note: Somalia* (Jan. 2010) <<http://www.state.gov/r/pa/ei/bgn/2863.htm>> (*Background Note*). Respondents allege that in the wake of the government's collapse, petitioner fled the country, and has been living in Virginia since 1997. Pet. App. 6a; J.A. 40, 64. Although the United States recognized the Barre regime, since the fall of that government, the United States has not recognized any entity as the government of Somalia.<sup>3</sup> *Background Note*.

3. Petitioner filed a motion to dismiss the complaint, contending that he is immune from this suit under the FSIA, and that the district court accordingly lacked subject-matter jurisdiction. Pet. App. 43a-45a. Respondents did not contend that their suit came within any of the FSIA's exceptions to immunity. *Id.* at 46a-47a. Instead, they argued that petitioner was not immune because his alleged actions violated international human rights law and so were outside the scope of his official authority. *Id.* at 48a.

The district court rejected that contention. It observed that respondents' complaint alleged that petitioner acted in his capacity as Defense Minister or Prime Minister of Somalia. Pet. App. 53a-54a. The court also accorded "great weight" to the representation by the

---

<sup>3</sup> Following the collapse of the Barre regime, reconciliation conferences among warring Somali factions have resulted in the creation of a transitional Somali government, the Transitional Federal Government (TFG). See *Background Note*. The United States supports the efforts of the TFG to establish a viable central government, see Hillary Rodham Clinton, Secretary of State, *Remarks with Somali Transitional Federal Government President Sheikh Sharif Sheikh Ahmed* (Aug. 6, 2009) <<http://www.state.gov/secretary/rm/2009a/08/126956.htm>>, but does not recognize the TFG as the sovereign government of Somalia. The United States does continue to recognize the State of Somalia.

Somali Transitional Federal Government (TFG)—which the court incorrectly described as “supported by and recognized by the United States as the governing body in Somalia”—that petitioner’s alleged actions were taken in his official capacities. *Id.* at 54a-55a, 57a, 61a (citation omitted); see note 3, *supra*. The district court therefore concluded that the FSIA conferred immunity on petitioner. Pet. App. 61a-63a.

4. The court of appeals reversed and remanded. The court first considered petitioner’s argument that the FSIA, which governs the immunity of a “foreign state” and any “agency or instrumentality” of the state, see 28 U.S.C. 1603(a), provides immunity to foreign officials from personal damage actions because the officials are instrumentalities of the state. The court rejected that argument, reasoning that Section 1603(b) defines an “agency or instrumentality” to include only corporate and other legal entities, not natural persons. Pet. App. 17a-19a. The court found support for that conclusion in the structure and legislative history of the FSIA. *Id.* at 19a-20a. The court therefore held that “the FSIA does not apply to individuals and, as a result, [petitioner] is not entitled to immunity under the FSIA.” *Id.* at 3a.<sup>4</sup>

The court further concluded that even if the FSIA did apply to individual foreign officials, it would provide immunity only for individuals who were state officials at the time suit was brought. Pet. App. 21a-25a. The court relied on *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003),

---

<sup>4</sup> Respondents also argued that the FSIA was inapplicable because Somalia currently does not exist in a form that could qualify it as a “foreign state” for purposes of the FSIA. In light of its conclusion that the FSIA does not govern claims of immunity by individual foreign officials, the court of appeals did not address that issue. Pet. App. 11a n.3; see also *id.* at 47a n.12.

which held that because Section 1603(b) uses the present tense in describing the necessary attributes of an “agency or instrumentality,” the entity in question must satisfy Section 1603(b)’s requirements at the time the suit is filed. Pet. App. 21a-25a.

The court of appeals therefore reversed the district court’s dismissal of the action based on the FSIA, and remanded for the district court to consider petitioner’s contention that he is immune from suit under common law immunity principles, as well as the other issues raised by petitioner. Pet. App. 25a-26a.

#### SUMMARY OF ARGUMENT

In the view of the United States, principles articulated by the Executive Branch, not the FSIA, properly govern the immunity of foreign officials from civil suit for acts in their official capacity.

I. Throughout the Nation’s history, the Executive and Judicial Branches have recognized that a foreign state is usually immune from suit in United States courts. *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 137 (1812). In light of the potentially significant foreign relations consequences of subjecting another sovereign state to suit, courts traditionally deferred to the Executive Branch’s judgment whether the foreign state should be accorded immunity in a given case. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 487 (1983). These Executive Branch principles, which are informed by customary international law and practice, similarly included the recognition that both current and former officials of a foreign state usually enjoy immunity for acts undertaken in their official capacity. See, e.g., *Underhill v. Hernandez*, 65 F. 577, 579-580 (2d Cir. 1895), aff’d, 168 U.S. 250 (1897).

Enacted against this backdrop, the FSIA sets forth a general rule of immunity for a “foreign state.” 28 U.S.C. 1604. The FSIA makes no reference to the immunity of individual foreign officials, and its text, structure and legislative history demonstrate that Congress did not intend the FSIA to govern such determinations or to displace Executive Branch principles governing the immunity of current and former officials. Particularly because the historical practice of deferring to the Executive’s determinations as to immunity arose out of the Executive’s traditional prerogative with respect to the sensitive diplomatic and foreign-policy judgments implicated by immunity questions, the FSIA should not be read to have altered that practice *sub silentio*. Therefore, foreign officials’ immunity continues to be governed by the generally applicable principles of immunity articulated by the Executive Branch.

