SUING FOREIGN OFFICIALS IN U.S. COURTS: UPHOLDING SEPARATION OF POWERS BY LIMITING JUDICIAL ABROGATION OF IMMUNITY

*Sarah P. Hogarth**

INTRODUCTION

As human rights atrocities continue to shock our world media, the international community is calling for ways to hold accountable the government actors who commit egregious acts of terror against their people.[1] Advocates have turned to U.S. courts as one arena in which violations of human rights may be vindicated.[2] Yet, no matter how commendable the fight for international human rights may be, there remains a fundamental jurisdictional bar to these suits: sovereign immunity.

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* Candidate for Juris Doctor, Notre Dame Law School, 2015; Bachelor of Arts, Social Relations and Policy, Michigan State University, 2012. I thank Professor A.J. Bellia for his inspiration for the topic of this Note as well as his invaluable guidance and commentary throughout the writing process. I would also like to thank my family for all their love and support. Finally, I thank the members of the *Notre Dame Law Review* for their skilled editing in preparing this Note for publication. All errors are my own.

1 *See* Mark C. Eades, *China's Excuses for Its Human Rights Record Don't Hold Water*, U.S. NEWS & WORLD REP. (Jan. 17, 2014), http://www.usnews.com/opinion/blogs/world-report/2014/01/17/china-has-no-excuse-for-its-poor-human-rights-record; Andrew E. Kramer, *In Ukraine Protests over New Laws, Sticks and Stones Are Met with Tear Gas*, N.Y. TIMES (Jan. 19, 2014), http://www.nytimes.com/2014/01/20/world/europe/in-ukraine-protests-over-new-laws-sticks-and-firecrackers-meet-tear-gas.html?hpw&rref=world&_r=0; Nicholas Kristof, Op-Ed., *How To Truly Honor Mandela*, N.Y. TIMES (Dec. 11, 2013), http://www.nytimes.com/2013/12/12/opinion/kristof-how-to-truly-honor-mandela.html (urging both Americans and the United States government to honor Mandela's legacy by putting global pressure on human rights abusers).

2 *See* Stephen Hopgood, *The End of Human Rights*, WASH. POST (Jan. 3, 2014), http://www.washingtonpost.com/opinions/the-end-of-human-rights/2014/01/03/7f8fa83c-6742-11e3-ae56-22de072140a2_story.html (noting that "Freedom House called on the United States . . . to do more" for human rights). *But see* David G. Savage, *Supreme Court Throws Out Overseas Human Rights Case*, L.A. TIMES (Jan. 14, 2014, 8:42 AM), http://www.latimes.com/nation/nationnow/la-na-nn-supreme-court-human-rights-abuses-20140114,0,341282.story#axzz2quJNccSU ("The Supreme Court said *again* Tuesday that federal courts are not the world's forum for dealing with human rights abuses . . . ." (emphasis added)).

Although sovereign immunity for foreign states has been codified in the Foreign Sovereign Immunities Act (FSIA),[3] the Supreme Court held in *Samantar v. Yousuf* that the FSIA does not codify immunity with respect to foreign officials or heads of state.[4] The Supreme Court opined, however, that a suit against a foreign official "may still be barred by foreign sovereign immunity under the common law."[5] The Supreme Court's holding in *Samantar* left it to the lower courts to decide how foreign official immunity should be treated under the "common law."[6] On remand, the Fourth Circuit concluded that foreign officials "are not entitled to foreign official immunity for *jus cogens* violations [of international law],"[7] which include atrocities such as genocide,[8] torture, and extrajudicial killing.[9] The court reasoned that because foreign officials may only claim immunity for acts "arguably attributable to the state," and "*jus cogens* violations are, by definition, acts that are not officially authorized by the Sovereign," foreign officials are not entitled to immunity for *jus cogens* violations.[10] This conclusion, however, poses considerable problems, both constitutionally and pragmatically. Most importantly, submitting foreign officials to the jurisdiction of U.S. courts significantly affects U.S. foreign relations—an area delegated by the Constitution to the political branches.[11]

This Note will propose the constitutional framework courts should implement when suits are brought against individual foreign officials post-*Samantar*, specifically arguing that the constitutional allocation of foreign affairs powers requires U.S. courts to broadly insulate foreign officials from suit absent authorization from a political branch.[12] Part I examines the law of nations and its incorporation into the specific foreign relations powers

3 Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended at 28 U.S.C. §§ 1330, 1602–1611 (2012)). The FSIA presumes immunity of a foreign state from suit. 28 U.S.C. § 1604. However, it provides several exceptions to this immunity, including: waiver by the foreign state, § 1605(a)(1), commercial activity of the state which affects the United States, § 1605(a)(2), certain expropriation actions by the foreign state, § 1605(a)(3), certain noncommercial torts committed by the foreign state, § 1605(a)(5), and actions to enforce an arbitral award, § 1605(a)(6).

4 560 U.S. 305, 323–24 (2010).

5 *Id.* at 324.

6 *Id.* at 324–25.

7 Yousuf v. Samantar, 699 F.3d 763, 773, 777-78 (4th Cir. 2012), *cert. denied*, 134 S. Ct. 897 (2014).

8 *Id.* at 775 (citing Evan J. Criddle & Evan Fox-Decent, *A Fiduciary Theory of Jus Cogens*, 34 YALE J. INT'L L. 331, 331 (2009)).

9 *Id.* at 778.

10 *Id.* at 775–77.

11 *See infra* Part I.

12 This Note confines its applicability to suits in the *civil* context, where customary international law is unsettled. *See* Curtis A. Bradley & Laurence R. Helfer, *International Law and the U.S. Common Law of Foreign Official Immunity*, 2010 SUP. CT. REV. 213, 240–45. Immunity in the criminal context has already been significantly eroded by customary international law and the jurisdiction of international tribunals. *Id.* at 238–40. In the civil context, it is important that customary international law is unsettled, as this lends further

delegated by the Constitution to the political branches, highlighting that the power to affect relations with foreign sovereigns resides in the political branches. Part II explains the Supreme Court's development of foreign sovereign immunity and the act of state doctrine—which were both informed by the law of nations—leading up to its decision in *Samantar*. Part III analyzes *Samantar* after remand, with particular emphasis on the Fourth Circuit's judicially created abrogation of immunity for foreign officials when plaintiffs allege violations of *jus cogens* norms of international law. This Part also describes the considerable problems, particularly constitutionally but also pragmatically, with recognition of a judicially created *jus cogens* exception to immunity.

Part IV proposes the constitutional framework under which analysis of a foreign official's amenability to suit should proceed. Specifically, this Note argues that the Constitution itself *requires* U.S. courts to abstain from entering a judgment against current and former officials of recognized foreign sovereigns, absent express authorization from a political branch. Therefore, the Fourth Circuit's judicially created abrogation of immunity for allegations of *jus cogens* violations runs afoul of the separation of powers because it usurps the constitutionally delegated powers of the political branches to shape U.S. foreign relations. Courts should first employ two separate immunity doctrines in suits involving foreign officials: status-based immunity, which bars suits against *sitting* heads of state and foreign officials, and conduct-based immunity, which bars suits for acts committed by officials in their official capacities. Finally, when suit is brought against an individual who was or is an official of a recognized sovereign for acts committed in his official capacity and within his sovereign territory, U.S. courts should invoke the act of state doctrine to dismiss the suit because it is impermissible for American courts to "sit in judgment on the acts of the government of another, done within its own territory,"[13] absent express authorization from a political branch. By refraining from entering judgment in suits against foreign officials, U.S. courts uphold the constitutional allocation of foreign affairs powers to the political branches.[14]

I. Constitutional Allocation of Powers

At the Founding, the law of nations provided the background upon which the drafters of the Constitution relied when allocating foreign relations powers among the branches.[15] Emmerich de Vattel's treatise, *The Law of Nations*, was well known to the Founders and informed "the men who . . .

weight to the conclusion that United States courts must err on the side of recognition of perfect sovereign rights absent clear direction from the political branches not to do so.

13 Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 416 (1964) (quoting Underhill v. Hernandez, 168 U.S. 250, 252 (1897)).

14 The relative powers of Congress and the President to unilaterally depart from the law of nations is beyond the scope of this Note.

15 *See* Anthony J. Bellia Jr. & Bradford R. Clark, *The Federal Common Law of Nations*, 109 Colum. L. Rev. 1, 28–46 (2009) [hereinafter Bellia & Clark, *Federal Common Law*]; Anthony

drew up the Constitution of the United States."[16] The law of nations embodied certain "perfect rights" of sovereign nations, which "included the rights to exercise territorial sovereignty, conduct diplomatic relations, exercise neutral rights, and peaceably enjoy liberty."[17] These rights were "so fundamental that interference with any of them provided just cause for war."[18] In fact, "[o]f all the rights possessed by a Nation," Vattel wrote in *The Law of Nations*, "that of sovereignty is doubtless the most important, and the one which others should most carefully respect if they are desirous not to give cause for offense."[19] As an element of sovereignty, Vattel noted that "[n]o foreign State may inquire into the manner in which a sovereign rules, nor set itself up as judge of his conduct."[20] At the time of ratification, the perfect rights of sovereigns were well understood, and the Constitution was structured so as to empower the new federal government to "conduct foreign relations" in light of these perfect rights.[21]

The Constitution allocates specific foreign relations powers to each of the political branches.[22] Article I grants Congress the power to, *inter alia*, "define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations,"[23] "declare War, grant Letters of Marque and Reprisal,"[24] "raise and support Armies,"[25] and "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers."[26]

Article II vests "[t]he executive Power . . . in a President,"[27] and provides that "[t]he President shall be Commander in Chief of the Army and Navy,"[28]

J. Bellia Jr. & Bradford R. Clark, *The Political Branches and the Law of Nations*, 85 NOTRE DAME L. REV. 1795, 1795 (2010) [hereinafter Bellia & Clark, *Political Branches*].

