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Nelson v. Saudi Arabia: An Unrestricted Reading of the Restrictive Doctrine of Foreign Sovereign Immunity

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NELSON v. SAUDI ARABIA: AN UNRESTRICTED READING OF THE RESTRICTIVE DOCTRINE OF FOREIGN SOVEREIGN IMMUNITY

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I. INTRODUCTION

Scott Nelson, an American monitoring systems engineer employed by a Saudi Arabian hospital, brought this action in the United States District Court for the Southern District of Florida against the hospital, the Saudi Arabian government, and Royspec, a Saudi government purchasing agency in the U.S, to recover damages for injuries allegedly received when Saudi police detained and

tortured him.¹ He maintained that the court had subject matter jurisdiction under the commercial activity exception of the Foreign Sovereign Immunities Act of 1976 ("FSIA").² The district court held that his claims were not based on commercial activities conducted by the Saudi Arabian government in the United States and dismissed the action.³

On appeal, Nelson argued that the tortious acts committed against him in Saudi Arabia were in retaliation for his performance of a job-required duty.⁴ The tortious acts were so closely intertwined with the commercial activity of recruiting and hiring him in the United States that they were based upon these commercial acts.⁵ The United States Court of Appeals for the Eleventh Circuit *held*, reversed and remanded: the district court had subject matter jurisdiction under the Foreign Sovereign Immunities Act's commercial activity exception, where (1) recruitment of the engineer in the United States was a commercial activity, and (2) the acts by Saudi police, in retaliation for his performance of duties for which he was recruited, provided a direct connection or nexus between the acts and the commercial activity. *Nelson v. Saudi Arabia*, 923 F.2d 1528 (11th Cir. 1991), *petition for cert. filed*, 60 U.S.L.W. 3294 (U.S. Sept. 26, 1991)(No. 91-522).

This is the first court interpreting the commercial activities exception of the FSIA to find a jurisdictional nexus between law enforcement activity of a foreign government committed in its territory and a commercial activity in the United States. The holding that Saudi Arabia's law enforcement activities were based upon commercial activities in the United States, and therefore not immune under the FSIA, defeats the primary purpose of the Act.⁶ Because it requires a foreign nation to defend in a U.S. court official acts of its police committed on its own territory, the *Nelson* decision may provoke retaliation; foreign courts may extend jurisdiction over domestic U.S. law enforcement activities involving their citizens. Additionally, the possibility of expensive litigation in U.S. courts over the official acts of a foreign state employer against an employee recruited in the U.S., may decrease employment op-

1. *Nelson v. Saudi Arabia*, 923 F.2d 1528, 1530 (11th Cir. 1991), *petition for cert. filed*, 60 U.S.L.W. 3294 (U.S. Sept. 26, 1991)(No. 91-522).

2. 28 U.S.C. § 1605(a)(2) (1988).

3. 923 F.2d at 1529.

4. *Id.*

5. *Id.*

6. For a discussion of the Act's purposes, see *infra* text accompanying notes 118-24.

portunities abroad for American citizens.

An alternative interpretation of the FSIA's commercial activities exception, and a better reading of the facts in *Nelson*, is that if a sovereign's law enforcement activity in that state is the effective, legal cause of the injury, the existence of a connection between the law enforcement activities there and the sovereign's commercial activities in the United States does not constitute a jurisdictional nexus. In other words, when a state's police activities in its own territory have an effective, legal cause in that territory, these activities giving rise to injuries cannot be based upon commercial activity in the United States merely because they are closely connected or intertwined with it. This alternative interpretation accords with the doctrine of restrictive immunity extant before the enactment of the FSIA and serves the purposes for which the Act was written. It preserves the respect for other nations' dignity which has been an important element in the doctrine of foreign sovereign immunity since Chief Justice Marshall gave it classic expression in *The Schooner Exchange v. M'Faddon*.⁷ It will spare foreign nations the exorbitant expense of American litigation. Finally, it will maintain the competitiveness of U.S. citizens seeking employment with foreign states.

II. THE COMMERCIAL ACTIVITIES EXCEPTION IN HISTORICAL PERSPECTIVE

Chief Justice John Marshall, in *The Schooner Exchange v. M'Faddon*, first clearly articulated the modern idea of foreign sovereign immunity.⁸ Two owners of a vessel commandeered at sea in 1810 by the French Navy sought to attach the vessel when, a year later, her French crew brought her into the port of Philadelphia.⁹ Appearing as a result of representations made by the French government, the United States Attorney suggested that the district court quash the attachment and dismiss the owners' libel.¹⁰ This the district court did, holding that a public armed vessel of a friendly foreign sovereign was not subject to the jurisdiction of American courts.¹¹ The disappointed owners appealed to the cir-

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

8. Daniel T. Murphy, Comment, *The American Doctrine of Sovereign Immunity: An Historical Analysis*, 13 VILL. L. REV. 583, 584 (1968).