That conclusion derives additional support from the complexity of certain official immunity determinations, which could not be accommodated under the rigid statutory framework of the FSIA. In this case, for example, the Executive reasonably could find it appropriate to take into account petitioner’s residence in the United States rather than Somalia, the nature of the acts alleged, respondents’ invocation of the statutory right of action in the TVPA against torture and extrajudicial killing, and the lack of any recognized government of Somalia that could opine on whether petitioner’s alleged actions were taken in an official capacity or that could decide whether to waive any immunity that petitioner otherwise might enjoy. It is unlikely that Congress, in enacting the FSIA, intended to divest the Executive of the ability to evaluate complex considerations like these in



deciding whether to recognize a foreign official’s immunity.

II. If this Court should hold, contrary to our view, that the FSIA governs the immunity of foreign officials, that holding should not serve to strip former officials of their immunity. Nothing in the FSIA suggests that Congress intended to accord immunity to current officials but not former officials. The grounds of the Court’s decision, however, will determine whether the immunity of former officials derives from the FSIA itself or from background common law principles. Again assuming that the Court holds that the FSIA plays any role in questions of official immunity, the Court should select the theory—resting on the “agency or instrumentality” language on the FSIA, 28 U.S.C. 1603(a)—that allows most room for these principles of Executive judgment to operate. Under either theory, a remand would be required to apply the relevant standards and determine whether petitioner has immunity.

#### ARGUMENT

#### I. PRINCIPLES ADOPTED BY THE EXECUTIVE BRANCH, INFORMED BY CUSTOMARY INTERNATIONAL LAW, GOVERN THE IMMUNITY OF FOREIGN OFFICIALS ACTING IN THEIR OFFICIAL CAPACITY

##### A. The Foreign Sovereign Immunities Act Was Enacted Against The Backdrop Of Judicial Deference To Sugges- tions And Principles Of Immunity Articulated By The Executive Branch For Foreign States And Foreign Offi- cials

1. The United States has long adhered to the principle that foreign states are generally immune from suit in our courts. *The Schooner Exchange*, 11 U.S. (7 Cranch) at 137. Wrongs perpetrated by foreign sovereigns have

been recognized as ordinarily appropriate “for diplomatic, rather than legal,” resolution. *Id.* at 146. In light of the potentially significant foreign relations consequences of subjecting another sovereign state to suit in our courts, the Court historically looked to “the political branch of the government charged with the conduct of foreign affairs” to determine whether immunity should be recognized. *Hoffman*, 324 U.S. at 34.

The Executive Branch traditionally provided the judiciary with suggestions of immunity, based on the Executive Branch’s judgments regarding customary international law and reciprocal practice. *Verlinden*, 461 U.S. at 487; see, e.g., *Ex parte Peru*, 318 U.S. 578, 589 (1943). When the Executive Branch made no specific recommendation, the courts decided the immunity question “in conformity to the principles” the Executive Branch had previously articulated. See *Hoffman*, 324 U.S. at 35.

Until 1952, the Executive Branch followed a theory of absolute foreign sovereign immunity. Under that doctrine, “a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign,” regardless of the nature of the acts alleged to have been committed. *Permanent Mission*, 551 U.S. at 199 (quoting Letter from Acting Legal Adviser Tate to Acting Attorney General Perlman (1952) (*Tate Letter*), reprinted in *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 App. (1976)). In 1952, the State Department adopted the “restrictive” theory of foreign sovereign immunity, under which foreign states are afforded immunity only for their sovereign or public acts, and not for their commercial or other private acts. See *Dunhill*, 425 U.S. at 698; *id.* App. at 711 (*Tate Letter*); see also *Isbrandtsen Tankers, Inc. v. President of India*, 446 F.2d 1198, 1200 (2d Cir.) (deferring to Executive’s deter-

mination that alleged conduct was “of a public, as opposed to a private/commercial, nature,” and therefore state was immune), cert. denied, 404 U.S. 985 (1971). After 1952, the Executive Branch relied upon the restrictive theory to inform its suggestions of immunity, and courts applied the restrictive theory when the Executive did not express its views.

2. The United States also has recognized the immunity of individual foreign officials “from suits brought in [United States] tribunals for acts done within their own States, in the exercise of governmental authority.” *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897). The Executive asserted that position on several occasions early in the Nation’s history. See, e.g., *Suits Against Foreigners*, 1 Op. Att’y Gen. 45, 46 (1794) (“[I]f the seizure of the vessel is admitted to have been an official act, done by the defendant \* \* \* , [that] will of itself be a sufficient answer to the plaintiff’s action.”); *Actions Against Foreigners*, 1 Op. Att’y Gen. 81, 81 (1797) (“[A] person acting under a commission from the sovereign of a foreign nation is not amenable for what he does in pursuance of his commission, to any judiciary tribunal in the United States.”).

The courts too have long recognized foreign official immunity in a variety of contexts. See, e.g., *The Schooner Exchange*, 11 U.S. (7 Cranch) at 138; *Jones v. Le Tombe*, 3 U.S. (3 Dall.) 384, 385 (1798) (“[T]he contract was made on account of the government \* \* \* and therefore, there was no cause of action against the present defendant.”). As in suits against foreign states, the courts traditionally deferred to the Executive Branch’s judgment whether an official should be accorded immunity in a given case, see, e.g., *Greenspan v. Crosbie*, No. 74 Civ. 4734 (GLG), 1976 WL 841, at \*1-\*2 (S.D.N.Y.

Nov. 23, 1976); *Waltier v. Thomson*, 189 F. Supp. 319, 320-321 (S.D.N.Y. 1960), and applied the principles articulated by the Executive in cases in which the Executive did not express a position, see *Heaney v. Government of Spain*, 445 F.2d 501, 504-506 (2d Cir. 1971).