16 Albert de Lapradelle, *Introduction* to EMMERICH DE VATTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW, at xxx n.1 (Charles G. Fenwick trans., Legal Classics Library spec. ed. 1993) (1758); *see also* U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 462 n.12 (1978) (noting that Vattel was the "international jurist most widely cited in the first 50 years after the Revolution").

17 Bellia & Clark, *Political Branches*, *supra* note 15, at 1799 (internal quotation marks omitted).

18 *Id.*; *see also* 1 VATTEL, *supra* note 16, intro., § 17, at 7 ("*Perfect rights* are those which carry with them the right of compelling the fulfillment of the corresponding obligations . . . .").

19 1 VATTEL, *supra* note 16, bk. II, ch. IV, § 54, at 131. *See generally* Bellia & Clark, *Federal Common Law*, *supra* note 15, at 15–19 (discussing Vattel's recognition of certain rights of sovereigns in *The Law of Nations* and his treatise's influence on the Founders).

20 1 VATTEL, *supra* note 16, bk. II, ch. IV, § 55, at 131.

21 Bellia & Clark, *Federal Common Law*, *supra* note 15, at 31.

22 *See generally id.* at 31–33 (listing quotations from the Constitution of foreign relations powers granted to the President and Congress under Articles II and I, respectively).

23 U.S. CONST. art. I, § 8, cl. 10.

24 *Id.* art. I, § 8, cl. 11.

25 *Id.* art. I, § 8, cl. 12.

26 *Id.* art. I, § 8, cl. 18.

27 *Id.* art. II, § 1, cl. 1.

28 *Id.* art. II, § 2, cl. 1.

that "[h]e shall have Power, by and with the Advice and Consent of the Senate, to make Treaties,"[29] that "he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors,"[30] and that "he shall receive Ambassadors and other public Ministers."[31] This power to send and receive ambassadors "enabled the political branches, on behalf of the United States, to recognize foreign nations as equal and independent sovereigns under the law of nations."[32] This allocation of powers granted the authority to conduct foreign relations to the federal *political* branches, and by implication, excluded the judiciary.[33] The role of the Court, then, in upholding the powers of the political branches is to understand perfect sovereign rights as *default* principles to be employed until either political branch properly exercises its power to infringe another nation's sovereign rights.[34]

II. The Supreme Court's Foreign Sovereignty Developments

This Part explores the history of foreign sovereign immunity and the act of state doctrine, both of which arose out of the law of nations' understanding of a sovereign's "perfect rights." Although head of state immunity and the act of state doctrine in positive federal law can both be traced to Chief Justice Marshall's opinion in *The Schooner Exchange*,[35] they are now distinct concepts. Head of state immunity shields foreign individual officials from the jurisdiction of U.S. courts.[36] The act of state doctrine, on the other hand, prohibits courts from questioning the validity of an act of a foreign sovereign taken within its own territory, and thus merits dismissal of the suit for failure to state a claim on which relief may be granted.[37] Neither doctrine is expressly written into the Constitution, but denial of their protections to foreign sovereigns traditionally would have been just cause for war.[38] Today, it is not only unwise, but also an usurpation of the constitutional allocation of foreign affairs powers, for courts, by exercising jurisdiction or rendering judgment, to singlehandedly cause the United States to become mired in a foreign conflict; such power is reserved to Congress and the Presi-

29 *Id.* art. II, § 2, cl. 2.

30 *Id.*

31 *Id.* art. II, § 3.

32 Bellia & Clark, *Political Branches*, *supra* note 15, at 1802 n.42.

33 *Id.* at 1802. Resolution of the particular allocation of foreign affairs powers between the two political branches is beyond the scope of this Note. It bears recognition, however, that until either of the political branches is deemed to have improperly exercised its corresponding powers, the judicial branch should not interfere.

34 *See* Bellia & Clark, *Federal Common Law*, *supra* note 15, at 46–47.

35 The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116 (1812); *see infra* subsection II.A.1.

36 *See* Samantar v. Yousuf, 560 U.S. 305, 321–22 (2010) (shielding foreign officials when "the effect of exercising jurisdiction would be to enforce a rule of law against the state" as a whole (quoting Restatement (Second) of the Foreign Relations Law of the United States § 66(f) (1965)) (internal quotation marks omitted)).

37 *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427–28 (1964).

38 *See supra* notes 15–18 and accompanying text.

dent. In the absence of a political branch exercising one of its powers, courts should broadly apply immunity doctrines and the act of state doctrine—thereby erring on the side of greater recognition of the perfect sovereign rights of foreign nations in order to preserve the Constitution's delegation of foreign affairs powers to the political branches.

A. Head of State Immunity

Head of state immunity arose out of the law of nations—"[the sovereign's] dignity alone, and the regard due to the Nation which he represents and governs . . . exempts him from the jurisdiction of the [foreign] country."[39] Thus during the Framing, the person representing the sovereign would have been understood as immune from U.S. courts' jurisdiction.[40] This Section will explore the American development of head of state immunity and its incorporation of the law of nations from John Marshall's opinion in *The Schooner Exchange*[41] through modern head of state immunity. Modern head of state immunity still echoes the law of nations principle that a court, by exercising jurisdiction over a foreign official, may offend the respect for sovereignty that is due to a foreign state.[42]

1. The Marshall Court

Head of state and foreign official immunity are closely linked to foreign sovereign immunity, which arose out of principles drawn from the law of nations.[43] The doctrine of sovereign immunity can be traced to Chief Justice Marshall's opinion in *The Schooner Exchange*,[44] which is regarded as the first Anglo-American writing that contemplates immunity as a "basic requirement of the law of nations."[45] In *The Schooner Exchange*, the plaintiffs filed a libel action alleging that their ship had been forcibly taken while at sea by French sailors acting under orders from Napoleon.[46] Seven months later, when the vessel was brought into port at Philadelphia due to adverse weather, the plaintiffs sued to attach the ship.[47] The Court dismissed the suit, holding that the vessel was immune by virtue of it being a public ship in service of a foreign sovereign.[48]

The Chief Justice's holding was premised on principles of sovereignty drawn from the law of nations, which granted each sovereign absolute and

39 2 VATTEL, *supra* note 16, bk. IV, ch. VII, § 108, at 386.

40 *See supra* notes 13–19 and accompanying text.

41 The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116 (1812).

42 *See* Curtis A. Bradley & Jack L. Goldsmith, *Foreign Sovereign Immunity, Individual Officials, and Human Rights Litigation*, 13 GREEN BAG 2D 9, 13–14 (2009).

43 *See* Anthony J. Bellia Jr. & Bradford R. Clark, *The Law of Nations as Constitutional Law*, 98 VA. L. REV. 729, 825 (2012).

44 *The Schooner Exchange*, 11 U.S. (7 Cranch) 116.

45 THEODORE R. GIUTTARI, THE AMERICAN LAW OF SOVEREIGN IMMUNITY 27 (1970).

46 *The Schooner Exchange*, 11 U.S. (7 Cranch) at 117.

47 *Id.*

48 *Id.* at 147.

complete jurisdiction over all persons and things within its borders.[49] Therefore, any limitation on a nation's exercise of jurisdiction must be by the sovereign's self-imposed consent, either explicit or implicit.[50] Marshall reasoned: "This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse . . . have given rise to a class of cases in which every sovereign is understood to wave [sic] the exercise of a part of that complete exclusive territorial jurisdiction."[51] Marshall highlighted two relevant areas in which sovereign immunity under the law of nations extended beyond the state itself: the individual head of state[52] and foreign ministers.[53] Finally, Marshall noted that each sovereign

> is capable of destroying this implication . . . either by employing force, or by subjecting such vessels to the ordinary tribunals. But until such power be exerted in a manner not to be misunderstood, the sovereign cannot be considered as having imparted to the ordinary tribunals a jurisdiction, which it would be a breach of faith to exercise.[54]

After *The Schooner Exchange*, courts adhered to a doctrine of absolute immunity, incorporating well-established principles of the law of nations.[55] In 1897, the Supreme Court in *Underhill v. Hernandez* held that a U.S. citizen could not recover from a Venezuelan military commander for unlawful assault and detention in Venezuela, when that revolutionary party ultimately succeeded and was recognized by the United States.[56] The Court first articulated the act of state doctrine,[57] relying on principles of the law of nations.[58] Further, the Court recognized that "[t]he immunity of individuals from suits

49 *Id.* at 136; *see* GIUTTARI, *supra* note 45, at 28.

50 *The Schooner Exchange*, 11 U.S. (7 Cranch) at 136.

51 *Id.* at 137.

52 *Id.* This immunity is embodied in "status" immunity.

53 *Id.* at 138. Marshall reasoned that foreign ministers are different from private individuals, who do not have immunity, because they are "employed by him . . . [and] engaged in national pursuits." *Id.* at 144. This immunity is embodied in modern day diplomatic immunity.

54 *Id.* at 146. Marshall may also have been influenced by the Attorney General's request for immunity, stating at the end of his opinion "that the fact might be disclosed to the Court by the suggestion of the Attorney for the United States." *Id.* at 147.

55 *See* Berizzi Bros. Co. v. S.S. Pesaro, 271 U.S. 562, 574 (1926) (holding that a merchant ship owned by a foreign sovereign, even though used for commercial trading, was immune from suit as a matter of sovereignty "in the absence of a treaty or statute of the United States evincing a different purpose"); Bradley & Helfer, *supra* note 12, at 217 (noting that "U.S. courts applied a doctrine of absolute immunity . . . stemming from considerations of both international law and international comity").