9. 11 U.S. at 117-20.

10. *Id.* at 119.

11. *Id.* at 120.

cuit court, which reversed, and the United States Attorney brought the case to the Supreme Court.¹²

Marshall began his opinion with an idea advanced by Emerich de Vattel—a well-known eighteenth century writer on international law—that a nation's sovereignty necessarily includes absolute and exclusive control over all property and activity within its territory.¹³ The jurisdiction of its courts, Marshall added, is a part of this sovereignty, and any exception to it must result from the nation's express or implied consent.¹⁴ An instance of implied consent, caused by the "mutual intercourse" and exchange of good offices between independent sovereigns, is the universal practice of exempting a sovereign's person from arrest or detention in a foreign territory. Another is that one sovereign's ships of war entering the ports of a friendly nation are exempted from that nation's jurisdiction.¹⁵ Although a sovereign may retract implied consent, until that is done, the ordinary jurisdiction of the sovereign's courts must be deemed waived.¹⁶ *The Exchange* was therefore exempt from a U.S. court's jurisdiction. The significance of Marshall's conception of foreign sovereign immunity was its dependence on the consent of the host or forum nation—a consent granted or withdrawn for reasons of state policy.¹⁷

A. *The Absolute Doctrine of Immunity*

During the remainder of the nineteenth century and early in the twentieth, however, courts seem to have been struck most by *The Exchange's* "absolute" and "exclusive" phraseology.¹⁸

This full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extra-territorial power, would not seem to contemplate foreign

12. *Id.*

13. *Id.* at 136. See EMERICH DE VATTEL, *THE LAW OF NATIONS* 172 (Northampton, Mass., S. Butler, 1820) (1758). See generally BENJAMIN MUNN ZIEGLER, *THE INTERNATIONAL LAW OF JOHN MARSHALL* 64-66 (1939) (indicating that the right of the sovereign to control exclusively all persons and things within the territory of the state was an accepted idea in Marshall's time and quoting Vattel).

14. 11 U.S. at 136.

15. *Id.* at 145-46.

16. *Id.*

17. Thomas H. Hill, *A Policy Analysis of the American Law of Foreign State Immunity*, 50 *FORDHAM L. REV.* 155, 164 (1981).

18. See JOSEPH W. DELLAPENNA, *SUING FOREIGN GOVERNMENTS AND THEIR CORPORATIONS* § 1.1, at 3 (1988).

sovereigns nor their sovereign rights as its objects. One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.¹⁹

Marshall's opinion became the foundation of the "absolute" doctrine of sovereign immunity.²⁰ Under this doctrine, a sovereign was *completely* immune from another country's jurisdiction, regardless of the subject matter or circumstances of a complaint, unless the sovereign consented to be sued.²¹ "Completely" meant just that. For example, in *The Parlement Belge*,²² a British appellate court held that a mail packet,²³ not a naval ship, owned by the King of Belgium was immune from suit for damages by the owners of an anchored, properly lighted tugboat with which she collided in Dover Bay. Because the vessel was used for a public purpose, carriage of mail, respect for the independent sovereignty of its owner required that Britain's courts decline to exercise jurisdiction.²⁴

Faced with a similar question in an admiralty action brought against a vessel owned and operated as a merchant ship by the Italian government, the Supreme Court of the United States, in *Berizzi Bros. v. Steamship Pesaro*,²⁵ cited *The Parlement Belge* and quoted extensively from *The Exchange*.²⁶ It acknowledged that Marshall's holding made no mention of merchant vessels, but noted that, in Marshall's time, governments owned no merchant vessels.²⁷ The principles of his decision nonetheless extended to

19. 11 U.S. at 137.

20. See *Verlinden B. V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983); DEL-LAPENNA, *supra* note 18, § 1.1, at 3; Robert B. von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 COLUM. J. TRANSNAT'L L. 33, 39 (1978); Murphy, *supra* note 8, at 587.

21. See D.P. O'CONNELL, 2 INTERNATIONAL LAW 844 (2d ed. 1970); Murphy, *supra* note 8, at 583-84.

22. 5 P.D. 197 (1880).

23. A boat, usually a coastal or river steamer, that plies a regular route carrying passengers, freight, or in this case, mail. WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 844 (1988).

24. *Id.* at 217.

25. 271 U.S. 562 (1926).

26. *Id.* at 571-73, 575.