The immunity of foreign officials was traditionally not limited to current employees of the foreign government. See, e.g., *Underhill*, 65 F. at 580; *Hatch v. Baez*, 14 N.Y. Sup. Ct. 596, 600 (1876) (“The fact that the defendant has ceased to be president of St. Domingo does not destroy his immunity.”). That is because the immunity of foreign officials arises from the official character of their acts.<sup>5</sup> See *ibid.* (Immunity “springs from the capacity in which the acts were done, and protects the individual who did them.”). The Executive Branch has therefore recognized that the immunity enjoyed by a foreign official generally survives his departure from office. Affording former officials residual immunity from civil suits based on actions in their official capacity is consistent with customary international law. See, e.g., Vienna Convention on Diplomatic Relations (VCDR), *done* Apr. 18, 1961, art.

---

<sup>5</sup> Under customary international law, head-of-state immunity is distinct from, and provides greater protection than, the immunity of lower-level foreign officials. See *Arrest Warrant of 11 Apr. 2000 (Dem. Rep. Congo v. Belgium)*, 2002 I.C.J. 3, 21-22. The Executive Branch retains its traditional pre-FSIA authority to suggest the immunity from suit of heads of state and other high officials. See, e.g., *Ye v. Zemin*, 383 F.3d 620 (7th Cir. 2004), cert. denied, 544 U.S. 975 (2005). After these high ranking officials leave office, they generally retain residual immunity only for their official acts. See 1 *Oppenheim’s International Law* 1043-1044 (Robert Jennings & Arthur Watts, eds., 9th ed. 1996). Respondents have sued petitioner for conduct, in part, when he was Prime Minister of Somalia, Pet. App. 5a, and the court of appeals remanded in part to permit the district court to consider petitioner’s claim of head-of-state immunity, *id.* at 25a-26a. That issue is not before the Court.

39(2), 23 U.S.T. 3227, 3245; *Report of the International Law Commission on the Work of its Forty-Third Session* at 25, U.N. Doc. A/46/10(Supp.) (Sept. 1, 1991) (Commentary on Draft Articles on Jurisdictional Immunities of States and Their Property). It also promotes the United States' interests in comity with other nations. See *The Schooner Exchange*, 11 U.S. (7 Cranch) at 137; *Hatch*, 14 N.Y. Sup. Ct. at 600; see also *Boos v. Barry*, 485 U.S. 312, 323-324 (1988).<sup>6</sup>

As petitioner notes (Br. 27), the basis for recognizing the immunity for current and former foreign officials is that “the acts of the official representatives of the state are those of the state itself, when exercised within the scope of their delegated powers.” *Underhill*, 65 F. at 579. But petitioner is incorrect to extrapolate (Br. 17, 44) from that principle the conclusion that a suit against a foreign official is invariably equivalent to a suit against the foreign state itself.

Suits like this one “seek to impose individual liability upon a government officer,” not the state itself. *Hafer v. Melo*, 502 U.S. 21, 25 (1991). They seek damages against the individual personally, not against the foreign state. To be sure, personal damage suits against foreign offi-

---

<sup>6</sup> The Executive Branch's recognition of foreign official immunity in the civil context does not imply that foreign officials are entitled to immunity in a criminal case brought by the United States. In choosing to prosecute a foreign official, the Executive Branch has necessarily determined that the official is not properly protected by immunity. See, e.g., *United States v. Noriega*, 117 F.3d 1206, 1212 (11th Cir. 1997), cert. denied, 523 U.S. 1060 (1998); cf. *Regina v. Bow St. Metro. Stipendiary Magistrate*, [2000] 1 A.C. 147 (H.L. 1999) (appeal taken from Eng.) (*Ex parte Pinochet*) (former official not entitled to immunity from criminal liability under the International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment for torture committed in an official capacity).

cials based on actions taken in their official capacity may require the court to sit in judgment of a foreign state's actions, much as in a suit against the state itself. See, e.g., *Greenspan*, 1976 WL 841, at \*2; *Jaffe v. Miller*, 13 O.R.3d 745 (1993), *reprinted in* 95 I.L.R. 446. But the remedial, substantive, and prudential concerns raised by suits against officials and suits against the state are not identical.

For this reason, the scope of immunity for foreign officials is not necessarily co-extensive with that of foreign states—and can diverge in either direction. After endorsing the restrictive theory of immunity for foreign states, the Executive Branch has recognized the immunity of foreign officials for their official acts in some circumstances in which the state itself would not be immune. See *Greenspan*, 1976 WL 841, at \*2 (Executive suggestion that officials were immune from fraud suit based on state's commercial activities). Conversely, there are circumstances in which a foreign state would be immune (and indeed potentially not implicated at all) but the individual officer would not be immune, as when the individual acts outside his official capacity.

#### **B. The FSIA Does Not Govern The Immunity Of Foreign Officials From Private Damages Actions**

In 1976, Congress enacted the FSIA, which, “[f]or the most part, \* \* \* codifies, as a matter of federal law, the restrictive theory of sovereign immunity.” *Verlinden*, 461 U.S. at 488. By its terms, the FSIA governs the immunity of a “foreign state,” 28 U.S.C. 1604, which is defined to “include[]” a “political subdivision” and an “agency or instrumentality” of the foreign state. 28 U.S.C. 1603(a). The FSIA makes no reference to the immunity of individual foreign officials.

Accordingly, as the Solicitor General recently informed this Court, the United States generally recognizes foreign officials to enjoy immunity from civil suits with respect to their official acts, but that immunity is properly founded on non-statutory principles articulated by the Executive Branch, not the FSIA. 08-640 U.S. Br. 6. Because the FSIA does not address the immunity of foreign officials, the FSIA left in place the pre-existing practice of recognizing official immunity in accordance with suggestions of immunity by the Executive Branch.