56 Underhill v. Hernandez, 168 U.S. 250, 253–54 (1897).

57 *Id.* at 252 ("[T]he courts of one country will not sit in judgment on the acts of the government of another done within . . . their own States, in the exercise of governmental authority, whether as civil officers or as military commanders . . . ."); *see infra* Section III.B.

58 *See* 1 VATTEL, *supra* note 16, bk. II, ch. IV, § 54, at 131 ("No foreign State may inquire into the manner in which a sovereign rules, nor set itself up as judge of his conduct . . . ."); *see also infra* Section III.B.

brought in foreign tribunals for acts done within their own States, in the exercise of governmental authority, whether as civil officers or as military commanders, must necessarily extend to the *agents* of governments ruling by paramount force as matter of fact."[59]

2. The Modern Doctrine: Executive Deference

By the late 1930s, however, courts began to defer to suggestions of immunity given by the State Department.[60] Deference to the Executive reached its peak in *Republic of Mexico v. Hoffman*, in which the Court held that in the absence of Executive guidance, courts must make immunity determinations "in conformity to the principles accepted by the department of the government charged with the conduct of our foreign relations."[61] The Court reasoned further, "[i]t is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize."[62] The *Hoffman* decision went further than any earlier decisions granting deference to the Executive's suggestions of immunity, instead holding that the Court must give deference to the Executive's *policies*.[63] It is important, however, to note the historical context in which the Court was electing to defer to the Executive on questions of sovereign immunity—it was an era that was giving nearly exclusive control over foreign affairs to the Executive, acting unilaterally.[64] In these opinions, the Court retained the doctrine of absolute sovereign immunity, but reallocated immunity determinations from legal considera-

59 *Underhill*, 168 U.S. at 252 (emphasis added).

60 *Compare Ex parte* Republic of Peru, 318 U.S. 578, 588 (1943) ("That principle is that courts may not so exercise their jurisdiction, by the seizure and detention of the property of a friendly sovereign, as to embarrass the executive arm of the Government in conducting foreign relations. 'In such cases the judicial department of this government follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction.'" (quoting United States v. Lee, 106 U.S. 196, 209 (1882))), *and* Compania Espanola de Navegacion Maritima, S.A. v. The Navemar, 303 U.S. 68, 74 (1938) ("If the [immunity] claim is recognized and allowed by the executive branch of the government, it is then the duty of the courts to release the vessel upon appropriate suggestion by the Attorney General . . . ."), *with S.S. Pesaro*, 271 U.S. at 574, 576 (granting immunity despite the State Department's lower court argument that immunity should not be granted).

61 324 U.S. 30, 35 (1945).

62 *Id.* The Court noted that "[i]t is enough that we find no persuasive ground for allowing the immunity in this case, an important reason being that the State Department has declined to recognize it." *Id.* at 35 n.1.

63 *See* GIUTTARI, *supra* note 45, at 146–47.

64 *See* United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319-20 (1936) ("It is important to bear in mind that we are here dealing [with] . . . the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations . . . . [I]f, in the maintenance of our international relations, embarrassment . . . is to be avoided and success for our aims achieved, congressional legislation . . . must often accord to the President a degree of discretion . . . which would not be admissible were domestic affairs alone involved."); GIUTTARI, *supra* note 45, at 154–61.

tions into political questions.[65] As one author notes, "[t]he only basis for justifying a dominant role for the executive in the determination of sovereign immunity questions sprang essentially from its acknowledged primacy in foreign affairs generally and the immediate impact which judicial decisions on sovereign immunity could have upon foreign policy interests."[66]

The Executive, for more than a century and a half, had generally recommended immunity for friendly sovereigns.[67] In the face of growing disdain for absolute sovereign immunity in light of foreign states increasingly engaging in commercial enterprises, the State Department issued the Tate Letter in 1952 endorsing the "restrictive theory" of sovereign immunity.[68] The restrictive theory provides that "immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*)."[69] The Tate Letter closed by stating: "It is realized that a shift in policy by the executive cannot control the courts but it is felt that the courts are less likely to allow a plea of sovereign immunity where the executive has declined to do so."[70]

The Supreme Court did adopt the restrictive theory, concluding that "immunity is confined to suits involving the foreign sovereign's public acts."[71] The restrictive theory, however, encountered significant problems in practice.[72] First, because initial immunity determinations fell on the State Department and were dispositive in the courts, foreign nations lobbied the Department heavily, generating politically charged suggestions of immunity, sometimes even in instances where immunity was unavailable under the restrictive theory.[73] Second, foreign nations did not always request suggestions of immunity from the State Department, and the State Department remained silent, leaving the courts to make independent immunity determinations.[74]

In response to inconsistent immunity determinations, in 1976 Congress passed the Foreign Sovereign Immunities Act, codifying the restrictive theory of foreign sovereign immunity.[75] The FSIA shifted responsibility for sover-

65 *See* GIUTTARI, *supra* note 45, at 159.

66 *See id.* at 161.

67 Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 486 (1983).

68 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* 26 DEP'T ST. BULL. 984–85 (1952) [hereinafter Letter from Jack B. Tate].

69 *Id.* at 984. The Tate Letter acknowledges that several foreign jurisdictions and scholars have endorsed the restrictive theory, and thus the shift in policy remains in step with jurisdictions internationally. *Id.*

70 *Id.* at 985.

71 *Verlinden*, 461 U.S. at 487.

72 *See id.*

73 *Id.*

74 *Id.*

75 Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended at 28 U.S.C. §§ 1330, 1602–1611 (2012)).

eign immunity determinations from the executive to the judicial branch.[76] It provided a comprehensive set of legal standards applicable to civil actions against a "foreign state" or a "political subdivision[,] . . . agency or instrumentality."[77] The FSIA provides that a foreign state is normally immune from jurisdiction subject to certain exceptions, including waiver by the foreign sovereign[78] or commercial activities of the foreign sovereign.[79] The Act provides that when an exception applies, "the foreign state shall be liable in the same manner and to the same extent as a private individual."[80]

Prior to enactment of the FSIA, suits against individual foreign officials were few and far between.[81] As suits against individual officials increased in frequency, however, courts were required to decide whether the FSIA applied to individuals. A circuit split developed, with the majority of circuits concluding that the FSIA applied to individual officials[82] and a minority concluding that the FSIA did not apply to individual officials.[83]

3. Returning to the "Common Law": *Samantar v. Yousuf*

The Fourth Circuit widened the split.[84] In *Samantar*, members of the Isaaq clan sued Samantar, the former Prime Minister of Somalia, under the Torture Victim Protection Act (TVPA) and the Alien Tort Statute (ATS), seeking redress for acts of torture and other human rights violations committed by the Somali military in the 1980s.[85] Plaintiffs alleged not that Samantar committed the violations himself, but that due to his roles as Minister of Defense and Prime Minister, he gave tacit approval.[86] Oppression of Somali citizens ended in January 1991 with the collapse of the Barre regime, and

76 28 U.S.C. § 1602.

77 *Id.* §§ 1603–1604.

78 *Id.* § 1605(a)(1).

79 *Id.* § 1605(a)(2).

80 *Id.* § 1606.

81 *See* Samantar v. Yousuf, 560 U.S. 305, 323 n.18 (2010) (noting that the State Department made only six individual immunity determinations out of a total of 110 total decisions rendered from 1952 to 1977).

82 *See, e.g.*, *In re* Terrorist Attacks on Sept. 11, 2001, 538 F.3d 71, 83 (2d Cir. 2008) (concluding that acts committed in an individual's official capacity in a sovereign government must be analyzed under the FSIA), *abrogated by Samantar*, 560 U.S. 305; Keller v. Cent. Bank of Nigeria, 277 F.3d 811, 815 (6th Cir. 2002) (same), *abrogated by Samantar*, 560 U.S. 305; Byrd v. Corporacion Forestal y Industrial de Olancho S.A., 182 F.3d 380, 388 (5th Cir. 1999) (same), *abrogated by Samantar*, 560 U.S. 305; El-Fadl v. Cent. Bank of Jordan, 75 F.3d 668, 671 (D.C. Cir. 1996) (same), *abrogated by Samantar*, 560 U.S. 305; Chuidian v. Phil. Nat'l Bank, 912 F.2d 1095, 1103 (9th Cir. 1990) (same), *abrogated by Samantar*, 560 U.S. 305.

83 *See, e.g.*, Yousuf v. Samantar, 552 F.3d 371, 381 (4th Cir. 2009) (concluding that the FSIA does not apply to immunity determinations for individual foreign officials), *aff'd*, 560 U.S. 305 (2010); Enahoro v. Abubakar, 408 F.3d 877, 881–82 (7th Cir. 2005) (same).

84 *Yousuf*, 552 F.3d at 381.

85 *Id.* at 373–75.

86 *Id.* at 374.