27. *Id.* at 573-74.

them. Ships owned and operated as merchant vessels by foreign governments to foster their commerce or provide revenue served public purposes and were therefore, like naval ships, public vessels.²⁸ It was perhaps appropriate that this admiralty case was the high-water mark of the absolute doctrine when the American judiciary considered foreign sovereign immunity.²⁹

In *The Exchange*, the United States Attorney suggested that the district court dismiss the action.³⁰ The Supreme Court approved this executive directive.³¹ Courts subsequently gave increasing deference to executive suggestions of immunity.³² For example, the Supreme Court in a 1943 opinion, *Ex Parte Peru*,³³ acknowledged that a friendly foreign state might claim immunity from suit by either appearing itself or by presenting its claim to the Department of State, which, if it recognized the claim, could certify this to the Attorney General for presentation to the court.³⁴ When the Department of State recognized a claim of immunity, it became the court's duty to dismiss the action "and remit the libellant to the relief obtainable through diplomatic negotiations."³⁵

In *Mexico v. Hoffman*,³⁶ a case involving a vessel owned but not possessed by a foreign state, the Court carried deference to the Department of State even further. It criticized liberal grant of immunity and held that in the absence of any previous recognition by the Department of State and without a present recommendation of immunity from the Executive, a court must, "in a matter so intimately associated with our foreign policy and which may profoundly affect it, not . . . enlarge an immunity to an extent which the government, although often asked, has not seen fit to recognize."³⁷ This decision appeared to place the power to determine immunity entirely in the Executive, leaving the courts as mere

28. *Id.* at 574.

29. See James Crawford, *International Law and Foreign Sovereigns: Distinguishing Immune Transactions*, 54 BRIT. Y.B. INT'L L. 75, 86 n.43 (1984); Murphy, *supra* note 8, at 590.

30. *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116, 117-118 (1812).

31. *Id.* at 147.

32. See *Verlinden B. V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983); Hill, *supra* note 17, at 173-174; von Mehren, *supra* note 20, at 40.

33. 318 U.S. 578 (1943).

34. *Id.* at 588.

35. *Id.*

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

37. *Id.* at 38.

finders of fact.³⁸

B. *The Restrictive Doctrine of Immunity*

In the nineteenth century, monarchs and states in Europe extended their activities beyond the traditional roles of defense and maintenance of public order. This resulted in state ownership of shipping companies, railroads, and various industries.³⁹ The sovereign's increased involvement in the commercial realm invariably led to injuries and to contractual disputes between private individuals and the state-owned entities. Injured parties began to sue the sovereign in these countries' courts. This eventually led the courts to distinguish between *acta jure imperii*, public acts, and *acta jure gestionis*, private acts, and to abolish sovereign immunity for the latter.⁴⁰ As the century closed, courts in Italy and Belgium applied the same distinctions to find jurisdiction over foreign states sued by their citizens.⁴¹ The distinction crossed the Channel and an English judge, Sir Robert Phillimore, gave it eloquent expression in 1873:

No principle of international law, and no decided case, and no dictum of jurists of which I am aware, has gone so far as to authorize a sovereign prince to assume the character of a trader, when it is for his benefit; and when he incurs an obligation to a private subject to throw off, if I may so speak, his disguise, and appear as a sovereign, claiming for his own benefit, and to the injury of a private person, for the first time, all the attributes of his character⁴²

This, however, was dictum. When Sir Robert, six years later, actually held that his court had the power to hear an action against a vessel owned by the King of Belgium, he was promptly reversed by

38. See Fredric Alan Weber, *The Foreign Sovereign Immunities Act of 1976: Its Origin, Meaning and Effect*, 3 YALE STUD. WORLD PUB. ORD. 1, 9-10 (1976); Murphy, *supra* note 8, at 594-97.

39. See HARVARD LAW SCHOOL RESEARCH IN INTERNATIONAL LAW, *Competence of Courts in Regard to Foreign States* (1932), in 26 AM. J. INT'L L. 451, 473 (Supp. 1932) [hereinafter HARVARD RESEARCH].

40. DELLAPENNA, *supra* note 18, § 1.2, at 5-6; Sompong Sucharitkul, *Immunities of Foreign States Before National Authorities: Some Aspects of Progressive Development of Contemporary International Law*, in ESTUDIOS DE DERECHO INTERNACIONAL 477, 481-83 (1979).

41. HARVARD RESEARCH, *supra* note 39, at 474; H. Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 BRIT. Y.B. INT'L L. 220, 227-28 (1951).