Petitioner nonetheless argues that the FSIA confers immunity on him as a statutory matter. Petitioner first argues that foreign officials are encompassed within the term “foreign state” because they are agents of the state and their acts constitute the acts of the state itself. Br. 23. Therefore, he continues, wherever the FSIA refers to the “foreign state,” that term should be construed to include foreign officials. Petitioner also contends that a foreign official is an “agency or instrumentality” of the state. Br. 23, 45-47. Neither argument can be reconciled with the text, structure, and legislative history of the FSIA.

1. a. The FSIA sets forth a general rule of immunity of a “foreign state,” 28 U.S.C. 1604, without mentioning the immunity of individuals. At the time of the FSIA’s enactment, the term “state” had long been understood to refer to a group of people within a defined territory, not to individual officials within that territory. See, *e.g.*, J.L. Brierly, *The Law of Nations* 126 (Humphrey Waldock ed., 6th ed. 1963) (referring to “a state” as an “institution”); William Edward Hall, *A Treatise on International Law* 17 (A. Pearce Higgins ed., 8th ed. 1924) (state is a “community” that is permanently established for a political end, has a defined territory, and is independent

of outside control); Theodore Dwight Woolsey & Theodore Salisbury Woolsey, *Introduction to the Study of International Law* § 36, at 34 (6th ed. 1901) (state is a “community of persons living within certain limits of territory” under an organization). It is therefore unlikely that Congress would have used the term “foreign state” to refer both to the state itself and to the individuals it employs.

b. Indeed, the FSIA’s text expressly distinguishes between a “foreign state” and its officials, thereby confirming that Congress did not view the term “foreign state” as including individual officials. In enacting the FSIA, Congress created an exception to foreign sovereign immunity for certain domestic torts, providing that “[a] *foreign state* shall not be immune” in a case “in which money damages are sought against a foreign state for personal injury \* \* \* 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 foreign state* while acting within the scope of his office or employment.” 28 U.S.C. 1605(a)(5) (emphases added). If Congress believed, as petitioner argues, that “individual agents of a foreign state, when they perform their official duties, *are* the ‘foreign state’ for purposes of the FSIA,” Br. 42 (citation omitted), Congress would not have needed to separately mention the acts of a foreign official or employee in Section 1605(a)(5).

When Congress subsequently established another exception to immunity, applicable to claims of torture, extrajudicial killing, and certain other acts of terrorism brought against states designated as state sponsors of terrorism, Congress again differentiated between the state and its officials. Congress there provided that “[a] foreign state” shall not be immune for such acts “en-



gaged in by *an official, employee, or agent of such foreign state* while acting within the scope of his or her office, employment, or agency.” 28 U.S.C. 1605A(a)(1) (emphasis added). Petitioner asserts that Section 1605A(a)(1) “creat[es] an exception to individual immunity” that would be unnecessary if officials were not otherwise immune under the FSIA. Br. 42 (citing *In re Terrorist Attacks on Sept. 11, 2001*, 538 F.3d 71, 84 (2d Cir. 2008), cert. denied, 129 S. Ct. 2859 (2009)). But the provision expressly abrogates immunity only for the “foreign state” itself; it does not relate at all to the immunity of individual officials.

Moreover, Section 1605A(c) creates a right of action against “[a] foreign state that is or was a state sponsor of terrorism \* \* \* and any official, employee, or agent of that foreign state while acting within the scope of his or her office.” 28 U.S.C. 1605A(c). The absence of any provision in Section 1605A separately addressing the immunity of those individuals—even though Subsection (a) refers to their acts in its abrogation of the *state’s* immunity, and Subsection (c) creates a cause of action against them—reinforces the conclusion that the FSIA does not govern the immunity of those foreign officials to begin with.<sup>7</sup>

c. It also is significant that Section 1603(a)’s definition of “foreign state” specifically “includes a political subdivision of a foreign state or an agency or instrumen-

---

<sup>7</sup> Contrary to petitioner’s argument (Br. 42), the creation of a statutory right of action in Section 1605A(c) against officials as well as the state itself does not suggest that the immunity provisions of the FSIA apply to individuals. See, e.g., *Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024, 1033 (D.C. Cir. 2004) (noting “distinction \* \* \* between statutory provisions that waive sovereign immunity and those that create a cause of action”).

tality of a foreign state,” but makes no mention of individual foreign officials. 28 U.S.C. 1603(a). Petitioner nonetheless insists that the “agency or instrumentality” language supports him, seeing that language both as itself encompassing foreign officials, and as demonstrating that Congress intended the term “foreign state” to “include[]” natural persons who are agents of the state. Br. 23, 45-47. Both arguments are without merit.

Section 1603(b) defines “agency or instrumentality” as an “entity” that satisfies all of the following conditions: (1) it is a “separate legal person, corporate or otherwise”; (2) it is an organ of, or a majority of its shares is owned by, a foreign state or political subdivision; and (3) it is neither “a citizen of a State of the United States as defined in” the corporate-citizenship provisions of 28 U.S.C. 1332(c) and (e), nor an entity “created under the laws of any third country.” 28 U.S.C. 1603(b). This definition is replete with terms that are “not usually used to describe natural persons.” *Tachiona v. United States*, 386 F.3d 205, 221 (2d Cir. 2004), cert. denied, 547 U.S. 1143 (2006); see *Enahoro v. Abubakar*, 408 F.3d 877, 881 (7th Cir. 2005), cert. denied, 546 U.S. 1175 (2006). Thus, contrary to petitioner’s arguments (Br. 45-47), the statutory definition makes clear that Congress intended Section 1603(b) to reach only corporate and other organizational entities, not individual foreign officials. See *Patrickson*, 538 U.S. at 474 (Section 1603(b) indicates that “Congress had corporate formalities in mind.”).