Samantar fled to Virginia where the plaintiffs found him and brought suit.[87] The Fourth Circuit adopted the minority view that the FSIA's "agency or instrumentality" language did not apply to individuals, and therefore the district court could exercise jurisdiction over Samantar.[88]

The Supreme Court intervened to resolve the circuit split in its 2010 decision in *Samantar v. Yousuf*, concluding unanimously that the FSIA did not apply to individual foreign officials.[89] The Supreme Court opined, however, that "[e]ven if a suit is not governed by the Act, it may still be barred by foreign sovereign immunity under the common law."[90] The Court emphasized "the narrowness of [its] holding," acknowledging that Samantar may be able to assert several other defenses beyond the FSIA.[91] The Supreme Court, however, refused to give any content to the "common law," instead reserving the issue for the district court on remand.[92]

B. Act of State Doctrine

Distinct from sovereign immunity, yet still a product of the law of nations, is the act of state doctrine. The act of state doctrine is not a jurisdictional defense like immunity, but rather is a binding rule of decision that precludes U.S. courts from evaluating the propriety, or lack thereof, of acts undertaken by a foreign sovereign within its own territory.[93] Vattel, in *The Law of Nations*, explained that "[i]t clearly follows from the liberty and independence of Nations that each has the right to govern itself as it thinks proper, and that no one of them has the least right to interfere in the government of another."[94] Accordingly, "[n]o foreign State may inquire into the manner in which a sovereign rules, nor set itself up as judge of his conduct, nor force him to make any change in his administration."[95] Thus, during the Framing, when foreign affairs powers were allocated by the Constitution to

87 *Id.*

88 *Id.* at 383.

89 Samantar v. Yousuf, 560 U.S. 305, 325 (2010).

90 *Id.* at 324.

91 *Id.* at 325–26. The Supreme Court offered a procedural defense. The foreign state itself may be a "required party," such that "disposing of the action in the [foreign state's] absence may . . . as a practical matter impair or impede the [state]'s ability to protect [its] interest." *Id.* at 324 (quoting FED. R. CIV. P. 19(a)(1)(B)) (internal quotation marks omitted). If the foreign state itself is immune, the suit could not be brought against the individual. *Id.* at 324–25. Second, the Court concluded that "some actions against an official in his official capacity should be treated as actions against the foreign state itself, as the state is the real party in interest," thus preventing liability from attaching to the individual. *Id.* at 325.

92 *Id.* at 325–26; *see infra* Part III.

93 Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427–28 (1964).

94 1 VATTEL, *supra* note 16, bk. II, ch. IV, § 54, at 131.

95 *Id.* § 55.

Congress and the Executive, it would have been understood that actions taken by foreign sovereigns were not subject to judgment by U.S. courts.[96]

The first case acknowledging the act of state doctrine was *Underhill v. Hernandez*.[97] Underhill, a U.S. citizen who created a waterworks system and machinery repair business in Venezuela, was detained by General Hernandez and denied a passport.[98] The Supreme Court affirmed dismissal of Underhill's claim against Hernandez, holding that "[t]he acts complained of were the acts of a military commander representing the authority of the revolutionary party as a government, which afterwards . . . was recognized by the United States."[99] The Court explained that this injury must be remedied through powers delegated to the political branches:

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.[100]

The Court even extended the protection of territorial sovereignty not only to the state itself but to the state's de facto officials as well:

> Nor can the principle be confined to lawful or recognized governments, or to cases where redress can manifestly be had through public channels. The immunity of individuals from suits brought in foreign tribunals for acts done within their own States, in the exercise of governmental authority, whether as civil officers or as military commanders, must necessarily extend to the agents of governments ruling by paramount force as matter of fact.[101]

The *Underhill* Court not only relied on the law of nations' conception of sovereignty, but "also the Constitution's allocation of recognition and war powers to the political branches by requiring *courts* to respect the territorial sovereignty of recognized foreign states."[102] Because the United States had recognized the Venezuelan government, "judicial scrutiny of its acts would have contradicted recognition by denying the territorial sovereignty that recognition acknowledged."[103]

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96 The law of nations recognized an exception to the general prohibition of judging the conduct of foreign sovereigns: when a foreign people justly revolt against their sovereign such that the ties between the sovereign and his people are severed. Foreign states can assist the side they believed to be "upholding the just cause." *Id.* § 56.

97 Underhill v. Hernandez, 168 U.S. 250 (1897).

98 *Id.* at 251.

99 *Id.* at 254.

100 *Id.* at 252. For example, such redress could be achieved through diplomatic negotiations or declaration of war. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 422–23 (1964) ("[T]he usual method for an individual to seek relief is to exhaust local remedies and then repair to the executive authorities of his own state to persuade them to champion his claim in diplomacy or before an international tribunal.").

101 *Underhill*, 168 U.S. at 252.

102 Bellia and Clark, *supra* note 43, at 805.

103 *Id.*

The act of state doctrine continued to preclude plaintiffs from bringing suit for actions committed by foreign sovereigns in their own territory.[104] Judicial application of the act of state doctrine was ultimately entrenched in the Supreme Court's 1964 decision in *Banco Nacional de Cuba v. Sabbatino*.[105] When faltering diplomatic relations with Cuba resulted in the United States lowering its Cuban sugar quota, the Cuban government responded by passing a legislative enactment that allowed the Cuban government to "nationalize by forced expropriation property or enterprises in which American nationals had an interest."[106] A controversy resulted over which party was entitled to the proceeds—the American nationals or the Cuban government—with the Cuban government relying on the act of state doctrine to protect its ability to exact a taking without compensation.[107] The Supreme Court held for Cuba, concluding that

> the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.[108]

Sabbatino tied the act of state doctrine to a general understanding of the Constitution's allocation of powers[109]—in particular, the Executive's recognition power—and ensured that, in the absence of Congress or the President independently exercising one of their own constitutionally delegated powers, the judiciary would not unilaterally violate a foreign nation's perfect right to territorial sovereignty.[110] Although the act of state of doctrine is not compelled by international law today, the Court held that "the act of state doctrine is a principle of decision binding on federal and state courts," whose "continuing vitality depends on its capacity to reflect the proper distribution

104 *See* United States v. Pink, 315 U.S. 203, 233 (1942) ("[T]he courts of one country will not sit in judgment on the acts of the government of another done within its own territory." (quoting *Underhill*, 168 U.S. at 252) (internal quotation marks omitted)); United States v. Belmont, 301 U.S. 324, 330 (1937) ("The effect of [recognition by the President] was to validate, so far as this country is concerned, all acts of the [foreign] [g]overnment here involved from the commencement of its existence."); Ricaud v. Am. Metal Co., 246 U.S. 304, 309 (1918) ("[*Underhill*] requires only that, when it is made to appear that the foreign government has acted in a given way on the subject-matter of the litigation, the details of such action or the merit of the result cannot be questioned but must be accepted by our courts as a rule for their decision."); Oetjen v. Cent. Leather Co., 246 U.S. 297, 304 (1918) ("To permit the validity of the acts of one sovereign State to be reexamined and perhaps condemned by the courts of another would very certainly 'imperil the amicable relations between governments and vex the peace of nations.'").

105 376 U.S. 398.

106 *Id.* at 401.

107 *Id.* at 400–01.

108 *Id.* at 428.

109 *Id.* at 423 ("The act of state doctrine . . . arises out of the basic relationships between branches of government in a system of separation of powers.").

110 Bellia & Clark, *supra* note 43, at 813.

of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs."[111] Although the *Sabbatino* Court explicitly mentioned the Executive's power, the act of state doctrine is just as much bound up with Congress's foreign affairs powers. In order to reflect the delegation of foreign affairs powers to the political branches, the judiciary should refrain from passing judgment on the acts of a foreign sovereign done within its own territory.[112] The act of state doctrine should be applied in order for the judiciary to avoid infringing on the Executive's power to confer the privileges of recognition and on Congress's many powers to affect U.S. foreign relations.

III. THE *JUS COGENS* "EXCEPTION"

The foregoing Part described the development of individual immunity determinations and the act of state doctrine—two doctrines that arose out of the law of nations and were, as this Note argues, incorporated into the allocation of foreign relations powers to the political branches.[113] After the Supreme Court's decision in *Samantar*, which concluded that Congress had not exercised its foreign affairs powers in the context of individual immunity, the case was remanded to determine whether immunity under the "common law" was available.[114] The Fourth Circuit concluded that Samantar was not eligible for immunity under the common law, in particular because the acts alleged against him were violations of *jus cogens* norms and thus immunity was abrogated.[115] However laudable the vindication of human rights may be, the Fourth Circuit's decision announcing a judicially created *jus cogens* exception usurps its limited role in foreign relations. By abrogating immunity in cases of *jus cogens* violations under the "common law," federal courts would be infringing on the foreign affairs powers constitutionally delegated to the political branches. This Part will discuss the disposition of the lower courts in *Samantar* after remand and argue that elimination by the judiciary of immunity for *jus cogens* violations is improper. Because foreign sovereign immunity was impliedly incorporated into the Constitution through the delegation of foreign relations powers to Congress and the President, U.S. courts are an inappropriate venue for declaring a categorical abrogation of immunity that the political branches have not authorized through the exercise of one of their corresponding powers.

111 *Sabbatino*, 376 U.S. at 427–28.

112 *See* Bellia & Clark, *supra* note 43, at 817–18.

113 *See supra* Part I.

114 Samantar v. Yousuf, 560 U.S. 305, 325–26 (2010).

115 Yousuf v. Samantar, 699 F.3d 763, 778 (4th Cir. 2012), *cert. denied*, 134 S. Ct. 897 (2014).

A. Samantar *on Remand*

On remand, the district court rejected Samantar's claims of immunity under the common law, and the Fourth Circuit affirmed.[116] Samantar raised two immunity claims: (1) head of state immunity, because the conduct alleged occurred while he was Prime Minister, and (2) foreign official immunity, because the alleged conduct was "taken in the course and scope of his official duties."[117] The State Department on remand recommended that Samantar not be granted immunity on two grounds: first, the United States does not recognize a Somalian government that could claim immunity on his behalf,[118] and second, that Samantar's residence in the United States indicates his acquiescence to the jurisdiction of American courts.[119] The Fourth Circuit affirmed the district court's conclusion that Samantar was not entitled to immunity under the common law.[120] First, the court attempted to discern the level of deference granted to State Department immunity suggestions, distinguishing between head of state immunity and official acts immunity.[121] On issues of head of state immunity, the court reasoned, "consistent with the Executive's constitutionally delegated powers and the historical practice of the courts, we conclude that the State Department's pronouncement as to head of state immunity is entitled to absolute deference."[122] On questions of conduct-based immunity, however, to which the recognition power does not quite as logically extend, the court concluded that the State Department's determination "is not controlling, but it carries substantial weight in [the court's] analysis."[123]

Finally, the court concluded that Samantar was not entitled to foreign official immunity under the common law, drawing on principles of international law, domestic immunity law, and the judgment of the State Department.[124]

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116 *Id.* at 766.