Petitioner further contends, however, that even if “agency or instrumentality” does not encompass natural persons, Section 1603(a)’s use of the term “includes” indicates that Congress intended to define “foreign state” broadly, to include not only “agenc[ies]” and “instrumentalit[ies],” but also individual “agents” and any “oth-

er means through which nations necessarily act.” Br. 22-24. As petitioner notes, the term “includes” can connote “an illustrative application of the general principle.” *Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95, 99-100 (1941). But that does not mean that Section 1603(a) is devoid of any limiting principle. Under the canon of *noscitur a sociis*, “a word is given more precise content by the neighboring words with which it is associated.” *United States v. Williams*, 128 S. Ct. 1830, 1839 (2008); *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961). Here, the categories expressly included within the definition of “foreign state”—political subdivisions, agencies, and instrumentalities—are all entities that are created by, or are a part of, the state. None are natural persons. This focus demonstrates that Congress intended to limit the term “foreign state” to the state itself and the non-natural entities that it creates. See *Enahoro*, 408 F.3d at 881-882 (“If Congress meant to include individuals acting in their official capacity in the scope of the FSIA, it would have done so in clear and unmistakable terms.”). Petitioner’s reading would thus expand Section 1603(a) well beyond its natural and intended scope. See *Jarecki*, 367 U.S. at 307.

2. The FSIA’s legislative history confirms that Congress did not intend to supplant existing principles regarding the immunity of foreign officials, as opposed to foreign states. The House Report emphasizes that the FSIA was not “intended to affect either diplomatic or consular immunity.” H.R. Rep. No. 1487, 94th Cong., 2d Sess. 12 (1976) (*FSIA Report*). In discussing Section 1605(a)(5)—which excepted certain torts committed by the state or its officials from immunity, and was the only contemporaneously enacted provision that mentioned foreign officials, see p. 15, *supra*—the *FSIA Report* reit-

erated that the FSIA would “deal[] only with the immunity of foreign states and not its diplomatic or consular representatives.” *FSIA Report* 21.<sup>8</sup>

Congress thus assumed that existing law would continue to govern the immunity of those officials. See *FSIA Report* 8 (contrasting “diplomatic immunity (which is drawn into issue when an individual diplomat is sued)” with “sovereign immunity,” which applies to “foreign state[s]”). In particular, the *FSIA Report* noted that with regard to discovery, “official immunity,” of a kind existing separate from and outside of the FSIA, would apply if a litigant sought to depose a “high-ranking official of a foreign government.” *Id.* at 23.

The legislative history also confirms that Congress had corporations and not natural persons in mind when it defined “agency or instrumentality.” The *FSIA Report* explains that “[a]s a general matter, entities which meet the definition of an ‘agency or instrumentality of a foreign state’ could assume a variety of forms, including a state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel company, a central bank, an export association, a governmental procurement agency or a department or ministry which acts and is suable in its own name.” *FSIA Report* 15-16. No natural person appears in the list of examples. In addition, in discussing an amend-

---

<sup>8</sup> Hearing testimony also underscored the FSIA’s inapplicability to foreign officials. See *Immunities of Foreign States: Hearing on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 16 (1973) (statement of Bruno Ristau, U.S. Dep’t of Justice) (“[W]e are not talking \* \* \* in terms of permitting suit against the Chancellor of the Federal Republic [of Germany]. \* \* \* That is an altogether different question.”).

ment to the venue statute addressing suits “against an agency or instrumentality of a foreign state as defined in section 1603(b),” 28 U.S.C. 1391(f)(3), the *FSIA Report* explains (at 32) that the amendment “is based on 28 U.S.C. 1391(e),” the provision regarding venue in suits against corporations. Congress made no reference to the provision for venue of suits against individuals.

3. The legislative history of the TVPA, enacted in 1992, does contain a discussion of the FSIA and its potential application to individual officials, but that history does not compel any different result. In the TVPA, Congress created a right of action against individuals alleged to have committed torture or extrajudicial killing “under actual or apparent authority, or color of law, of any foreign nation.” TVPA § 2(a), 106 Stat. 73. The TVPA’s legislative history indicates that the Senate Judiciary Committee believed that the TVPA would not affect traditional diplomatic or head-of-state immunities but, consistent with longstanding principles, that these immunities would not protect such officials after they left office. See S. Rep. No. 249, 102d Cong., 1st Sess. 7-8 (1991) (*TVPA Report*); see note 5, *supra*. In addition, the House and Senate Committees appeared to assume, consistent with the Ninth Circuit’s then-recent decision in *Chuidian v. Philippine Nat’l Bank*, 912 F.2d 1095 (9th Cir. 1990), that the FSIA would govern the determination of immunity for other foreign officials while in office and for all former foreign officials. *TVPA Report* 8 (citing 28 U.S.C. 1603(b), which defines “agency or instrumentality” of the foreign state, as providing the basis for official immunity); H.R. Rep. No. 367, 102d Cong., 1st

Sess. Pt. 1, at 5 (1991).<sup>9</sup> That apparent assumption, however, was incorrect. As noted above, the text, structure and legislative history of the FSIA as originally enacted demonstrate that Congress did not intend the FSIA to govern individual officials' immunity. Against that background, the assumption of a congressional committee 15 years later, following a single appellate court decision, would be a "hazardous basis for inferring the intent of an earlier Congress" in enacting the FSIA. See *United States v. Texas*, 507 U.S. 529, 535 n.4 (1993) (citation omitted).

4. Petitioner contends that Congress must have intended the term "foreign state" to encompass foreign officials, despite the absence of any provision to that effect, because a suit against a foreign official "for actions undertaken on behalf of the state is in reality a suit against the 'foreign state' itself." Br. 24. To be sure, immunity ordinarily attaches when (and because) the individual was acting as an officer of the foreign state. See, e.g., *Oetjen v. Central Leather Co.*, 246 U.S. 297, 303 (1918); *Underhill*, 65 F. at 579. But it does not follow that Congress must have treated suits against individual foreign officials identically to suits against foreign states. To the contrary, if Congress intended the FSIA to gov-

---

<sup>9</sup> The TVPA's legislative history also describes the Senate Committee's understanding of how to decide whether an official covered by the FSIA would have immunity from suit. In the Committee's view, that determination would require the official to prove "an agency relationship to [the] state," which it suggested would require the state to "admit some knowledge or authorization of the relevant acts." *TVPA Report* 8. The Committee further observed that because all states are officially opposed to torture and extrajudicial killing, the FSIA should normally not provide a defense to an action brought under the TVPA against an individual acting "under actual or apparent authority, or color of law, of any foreign nation," TVPA § 2(a), 106 Stat. 73. *TVPA Report* 8.

ern the amenability to suit of foreign officials, it likely would have addressed a number of issues raised by such suits. Yet the statute does not do so.

*First*, as noted earlier, the scope of immunity that individual foreign officials enjoy under traditional principles can be either more or less extensive than the immunity of the state itself. In some circumstances, individual immunity will be narrower. For example, a foreign state is entitled to immunity for any acts unless one of the FSIA's exceptions applies, 28 U.S.C. 1604, but officials are usually immune only for acts taken in their official capacity. Conversely, the Executive Branch has on occasion suggested the immunity of a foreign official even when the state would lack immunity for the same conduct. See *Greenspan*, 1976 WL 841, at \*2 (official immunity for commercial activities). That would be the case, for example, when a suit falls within one of the exceptions to foreign sovereign immunity for contractual or other commercial activities or expropriations, see 28 U.S.C. 1605(a)(2) and (3), and a state, but not an individual, is appropriately held liable for the potentially huge monetary sums at stake. In a variety of contexts, personal damage actions against foreign officials can unduly chill their performance of duties, trigger reciprocity concerns about the treatment of United States officials sued in foreign courts, and interfere with the Executive Branch's conduct of foreign affairs—even when a state itself can be sued.

Given these and other relevant factors, Congress is unlikely to have inflexibly linked the immunity of foreign officials to that of their states—and, without saying so, to have substituted a rigid statutory regime for the pre-existing authority of the Executive to take into account, in determining whether to suggest immunity, the distinc-

tive considerations that suits against foreign officials may raise.<sup>10</sup> At the least, had Congress contemplated that the FSIA would address the immunity of individual foreign officials, it would have specified the category of acts for which such immunity would lie. The foreign state and its agencies and instrumentalities are absolutely immune from suit on any basis and for any acts unless one of the express exceptions in the FSIA applies. But Congress surely would not have intended to confer an absolute immunity on individual foreign officials, including for their wholly private conduct. Accordingly, if those individuals were to be covered, Congress presumably would have included in the general rule of immunity in 28 U.S.C. 1604 an express limitation to clarify when an official's conduct could be considered an act of the foreign state for immunity purposes. Congress might also have expanded or restricted one or another of the exceptions to immunity in Section 1605(a) as applied to individual officials to take account of the differences between suits against the state and suits against individual officials.

*Second*, if Congress had intended the FSIA to govern suits against individual foreign officials, the statute likely would have addressed the available remedies. Section 1610 provides litigants with broader rights to attach the property of agencies and instrumentalities compared to the property of the foreign state itself, and Section 1606

---

<sup>10</sup> This case vividly illustrates the point, as discussed further at pp. 24-26, *infra*. For apparently under petitioner's view the FSIA, *sub silentio*, would have altogether divested the Executive of the ability to consider in its immunity determination such features of this case as petitioner's residence in the United States rather than in Somalia, respondents' invocation of the statutory cause of action in the TVPA, and the absence of a recognized government in Somalia.



similarly permits punitive damages against agencies and instrumentalities but not against the state. 28 U.S.C. 1606, 1610(a) and (b). Congress’s careful calibration of these remedies renders its silence with respect to the personal funds and property of individual foreign officials particularly telling.

*Third*, the FSIA does not expressly provide for service of process on individuals. Section 1608(b), which governs service on agencies and instrumentalities, provides that in the absence of a special arrangement, service may be made on “an officer, a managing or general agent, or to any other agent [so] authorized by appointment or by law.” 28 U.S.C. 1608(b)(2). That provision parallels the corporate service method set forth in Federal Rule of Civil Procedure 4(h)(1)(B), providing further confirmation that natural persons are not agencies or instrumentalities. Section 1608(a), which governs service on the state itself, also makes no mention of service on individuals; rather, it permits service by special arrangement with the state; in accordance with an international convention; on the head of the ministry of foreign affairs of the state; or “through diplomatic channels to the foreign state.” 28 U.S.C. 1608(a). Notably, Section 1608(a) does not invoke any of Rule 4’s detailed provisions for serving individuals in the United States and foreign countries. See Fed. R. Civ. P. 4(e) and (f).