117 *Id.* at 767.

118 Unfortunately for Mr. Samantar, this fact may be conclusive as to his eligibility for immunity. Sovereign immunity and the act of state doctrine apply to sovereigns *recognized* at the time of suit. Where a sovereign is not recognized, the concerns raised by adjudicating in U.S. courts—interference with foreign relations and territorial sovereignty—are no longer applicable. The President has exercised his power not to recognize a government in Somalia, and therefore Mr. Samantar does not have a sovereign to whom he can tie his immunity claim. However, the Fourth Circuit's holding that any allegations of *jus cogens* violations abrogate immunity presents considerable concern and should be addressed. *Id.* The Supreme Court, though, denied certiorari to reevaluate Mr. Samantar's claim after remand. Samantar v. Yousuf, 134 S. Ct. 897 (2014) (mem.) (denying certiorari).

119 *Yousuf*, 699 F.3d at 767.

120 *Id.* at 766.

121 *Id.* at 768–69.

122 *Id.* at 772. The Executive power the court relied upon is the power to "receive Ambassadors and other public Ministers," which includes the power to recognize foreign heads of state. U.S. CONST. art. II, § 3.

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

124 *Id.* at 773, 778.

> [A] foreign official may assert immunity for official acts performed within the scope of his duty, but not for private acts where "the officer purports to act as an individual and not as an official, [such that] a suit directed against that action is not a suit against the sovereign." A foreign official . . . will therefore not be able to assert this immunity for private acts that are not arguably attributable to the state.[125]

The court explained that the allegations against Samantar violated *jus cogens* norms of international law, which are "norm[s] accepted and recognized by the international community . . . as a norm from which no derogation is permitted."[126] Therefore, by definition, *jus cogens* violations are "acts that are not officially authorized by the Sovereign."[127] The court held that foreign officials "are not entitled to foreign official immunity for *jus cogens* violations, even if the acts were performed in the defendant's official capacity."[128] The court concluded that because the allegations against Samantar included violations of *jus cogens* norms, which by definition cannot be authorized by a foreign sovereign, he was not entitled to immunity.[129]

By holding that violations of *jus cogens* norms of international law cannot be shielded from suit under head of state immunity, the Fourth Circuit diverged from other circuits and opened former foreign officials to a vast array of personal liability.[130]

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125 *Id.* at 775 (alteration in original) (quoting Chuidian v. Phil. Nat'l Bank, 912 F.2d 1095, 1106 (9th Cir. 1990), *abrogated by* Samantar v. Yousuf, 560 U.S. 305 (2010)).

126 *Id.* (quoting Vienna Convention on the Law of Treaties art. 53, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980)) (internal quotation marks omitted).

127 *Id.* at 776.

128 *Id.* at 777.

129 *Id.* at 778. The court also acknowledged that the State Department's recommendation against immunity added substantial weight in favor of denying immunity. *Id.* at 778–79.

130 In *Giraldo v. Drummond Co.*, the District Court for the District of Columbia found instructive the reasoning in pre-*Samantar* D.C. Circuit decisions, despite the fact that they were decided under the now-inapplicable FSIA. 808 F. Supp. 2d 247, 250 (D.D.C. 2011), *aff'd*, 493 F. App'x 106 (D.C. Cir. 2012) (per curiam). The court rejected the plaintiff's argument that former President Uribe "acted within his official capacity but illegally, and hence such unlawful acts were outside the scope of his official duties by definition." *Id.* at 251. The court ultimately concluded that *jus cogens* violations remained within the scope of an official's capacity. *Id.* The D.C. Circuit affirmed in a per curiam opinion, stating that "mere allegations [of *jus cogens* violations] were insufficient to defeat former President Uribe's immunity." Giraldo v. Drummond Co., 493 F. App'x 106, 106 (D.C. Cir. 2012) (per curiam). Such a conclusion is consistent with pre-*Samantar* holdings. *See* Matar v. Dichter, 563 F.3d 9, 15 (2d Cir. 2009) ("A claim premised on the violation of *jus cogens* does not withstand foreign sovereign immunity."); Ye v. Zemin, 383 F.3d 620, 627 (7th Cir. 2004) (holding that the executive branch's determination that an official was entitled to immunity is conclusive, notwithstanding any *jus cogens* violations).

B. The Failure of the Jus Cogens *"Exception"*

The Supreme Court has incorporated the "restrictive theory" of foreign sovereign immunity[131]—meaning that immunity does not extend to private or commercial acts—yet it does not follow that what constitutes an official's *public* acts ought to be construed narrowly. Because governments can only act through individuals, a suit against a foreign official for conduct taken in his official capacity is akin to a suit against the sovereign.[132] Further, international law indicates "that *jus cogens* violations committed by officials are *governmental* rather than private acts."[133] By denying the protections of immunity to foreign officials when they have engaged in a governmental act in their official capacity within their own territory, courts are encroaching on the powers of the other branches to determine when to infringe upon another sovereign's "perfect rights." Failure to recognize the immunity of foreign officials has wide-ranging constitutional and practical ramifications—especially because it involves the United States imposing civil liability on foreign officials for a plethora of human rights violations. The judiciary should err on the side of broad recognition of the rights of foreign officials to act in their official capacities, absent authorization from the political branches to abrogate such protections, if the proper allocation of foreign affairs powers is to be upheld.

1. Usurpation of Constitutional Allocation of Power

As noted earlier, Congress and the President are given broad foreign relations powers.[134] At the Founding, denying an official immunity from suit would have been just cause for war.[135] Because of the foreign relations implications associated with denial of immunity, the Framers' allocation of foreign affairs powers to the political branches reserved to those branches the power to derogate from the "perfect rights" of foreign sovereigns.[136] Therefore, when the judiciary denies immunity absent authorization from a political branch, it usurps the constitutionally delegated power of the political branches to determine U.S. foreign relations. To preserve the proper alloca-

131 Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 487 (1983). Further, the restrictive theory has also been, at some point, endorsed by both political branches. *See* Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-582, 90 Stat. 2891 (codified as amended at 28 U.S.C. §§ 1330, 1602–1611 (2012)); Letter from Jack B. Tate, *supra* note 68. In its adoption of the restrictive theory, the Court is at least acting with some indication of authorization from the political branches—whether the authorization is constitutionally sound is beyond the scope of this Note.

132 Bradley & Goldsmith, *supra* note 42, at 10–11; *see also* 2 VATTEL, *supra* note 16, bk. IV, ch. VII, § 108, at 386 ("[The prince's] dignity alone, *and the regard due to the Nation which he represents and governs* . . . exempts him from the jurisdiction of [another] country." (emphasis added)).

133 Bradley & Helfer, *supra* note 12, at 245 (emphasis added).

134 *See supra* Part I.

135 *See supra* note 18 and accompanying text.

136 *See supra* Part I.

tion of powers, U.S. courts should err on the side of over-recognition of the rights of foreign sovereigns and rely on the law of nations to provide default principles.[137] Courts should be hesitant to adjudicate a suit against a foreign official—thereby interfering with the political branches' ability to conduct foreign affairs—absent express authorization to do so.

Congress has never expressly acknowledged a *jus cogens* exception to immunity; in fact, no such exception exists in the FSIA.[138] Although congressional inaction is not appropriate evidence of congressional intent, given the particular circumstances of foreign official immunity, congressional inaction should urge courts to exercise judicial restraint to avoid infringing on authority reserved to Congress. The executive branch also has broad foreign relations powers, which are an outgrowth of the recognition power. When the executive branch recognizes a foreign state—as is its prerogative—the implication is that the executive branch confers upon that sovereign the many rights and protections that accompany territorial sovereignty.[139]

Even when a recognized foreign sovereign *abuses* its power and commits human rights violations, its status as a sovereign should not be infringed lightly. Because *jus cogens* violations are governmental acts in the exercise of a sovereign's police power, "however monstrous such abuse undoubtedly may be, a foreign state's exercise of [that power] has long been understood for purposes of the restrictive theory as peculiarly sovereign in nature."[140] Because a sovereign state can only act through its officials, when an individual acts in his official capacity—even in committing a human rights abuse—he is engaging in a sovereign act that implicates the foreign state's territorial sovereignty. By denying immunity to officials who have committed *jus cogens* violations while acting in their official capacity, the judicial branch undermines the Executive's ability to recognize and thereby confer full sovereign authority upon a foreign state and its officials.

Because the law of nations was the backdrop upon which the Constitution was drafted, the Framers—in allocating foreign affairs powers to Congress and the Executive—reserved to the political branches the ability to derogate from recognition of the perfect rights of sovereigns.[141] Therefore, the judicial branch, in order to preserve this constitutional structure, should not deviate from the perfect rights of sovereigns unless and until a political branch has exercised its power.

137 *See supra* note 34 and accompanying text.

138 Bradley & Goldsmith, *supra* note 42, at 11 ("[T]he FSIA appears to contain no exception for international human rights cases.").