5. The conclusion that the FSIA does not govern foreign official immunity is reinforced by the number of complexities that could attend the immunity determination in this and other cases—complexities that could not be accommodated under the rigid and ill-fitting statutory regime of the FSIA. Even in an ordinary case, in considering whether to recognize immunity of a foreign official under the generally applicable principles of immunity

discussed above, the Executive might find it appropriate to take into account issues of reciprocity, customary international law and state practice, the immunity of the state itself, and, when appropriate, domestic precedents. But in this case, the Executive may also find the nature of the acts alleged—and whether they should properly be regarded as actions in an official capacity—to be relevant to the immunity determination. Respondents have not only relied on the ATS to assert a federal common law cause of action, but have also invoked the statutory right of action in the TVPA for damages based on torture and extrajudicial killing. And respondents, some of whom are United States citizens, have brought that action against a former Somali official who now lives in the United States, not Somalia.

Furthermore, as noted above, the *TVPA Senate Report* contemplated—and a number of courts have held—that the foreign state’s position on whether the alleged conduct was in an official capacity would be an important consideration in determining an official’s immunity. See, e.g., *Matar v. Dichter*, 563 F.3d 9, 11, 14 (2d Cir. 2009) (noting Executive Branch’s recognition of the Israeli government’s assertion that its former official acted “in furtherance of official policies of the State of Israel”); *In re Estate of Marcos, Human Rights Litig.*, 25 F.3d 1467, 1471 (9th Cir. 1994) (finding no immunity, relying in part on Philippine government’s representation that former president’s acts were “not official acts pursuant to his authority as President”), cert. denied, 513 U.S. 1126 (1995); see also *Jones v. Ministry of Interior*, [2007] 1 A.C. 270, 281 (H.L. 2006) (appeal taken from Eng.) (finding immunity where Saudi Arabia asserted it for sitting

officials).<sup>11</sup> Here, however, the United States does not recognize any government that can speak on behalf of Somalia.

Also, a foreign state may seek to waive the immunity of a current or former official, because immunity is accorded to foreign officials not for their personal benefit, but for the benefit of the foreign state. See, *e.g.*, VCDR, pmb., art. 32(1), 23 U.S.T. at 3230, 3241; Vienna Convention on Consular Relations, *done* Apr. 24, 1963, pmb., 21 U.S.T. 77, 79; *Paul v. Avril*, 812 F. Supp. 207, 210-211 (S.D. Fla. 1992). But the issue of waiver is likewise rendered difficult in this case because the United States does not currently recognize any government of Somalia that could render a formal waiver.

In sum, it is unlikely that in enacting the FSIA, Congress *sub silentio* removed the Executive's ability to take complex considerations like these into account in deciding whether to recognize immunity of foreign officials from civil actions.

6. Petitioner contends that a number of adverse consequences would flow from construing the FSIA not to govern the immunity of foreign officials. That is incorrect. Petitioner's arguments that his interpretation is necessary to avoid abrogating the immunity of foreign officials (Br. 26), to avoid violating international law by subjecting officials to suit (Br. 40-41), to avoid opening United States officials to a "heightened risk of reciprocal actions abroad" (Br. 39), and to avoid inviting a flood of litigation in U.S. courts (Br. 33-35), all assume that for-

---

<sup>11</sup> In *Jones*, [2007] 1 A.C. at 290, the House of Lords held that the British State Immunity Act 1978 provided immunity to sitting officials for alleged acts of torture, but noted that officials sued in United States courts for torture or extrajudicial killing under the TVPA might not be immune from suit, *id.* at 297.

eign officials have immunity under the FSIA or not at all. But that is not so: officials generally continue to enjoy immunity under background principles for their official acts, and fidelity to international norms and the protection of United States officials abroad are important factors that the Executive Branch considers in determining whether to suggest immunity for particular foreign officials. Indeed, in some circumstances the immunity of officials under Executive Branch principles may be broader than (as in other circumstances it may be narrower than) that of the state under the FSIA.

**C. The FSIA Did Not Abrogate The Long-Recognized Immunity From Suit Of Foreign Officials, Rooted In The Executive Branch’s Constitutional Authority To Conduct Foreign Affairs**

1. In the FSIA, Congress codified the substantive principles that the Executive Branch had used to govern its immunity determinations with respect to foreign states and their instrumentalities. At the same time, Congress altered the pre-existing procedure for making such determinations, replacing the prior regime of Executive suggestions of immunity with statutory standards to be applied by the courts. *FSIA Report* 7 (“A principal purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch.”).

By contrast, the FSIA contains no text altering or otherwise addressing the background common law principles relating to foreign officials’ immunity to suit. Sensitive diplomatic and foreign policy judgments are involved in determining the contours of official immunity and any refinements or exceptions to it, and in assessing the significance of unfolding international law and prac-

tice in making those determinations. Such judgments are ordinarily committed to the Executive as an aspect of the Executive Branch's prerogative to conduct foreign affairs on behalf of the United States, see, *e.g.*, *Ex parte Peru*, 318 U.S. at 588. The FSIA should not be read to have altered that practice *sub silentio*. See *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952) ("Statutes which invade the common law \* \* \* are to be read with a presumption favoring the retention of long-established and familiar principles."). Therefore, foreign officials' immunity continues to be governed by the pre-existing practice, under which courts defer to Executive suggestions and principles of immunity with respect to foreign officials. See *Enahoro*, 408 F.3d at 881-882; *Ye*, 383 F.3d at 625; *Noriega*, 117 F.3d at 1212.

2. After concluding that the district court erred in holding that this suit must be dismissed under the FSIA, the court of appeals declined to consider whether petitioner is entitled to official immunity under background principles recognized by the Executive and the courts. It instead remanded to the district court to consider that question in the first instance. That was the correct disposition. Because neither court below passed on that question, there is no occasion for this Court to do so.