139 Defining what rights accompany territorial sovereignty should be informed by the law of nations and understood to be incorporated into the powers of the political branches. *See supra* Part I.

140 Saudi Arabia v. Nelson, 507 U.S. 349, 361 (1993).

141 *See supra* Part I.

2. Reciprocity and International Cohesion

Each sovereign has the *power* to infringe the perfect rights of other nations—however, upholding these rights is central to maintaining peaceful relations among countries.[142] Recognition of foreign sovereign immunity and its extension to foreign officials is not an obligation on any other foreign nation, but is a "matter of grace and comity."[143] Comity is "neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other."[144] When the United States denies immunity to a foreign official against the will of that foreign state, the United States jeopardizes its ability to have immunity conferred on American officials in the future. By concluding that "officials from other countries are not entitled to foreign official immunity for *jus cogens* violations, even if the acts were performed in the defendant's official capacity,"[145] the Fourth Circuit creates a future reciprocity problem.[146] As a pragmatic matter, the courts, when acting alone, should be hesitant to compromise the ability of the United States' sovereign rights to be recognized in courts abroad.

Further, "[a] court that interprets immunity broadly will not violate [customary international law], whereas a court that interprets immunity narrowly may."[147] Under international law, U.S. courts remain in compliance by applying a broad interpretation of immunity, even while adhering to the "restrictive" theory of sovereign immunity. By construing immunity broadly, courts also avoid opening the floodgates to human rights litigation, wherein "cases . . . might well be brought by the victims of all the ruthless military juntas, presidents-for-life, and murderous dictators of the world."[148] The courts should leave resolution of international human rights violations to

142 Bellia & Clark, *Political Branches*, *supra* note 15, at 1799; *see also* Louis Henkin, *The President and International Law*, 80 AM. J. INT'L L. 930, 931 (1986) ("In principle, every state has the power—I do not say the right—to violate international law and obligation and to suffer the consequences.").

143 Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 486 (1983).

144 Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 409 (1964) (quoting Hilton v. Guyot, 159 U.S. 113, 163–64 (1895)) (internal quotation marks omitted).

145 Yousuf v. Samantar, 699 F.3d 763, 777 (4th Cir. 2012), *cert. denied*, 134 S. Ct. 897 (2014).

146 Imagine, for example, that a foreign state or international tribunal determines that there is a *jus cogens* norm against all capital punishment. In fact, such a norm does exist for capital punishment of juvenile offenders. *See* Domingues v. United States, Case 12.285, Inter-Am. Comm'n H.R., Report No. 62/02, ¶ 85 (2002), *available at* http://cidh.org/annualrep/2002eng/USA.12285.htm ("[T]he Commission considers that the United States is bound by a norm of *jus cogens* not to impose capital punishment on individuals who committed their crimes when they had not yet reached 18 years of age."). It is difficult to imagine that the United States would approve foreign courts finding an American official civilly liable for damages arising out of the capital punishment of an adult offender.

147 Bradley & Helfer, *supra* note 12, at 252.

148 Belhas v. Ya'alon, 515 F.3d 1279, 1287 (D.C. Cir. 2008) (quoting Princz v. Fed. Republic of Germany, 26 F.3d 1166, 1175 n.1 (D.C. Cir. 1994)) (internal quotation marks omitted).

international tribunals and the political branches, all of which are bodies more fully equipped to handle foreign relations and international human rights violations. By so doing, U.S. courts protect the constitutional allocation of foreign affairs powers to Congress and the Executive and also avoid violating customary international law.

IV. SOLUTION: STATUS IMMUNITY, CONDUCT IMMUNITY, AND ACTS OF STATE

The status of head of state and foreign official immunity is no doubt in disarray as courts search for the content of the federal "common law," alluded to in *Samantar*, that comprises foreign official immunity.[149] Through careful consideration of the relevant constitutional powers allocated to each branch of the federal government, as well as the values espoused in the Supreme Court's development of foreign sovereign immunity and the act of state doctrine, a doctrinal framework emerges that will preserve the constitutional separation of powers, promote restraint of the apolitical branch in delicate foreign affairs questions, and avoid reciprocity concerns by respecting sovereign immunity's importance to international comity. This Part proposes a framework for courts to utilize prior to hearing a suit against a foreign official. First, the court should evaluate whether the official has "status-based" immunity;[150] second, the court should evaluate whether the individual official has "conduct-based" immunity;[151] and third, if the court decides there is no immunity bar to jurisdiction, it should apply the act of state doctrine when suit is brought against an official of a recognized sovereign for governmental acts occurring within the sovereign territory. Courts should apply each step of this framework separately. By broadly construing the inability of U.S. courts to enter judgment against foreign officials, courts will uphold the proper allocation of foreign affairs powers—and the ability to infringe sovereign rights—to the political branches.[152]

A. Status-Based Immunity

Courts should first apply status-based immunity. Status-based immunity protects a *sitting* head of state or high-ranking foreign official[153] from legal consequences purely by nature of his position in a foreign government.[154] This immunity, however, "terminates with the office."[155]

149 Samantar v. Yousuf, 560 U.S. 305, 323–24 (2010).

150 *See infra* Section IV.A.

151 *See infra* Section IV.B.

152 *See infra* Section IV.C.

153 The criteria for determining who exactly constitutes a "high-ranking foreign official" for purposes of status-based immunity is beyond the scope of this Note; however, it would be left to the courts to develop the doctrine.

154 Yousuf v. Samantar, 699 F.3d 763, 769, 773 (4th Cir. 2012), *cert. denied*, 134 S. Ct. 897 (2014).

155 Bradley & Goldsmith, *supra* note 42, at 18.

Status-based immunity arises out of the law of nations. Vattel wrote that a prince's "dignity alone, and the regard due to the Nation which he represents and governs . . . exempts him from the jurisdiction of the country."[156] This understanding was impliedly incorporated into the Constitution, and the power to deviate was expressly granted to the political branches by allocation of their foreign affairs powers.[157] This conception of immunity was then recognized by the Supreme Court in *The Schooner Exchange*.[158] Chief Justice Marshall expressed that "the person of the sovereign" is protected "from arrest or detention within a foreign territory," because he cannot be "understood as intending to subject himself to a jurisdiction incompatible with his dignity, and the dignity of his nation."[159]

Although the existence of monarchs has been curtailed in contemporary governments, the principle that the dignity of the *nation* warrants exemption from jurisdiction should be extended to modern foreign leaders. Because governments can only act through individuals, modern status-based immunity is justified by its ability to ensure that officials can perform their duties unhindered and are respected as embodiments of the sovereign.[160] In fact, "[t]he rationales for granting status immunity are threefold: 'to ensure the effective performance of [the officials'] functions on behalf of their respective States'; to facilitate 'the proper functioning of the network of mutual inter-State relations'; and to preserve the sovereign equality and *dignity of the state itself*, which the official embodies."[161]

While the importance of status-based immunity has been repeatedly underscored, the question then becomes: How should U.S. courts determine whether to grant status-based immunity? American courts have generally deferred to the executive branch's determination on whether to assume jurisdiction.[162] In fact, *Verlinden* opines that courts do so because sovereign

156 2 VATTEL, *supra* note 16, bk. IV, ch. VII, § 108, at 386.

157 *See supra* Part I.

158 The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116 (1812).

159 *Id.* at 137.

160 Yousuf v. Samantar, 699 F.3d 763, 769 (4th Cir. 2012), *cert denied*, 134 S. Ct. 897 (2014).

161 Bradley & Helfer, *supra* note 12, at 234–35 (emphasis added) (alteration in original) (quoting Case Concerning the Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. 3, ¶ 53 (Feb. 14); Int'l Law Comm'n, Immunity of State Officials from Foreign Criminal Jurisdiction: Memorandum Prepared by the Secretariat, 60th Sess., May 5–June 6, July 7–Aug. 8, 2008, ¶ 148, UN Doc. A/CN.4/596 (Mar. 31, 2008)); *see also Yousuf*, 699 F.3d at 769 (noting that the rationale for head of state immunity "is to promote comity among nations by ensuring that leaders can perform their duties without being subject to detention, arrest or embarrassment in a foreign country's legal system" (quoting *In re* Grand Jury Proceedings, 817 F.2d 1108, 1110 (4th Cir. 1987) (internal quotation marks omitted)).

162 *See* Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 486 (1983) ("[T]his Court consistently has deferred to the decisions of the political branches—in particular, those of the Executive Branch—on whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities."); *supra* subsection II.A.2.

immunity is "not a restriction imposed by the Constitution."[163] *Verlinden*'s conclusion, however, fails to fully capture the way in which sovereign immunity *is* a constitutional requirement. Although sovereign immunity was not explicitly written into the Constitution, it was impliedly incorporated through the delegation of the President's and Congress's foreign affairs powers.[164] When framing the constitutional foreign affairs powers, absolute immunity for the person of the sovereign was widely understood; thus it is solely within the province of the political branches—not the judiciary—to determine when such immunity should be abrogated.[165]

Status-based immunity is most closely linked to the Executive's recognition power, as it depends on the official's status as the head of state (or high-ranking foreign official) of a recognized sovereign at the time of suit. Thus, the modern practice of deferring to the executive branch on questions of immunity does not raise constitutional concerns, provided the courts rely on the Executive insofar as it answers the appropriate question. The question the executive branch should answer is not whether a foreign individual is entitled to status-based immunity, but rather, whether that individual is *recognized* as the head of state of a foreign sovereign. The answer to this question was dispositive in *United States v. Noriega*, where the court denied head of state immunity "because the United States government never recognized Noriega as Panama's legitimate, constitutional ruler."[166]

When determining whether a head of state or foreign official has status-based immunity, the inquiry courts should undertake is whether the Executive recognizes the sovereign nation and recognizes the official as a sitting foreign official or head of state at the time of suit. If both conditions are present, the sitting official should be accorded head of state immunity in order to uphold the Executive's power to confer the rights attendant to territorial sovereignty upon a foreign state.