**II. IF THE FSIA GOVERNS THE IMMUNITY FROM SUIT OF SITTING FOREIGN GOVERNMENT OFFICIALS FOR ACTIONS IN AN OFFICIAL CAPACITY, THEY GENERALLY RETAIN THAT IMMUNITY AFTER LEAVING OFFICE**

If this Court were to agree with petitioner that the FSIA applies to sitting foreign officials, former officials generally will retain immunity for their official acts. That would be so under either of the two theories petitioner has advanced in arguing that the FSIA governs

his immunity. But petitioner’s “agency or instrumentality” theory offers the better approach to that result because under that theory the FSIA would not intrude so deeply on pre-existing common law principles of official immunity.

1. At the time of the FSIA’s enactment, the background common law rule generally recognized the immunity of former officials for actions taken in an official capacity. See, *e.g.*, VCDR art. 39(2), 23 U.S.T. at 3245; pp. 11-12, *supra*. That rule reflects the principle that functional immunity “based on acts—rather than status—does not depend on tenure in office.” *Matar*, 563 F.3d at 14. As a general matter, affording immunity to former officials for matters within their official capacity serves the important purposes of protecting the reciprocal interests of sovereigns, ensuring that officials are not unduly chilled in the performance of their duties, and preventing litigants from circumventing the FSIA’s stringent limitations on suit against the state through suits against its former officials. *Belhas v. Ya’alon*, 515 F.3d 1279, 1286 (D.C. Cir. 2008); *Chuidian*, 912 F.2d at 1101.

Accordingly, nothing in the FSIA should be read to establish a scheme in which current officials, but not former officials, could enjoy immunity. Congress surely did not intend to depart from established domestic and international practice in so dramatic a manner. That is especially so given the requirement that Congress speak clearly when it intends to change settled common law principles. See *Texas*, 507 U.S. at 534. Nor would such abrogation be consistent with the understanding that one of Congress’s “well-recognized” purposes in enacting the FSIA was the “codification of international law [of immu-

nity] at the time of the FSIA’s enactment.” *Permanent Mission*, 551 U.S. at 199.

2. If the Court concludes that foreign officials are “agenc[ies] or instrumentalit[ies]” of the foreign state, 28 U.S.C. 1603(b), the immunity of former officials should continue to be governed by the common law regime, guided by executive judgment, that predated the FSIA. The court of appeals held that were foreign officials considered “agenc[ies] or instrumentalit[ies],” individuals no longer employed by the foreign state at the time of the suit’s filing would not be entitled to immunity under the FSIA. Pet. App. 21a-25a. In so concluding, the court relied on this Court’s decision in *Patrickson*, which held that because the majority-share-ownership prong of Section 1603(b)’s definition of an “agency or instrumentality” is “expressed in the present tense,” corporate entities that satisfied Section 1603(b)’s definition at the time of the acts in question but not at the time of suit fall outside of the FSIA’s coverage. 538 U.S. at 478. Under the rationale of *Patrickson*, former officials likewise would no longer be agencies or instrumentalities of the foreign state. At that point, they should once again receive immunity (or not) under common law principles. Nothing in Section 1603(b) or any other provision of the FSIA indicates any intent to abrogate common law immunity for former officials. See *Matar*, 563 F.3d at 13 (“[t]he FSIA is a statute that ‘invade[d] the common law’ and accordingly must be ‘read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.’”) (citation omitted); *id.* at 14. Accordingly, the Second Circuit has held that “if \* \* \* the FSIA does not apply to former government officials,” such officials may be “immune from suit under common-law principles

that pre-date, and survive, the enactment of that statute.” *Ibid.*

Under the “agency or instrumentality” theory of the FSIA’s application to individuals, petitioner’s status as a former official removes him from the FSIA and returns him to the world of common law principles of immunity. In that event, as noted earlier, the remand ordered by the court of appeals will allow the district court to determine in the first instance whether petitioner is immune from this suit. See p. 28, *supra*.

3. Should this Court instead adopt petitioner’s alternative theory and conclude that the term “foreign state,” see 28 U.S.C. 1603(a), covers foreign officials, the Court’s construction would apparently apply to former as well as current officials. The very reason for including individual officials within the term “foreign state” presumably would have to do with the relationship between the acts of the official and the acts of the state. If so, the state’s immunity would extend to all acts in an official capacity, even when the individuals who committed them no longer hold office. See *Matar*, 563 F.3d at 14. Accordingly, this theory would work an even greater invasion of the pre-existing common law than would petitioner’s first theory, and for this reason alone should be rejected.

If the Court concludes otherwise, however, the question still remains under the FSIA whether petitioner acted in an official rather than a personal capacity. See p. 23, *supra*. A remand to the district court to make that determination would therefore be required.<sup>12</sup>

---

<sup>12</sup> As noted previously, the district court relied upon letters from the TFG stating that the actions alleged in the complaint “would have been taken by [petitioner] in his official capacities.” See Pet. App. 54a-55a, 57a, 61a. But the United States does not recognize the TFG as the government of Somalia, and absent contrary guidance from the Executive



CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

HAROLD HONGJU KOH  
*Legal Advisor*  
JONATHAN B. SCHWARTZ  
*Deputy Legal Adviser*  
*Department of State*

ELENA KAGAN  
*Solicitor General*  
TONY WEST  
*Assistant Attorney General*  
EDWIN S. KNEEDLER  
*Deputy Solicitor General*  
GINGER D. ANDERS  
*Assistant to the Solicitor*  
*General*  
DOUGLAS N. LETTER  
SHARON SWINGLE  
LEWIS S. YELIN  
*Attorneys*

JANUARY 2010

---

Branch, the TFG is not in a position to assume that role in United States courts. The district court therefore should not attach significance to the statements of the TFG unless the Executive Branch advises it to do so.