B. Conduct-Based Immunity

Distinct from status-based immunity is conduct-based immunity, which should be addressed as a separate inquiry. Conduct-based immunity applies to government officials, "both during and after" holding office, but only for their "*official acts*."[167]

Unlike status-based immunity, the law of nations does not provide a corresponding parallel for conduct-based immunity, as Vattel's analysis presumed sovereignty rested in one "prince."[168] Yet the law of nations insisted on broad recognition of immunity for the person of the sovereign in order to respect the "dignity" of the foreign state.[169] The allocation of foreign affairs

163 *Verlinden*, 461 U.S. at 486.
164 Bellia & Clark, *supra* note 43, at 731–32, 827.
165 *See supra* Part I; *supra* notes 158–61 and accompanying text.
166 117 F.3d 1206, 1211–12 (11th Cir. 1997).
167 Bradley & Goldsmith, *supra* note 42, at 18.
168 *See* 2 VATTEL, *supra* note 16, bk. IV, ch. VII, § 108, at 386.
169 *See id.*

powers was designed with the understanding of absolute immunity. Modern developments, however, indicate that both political branches have, at least impliedly, authorized deviation from this absolute understanding when foreign actions are private in nature.[170] Thus, courts, by adopting the "restrictive theory," should not be understood as deviating from the perfect rights of sovereigns in a way that undermines allocation of powers. In applying the tenets of the restrictive theory, however, courts should construe conduct-based immunity broadly to avoid any violation of perfect sovereign rights that the political branches would not authorize.

Conduct-based immunity posits that

> a foreign official may assert immunity for official acts performed within the scope of his duty, but not for private acts where "the officer purports to act as an individual and not as an official, [such that] a suit directed against that action is not a suit against the sovereign."[171]

Under this conception of conduct-based immunity, acts undertaken by a foreign official are granted conduct-based immunity when "the effect of exercising jurisdiction [over the individual] would be to enforce a rule of law against the state."[172]

The question of the executive branch's involvement in conduct-based immunity analysis should be different than that of status-based immunity. Courts have, rightfully, adopted deference to the Executive on questions of status-based immunity—despite the fact that this adoption has not been cogently linked to the recognition power. But, for conduct-based immunity, courts should resist similarly adopting absolute deference.[173]

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170 *See* Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended at 28 U.S.C. §§ 1330, 1602–1611 (2012)); Letter from Jack B. Tate, *supra* note 68. This Note takes no position on whether the branches acted constitutionally in abrogating this understanding, but merely argues that the courts, by adopting the restrictive theory, had some indication of authorization from the political branches.

171 Yousuf v. Samantar, 699 F.3d 763, 775 (4th Cir. 2012) (alteration in original) (quoting Chuidian v. Phil. Nat'l Bank, 912 F.2d 1095, 1106 (9th Cir. 1990), *abrogated by* Samantar v. Yousuf, 560 U.S. 305 (2010)), *cert. denied*, 134 S. Ct. 897 (2014).

172 RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 66(f) (1965); *see also Samantar*, 560 U.S. at 321 (quoting this same passage from the *Restatement (Second) of the Foreign Relations Law of the United States*).

173 *See* Chimène I. Keitner, *The Common Law of Foreign Official Immunity*, 14 GREEN BAG 2D 61, 72–75 (2010). Professor Keitner found that between the Tate Letter and enactment of the FSIA, the State Department only issued determinations in four conduct-based immunity cases "of individual defendants." *Id.* at 72 (citing *Samantar*, 560 U.S. at 323; Sovereign Immunity Decisions of the Department of State: May 1952 to January 1977, 1977 DIG. U.S. PRAC. INT'L L. 1017 app. at 1020); *see supra* note 81 and accompanying text. Of these four cases, which never went beyond a district court, two of the final court decisions could not be located, and the other two granted immunity. Keitner, *supra*, at 72–73. This leads to her conclusion that "[t]here is thus no consistent, well-settled practice from which to infer a standard of absolute deference to the Executive on questions of conduct-based immunity," and "[t]here is also a scant record from which to derive 'the principles accepted' by the Executive as governing claims to conduct-based immunity when the State Department" is silent. *Id.* at 73.

The key question to be answered when determining whether an individual is entitled to conduct-based immunity is whether his actions are imputable to the state, such that denying immunity for his acts would be akin to permitting a suit against the sovereign. Because a government can only act through individuals, "any act performed by the individual as an act of the State enjoys the immunity which the State enjoys."[174] Although the exact limitations of conduct-based immunity have not been clearly defined, the Fourth Circuit has ruled that it does not extend to violations of *jus cogens* norms of international law—namely, atrocities such as genocide, extrajudicial killing, and torture.[175] The Fourth Circuit reasoned that "*jus cogens* violations may well be committed under color of law and, in that sense, constitute acts performed in the course of the foreign official's employment by the Sovereign. However, . . . *jus cogens* violations are, by definition, acts that are not officially authorized by the Sovereign."[176] This conclusion, though, rests on questionable legal precedent.[177]

For courts analyzing conduct-based immunity, the restrictive theory of sovereign immunity provides that "immunity is confined to suits involving the foreign sovereign's public acts, and does not extend to cases arising out of a foreign state's strictly commercial acts."[178] Under the "doctrine of imputability" to the state, an individual foreign official should be entitled to immunity

174 HAZEL FOX, THE LAW OF STATE IMMUNITY 455 (2d ed. 2008).

175 *Yousuf*, 699 F.3d at 775–76.

176 *Id.*

177 The Fourth Circuit cites three cases for its assertion that "American courts have generally . . . conclud[ed] that *jus cogens* violations are not legitimate official acts and therefore do not merit foreign official immunity." *Id.* at 776. This "general conclusion" arrived at by the Fourth Circuit is "supported" by *Siderman de Blake v. Republic of Argentina*, which states, "International law does not recognize an act that violates jus cogens as a sovereign act." *Id.* (quoting Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 718 (9th Cir. 1992)) (internal quotation marks omitted). The next sentence in *Siderman* reads: "A state's violation of the *jus cogens* norm prohibiting official torture therefore would not be entitled to the immunity *afforded by international law*." *Siderman*, 965 F.2d at 718 (emphasis added). It is important to note that the immunity afforded by international law is *not* coextensive with the immunity afforded by the allocation of powers, which requires a political branch to authorize any abrogation of absolute immunity. *Siderman* acknowledged as much, stating that "we do not write on a clean slate." *Id.* Another case cited for support by the Fourth Circuit is *Sarei v. Rio Tinto, PLC*, which relied on *Siderman* and stated in dicta that acts in "violation[ ] of jus cogens norms . . . cannot constitute official sovereign acts." *Yousuf*, 699 F.3d at 776 (alteration in original) (quoting Sarei v. Rio Tinto, PLC, 487 F.3d 1193, 1209–10 (9th Cir. 2007)) (internal quotation marks omitted). A third case giving support to the Fourth Circuit's creation of a *jus cogens* exception to immunity is Judge Cudahy's dissent in *Enahoro*. *Yousuf*, 699 F.3d at 777 (quoting Enahoro v. Abubakar, 408 F.3d 877, 893 (7th Cir. 2005) (Cudahy, J., dissenting in part)). The Fourth Circuit's conclusion also has questionable legal support in the international community. *See* Bradley & Helfer, *supra* note 12, at 243 ("International tribunals have yet to take a definitive position on whether there is a *jus cogens* exception to foreign official immunity in civil cases.").

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

for his official public acts that are attributable to the state.[179] In fact, scholars have noted an emerging trend "that *jus cogens* violations committed by officials are governmental rather than private acts."[180] The Fourth Circuit conceded that "*jus cogens* violations" can "be committed under color of law and, in that sense, constitute acts performed *in the course of the foreign official's employment* by the Sovereign."[181] Had the conduct-based immunity inquiry ended there, it would have had support from the Second, Seventh, and D.C. Circuits.[182]

In addition, the Supreme Court—although interpreting within the context of the FSIA—has stated that

> the intentional conduct alleged here . . . boils down to abuse of the power of its police by the Saudi Government, and however monstrous such abuse undoubtedly may be, a foreign state's exercise of the power of its police has long been understood for purposes of the restrictive theory as *peculiarly sovereign* in nature.[183]

Rationalizing courts' refusal to entertain suits purely because the allegations constitute violations of international law, the D.C. Circuit in *Belhas v. Ya'alon*, although interpreting the FSIA, concluded:

> [S]omething more nearly express is wanted before we impute to the Congress an intention that the federal courts assume jurisdiction over the countless human rights cases that might well be brought by the victims of all the ruthless military juntas, presidents-for-life, and murderous dictators of the world, from Idi Amin to Mao Zedong.[184]

Although the D.C. Circuit clearly decided *Belhas* on grounds of statutory interpretation of the FSIA and its lack of an enumerated *jus cogens* exception, the court's rationale is instructive for development of conduct-based immunity—namely, that the creation of such a broad exception to immunity by the judicial branch would invade the province of the political branches who are charged with managing foreign relations. Neither Congress nor the Executive has taken the position that allegations of *jus cogens* violations preclude immunity, and thus, in order to preserve the powers of the political branches

179 *See* Fox, *supra* note 174, at 455.

180 Bradley & Helfer, *supra* note 12, at 245.

181 *Yousuf*, 699 F.3d at 775–76 (emphasis added). The Seventh Circuit has noted that "*jus cogens* norms do not require Congress (or any government) to create jurisdiction." Sampson v. Fed. Republic of Germany, 250 F.3d 1145, 1152 (7th Cir. 2001).

182 *See* Matar v. Dichter, 563 F.3d 9, 15 (2d Cir. 2009) ("A claim premised on the violation of *jus cogens* does not withstand foreign sovereign immunity."); Belhas v. Ya'alon, 515 F.3d 1279, 1287 (D.C. Cir. 2008) (holding that courts will not carve "another" *jus cogens* exception into the FSIA, because Congress would have to expressly intend the federal courts to have "jurisdiction over the countless human rights cases" (quoting Princz v. Fed. Republic of Germany, 26 F.3d 1166, 1175 n.1 (D.C. Cir. 1994)) (internal quotation marks omitted); Ye v. Zemin, 383 F.3d 620, 627 (7th Cir. 2004) (concluding that there is no blanket exception to immunity even where *jus cogens* violations are alleged).

183 Saudi Arabia v. Nelson, 507 U.S. 349, 361 (1993) (emphasis added).

184 *Belhas*, 515 F.3d at 1287 (quoting *Princz*, 26 F.3d at 1174 n.1) (internal quotation marks omitted).

to control foreign relations, the Constitution *requires* courts to err on the side of over-recognition of the rights of foreign sovereigns, unless and until a political branch acts.

Where a foreign official acts on behalf of his sovereign and within his official capacity, even if his actions violate a *jus cogens* norm, he has engaged in a public, sovereign act attributable to the state. Therefore his conduct should be entitled to conduct-based immunity from civil liability in U.S. courts. By construing broadly what constitutes an "official public act" for purposes of granting conduct-based immunity, the judicial branch avoids opening the floodgates to international human rights litigation and upholds the power of the political branches—Congress in particular—to determine in what context the perfect sovereign rights of foreign states should be infringed.

C. The Act of State Doctrine as Applied to Foreign Officials

Beyond a jurisdictional defense of immunity—which as discussed above is bound up with the Executive's recognition of power or, in the Fourth Circuit, is unavailable when plaintiffs have alleged *jus cogens* violations[185]—the act of state doctrine may be able to fill the gap left by the lack of a proper conduct-based immunity analysis. Rather than relinquishing jurisdiction on grounds of immunity, courts could apply the act of state doctrine to individual officials and dismiss suits on the grounds that American courts "will not sit in judgment on the acts of the government of another [country] done within its own territory."[186] When suit is brought against an individual who was a recognized official of a recognized sovereign for governmental acts committed within the sovereign territory, the Constitution compels application of the act of state doctrine to prevent U.S. courts from questioning the validity of the act; the ability to divest a foreign sovereign of perfect sovereign rights rests with the political branches.

As noted earlier, sovereign immunity and the act of state doctrine arise from common origins.[187] The distinction between the doctrines is subtle, yet crucial: "Immunity protects states and their officials from suits in foreign courts, and the act of state doctrine protects government actions within their own territory from challenges in foreign courts."[188] Immunity removes the court's jurisdiction,[189] but the act of state doctrine provides "a substantive defense on the merits," because U.S. courts cannot declare a sovereign act invalid.[190] As Professors Bradley and Helfer note, questions of immunity are

185 *See supra* Part I, Sections II.B, IV.A–B.

186 Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 416 (1964) (quoting Underhill v. Hernandez, 168 U.S. 250, 252 (1897)) (internal quotation marks omitted).

187 *See supra* Part II.

188 Ingrid Wuerth, *Foreign Official Immunity Determinations in U.S. Courts: The Case Against the State Department*, 51 VA. J. INT'L L. 915, 957 (2011).

189 *See supra* Section II.A.

190 Samantar v. Yousuf, 560 U.S. 305, 322 (2010) (quoting Republic of Austria v. Altmann, 541 U.S. 677, 700 (2004)) (internal quotation marks omitted).

distinct from the act of state doctrine, and they conclude that the "distinguishing factors" between the two doctrines suggest that the act of state doctrine "is not a categorical bar to a more assertive judicial role in the development of . . . immunity principles."[191] The act of state doctrine, however, should still be considered on its own as a *constitutional* bar to U.S. courts issuing judgments against foreign officials. Until a political branch authorizes divesting a foreign sovereign of the protections of territorial sovereignty, the Constitution requires that the judicial branch dismiss the suit.

The Supreme Court has made clear that the act of state doctrine exists as a mechanism for upholding the proper allocation of powers, holding that the act of state doctrine's purpose is "to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs."[192] Although the *Sabbatino* Court relied on a vague formulation of "separation of powers," the doctrine can be grounded in the allocation of specific foreign affairs powers—namely, the Executive's recognition power and Congress's war and reprisal powers.[193]

The act of state doctrine has historically been applied in the context of sovereign acts and not directly applied to preclude suit against a foreign official.[194] The Supreme Court in *Samantar* acknowledged, however, that "in the context of the act of state doctrine, . . . an official's acts can be considered the acts of the foreign state."[195] Extending the act of state doctrine to suits against foreign officials prevents circumvention of state sovereign immunity simply by suing officials as individuals, rather than suing the state.

Act of state doctrine analysis as applied to foreign officials would operate as follows: (1) The act of state doctrine prevents a U.S. court from declaring a sovereign act undertaken within its own territory invalid; (2) abuse of the police power that leads to commission of a *jus cogens* violation is an act that is purely sovereign in nature; (3) therefore, when an individual official abuses the police power of the state, he is engaging in a sovereign act; (4) by adjudicating a claim against the official for a *jus cogens* violation, the court would be required to declare that a sovereign use of the police power *is* susceptible to liability and therefore invalid. Under the act of state doctrine, U.S. courts cannot do this. When a foreign official has engaged in a sovereign act, however egregious, the constitutional allocation of foreign affairs powers to the political branches requires the suit to be dismissed in order to avoid infringing on the powers of the Executive and Congress to conduct foreign relations.

191 Bradley & Helfer, *supra* note 12, at 256–57.

192 Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427–28 (1964).

193 *See supra* Section II.B.

194 *See supra* Section II.B.

195 *Samantar*, 560 U.S. at 322 (citing Underhill v. Hernandez, 168 U.S. 250, 252, 254 (1897)).

D. Caveats

Although a broad protection of foreign officials is advanced in this Note, it is important to recognize two caveats that will always preclude a foreign official from avoiding judgment in U.S. courts. Because immunity is an outgrowth of the rights of the recognized *sovereign* and not the individual himself, the foreign state is entitled to remove the cloak of immunity from its government officials.[196] First, the foreign state can waive immunity as to the individual official.[197] Waiver would apply in both status- and conduct-based immunity, as well as in act of state doctrine analysis. This situation may occur in the context of a regime change, wherein the new government approves the pursuit of human rights litigation in U.S. courts and thus opts to waive the ability of the country's former officials to claim immunity.[198] The second situation arises "where the foreign state indicates that the defendant's actions were unauthorized or not within the scope of his or her authority."[199] Such a conclusion by a foreign government would not abrogate status-based immunity, unless the foreign government indicates its intent to waive all immunity, but it would be applicable in determinations of conduct-based immunity, which requires the foreign official to have acted within the scope of his authority.[200]

CONCLUSION

The status of foreign officials in U.S. courts is in a state of confusion. But, this does not have to be the case. The Constitution's allocation of powers, informed by the law of nations, requires the courts to err on the side of over-recognition of the rights of sovereigns. Denial of immunity in U.S. courts at the time of the Founding would have been just cause for war, and today, denial of immunity infringes on the powers of the political branches. The President and Congress have extensive powers under the Constitution to conduct foreign relations, while the judiciary does not. In order to preserve the political branches' ability to conduct foreign affairs, the judicial branch should refrain from adjudicating claims against foreign officials absent express authorization from Congress or the President exercising one of their respective foreign affairs powers.

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196 *See supra* note 172 and accompanying text. It also bears noting that the foreign official must be recognized as a leader of the sovereign. *See* United States v. Noriega, 117 F.3d 1206, 1212 (11th Cir. 1997) ("Noriega never served as the constitutional leader of Panama, [and] Panama has not sought immunity for Noriega . . . .").

197 *See* Bradley & Helfer, *supra* note 12, at 253.

198 *Id.* at 253 n.198; *see also In Re* Doe, 860 F.2d 40, 45 (2d Cir. 1988) (concluding that a foreign government may waive head of state immunity for its officials).

199 Bradley & Helfer, *supra* note 12, at 253.

200 *See id.* at 253 n.199 ("In cases involving foreign sovereign immunity, it is also appropriate to look to statements of the foreign state that either authorize or ratify the acts at issue to determine whether the defendant committed the alleged acts in an official capacity."); *see also supra* Section IV.B.

When faced with a claim against a foreign official, courts should make three separate determinations. Status-based immunity should be granted in claims against sitting heads of state or high-ranking foreign officials. Conduct-based immunity should be granted when a claim is brought against any current or former official acting in his or her official capacity. And finally, should either bar to jurisdiction fail, the court should apply the act of state doctrine and deem valid any sovereign act undertaken in the foreign state's territory, even if the act was an abuse of a sovereign power. Undoubtedly, there will still remain difficult questions that courts will need to address.[201] By exercising judicial restraint and erring on the side of recognition, however, courts uphold the constitutional allocation of powers and ensure that difficult foreign affairs questions remain squarely with Congress and the President.

201 *See* Wuerth, *supra* note 188, at 965–66 (noting that courts must develop common law on issues such as, *inter alia*, "waiver, who qualifies as a foreign official," and "the status of the official's government" (footnotes omitted)).