42. The Charkieh, 4 L.R.-Adm. & Eccl. 59, 99-100 (1873).

the court of appeals.⁴³

A problem with the "public" and "private" labels as applied to sovereign conduct is that a state, considered as an actor, is essentially public and has no private purposes.⁴⁴ A judge of the International Court of Justice suggested a possible solution to this quandary in 1923.⁴⁵ He proposed to examine the nature rather than the purpose of an act and determine whether a private citizen could not ordinarily perform it.⁴⁶

Despite the logical difficulties in distinguishing between types of acts, the restrictive doctrine gained sufficient ground to warrant its inclusion in a draft convention on foreign state immunity published in 1932.⁴⁷ Article 11 of the *Harvard Research's Draft Convention on the Competence of Courts in Regard to Foreign States* recommends that jurisdiction of one state's courts should exist in proceedings based on another state's business enterprises in the forum territory which private citizens of the host forum could also conduct or when it is based on acts in the forum territory connected with such enterprises.⁴⁸

Professor H. Lauterpacht presented the arguments against absolute immunity and the restrictive doctrine in 1951.⁴⁹ He proposed that the difficulties of distinguishing between public and private or commercial acts would be avoided by adopting a rule of immunity for foreign states that would subject them to the jurisdiction of a nation's courts exactly to the extent the nation sub-

43. The Parlement Belge, 4 P.D. 129 (1879), *rev'd* 5 P.D. 197 (1880).

44. See G. G. Fitzmaurice, *State Immunity from Proceedings in Foreign Courts*, 14 BRIT. Y.B. INT'L L. 117, 123-24 (1933); Lauterpacht, *supra* note 41, at 224.

45. A. Weiss, *Competence ou Incompétence des Tribunaux a l'égard des états étrangers*, 1923 R.C.A.D.I. 525 (1923).

46. *Id.* at 546. See also Lauterpacht, *supra* note 41, at 225 (suggesting that this test "merely postpones the difficulty" of defining private acts, but not demolishing the test's validity for defining public acts).

47. HARVARD RESEARCH, *supra* note 39, art. 11, at 597.

48. *Id.* Article 11 reads:

A State may be made a respondent in a proceeding in a court of another State when, in the territory of such other State, it engages in an industrial, commercial, financial or other business enterprise in which private persons may there engage, or does an act there in connection with such an enterprise wherever conducted, and the proceeding is based upon the conduct of such enterprise or upon such act.

The foregoing provision shall not be construed to allow a State to be made a respondent in a proceeding relating to its public debt.

Id. at 597.

49. Lauterpacht, *supra* note 41.

jects itself to its own courts' jurisdiction.⁵⁰ Abolition of foreign sovereign immunity would replace its restriction. Even while proposing this revolution, however, Lauterpacht hastened to qualify it with four "safeguards": (1) legislative acts and measures pursuant to them must remain immune; (2) executive and administrative acts within a nation's own territory, including particularly torts, should be immune; (3) governmental contracts should be treated according to the forum's conflict of laws rules; and (4) diplomatic immunity and that of warships should be preserved.⁵¹ Whether these safeguards relegate abolition to restriction is an interesting query.⁵²

C. From the Tate Letter to the Foreign Sovereign Immunities Act

In a 1952 letter to the Attorney General, not without particular piquancy for law review authors,⁵³ the State Department announced that henceforth it would follow the restrictive theory of sovereign immunity when considering foreign governments' requests for immunity.⁵⁴ It based this decision on its own survey of the practices of foreign states, the inconsistency of U.S. granting foreign states immunity while submitting itself to the jurisdiction of the same courts in contract and tort actions, and the consideration that "the widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts."⁵⁵ The Department would recognize immunity with regard to sovereign or public acts and deny it for private acts, but the letter gave no indication of any criteria the Department might use to distinguish one from the other.⁵⁶ From 1952 to 1976 the Department of State's practice

50. *Id.* at 237.

51. *Id.* at 237-38.

52. For a suggestion that they do, see O'CONNELL, *supra* note 21, at 846-47.

53. The letter stated: "Furthermore, it should be observed that in most of the countries still following the classical theory there is a school of influential writers favoring the restrictive theory and the views of writers, at least in civil law countries, are a major factor in the development of the law." Letter from Jack B. Tate, Acting Legal Advisor, U.S. Dep't of State, to the Acting Attorney-General (May 19, 1952) *reprinted in* 26 DEP'T STATE BULL. 984 (1952).

54. *Id.* at 985.

55. *Id.*

56. *Id.* at 984. *See also* Hill, *supra* note 17, at 175-76; von Mehren, *supra* note 20, at 41 (pointing out the inadequacy of the Tate Letter in this respect).

often did not comply with its prescription, particularly when international political pressures conflicted with the restrictive theory.⁵⁷ Criticism from without,⁵⁸ increasing uneasiness within the Office of Legal Counsel over the suitability of the political branch to determine judicial questions,⁵⁹ and the burden of work imposed by requests for immunity⁶⁰ led the Department to propose legislation jointly with the Justice Department. On October 31, 1975 the two departments submitted identical bills to the Senate and House of Representatives.⁶¹ These became the Foreign Sovereign Immunities Act of 1976.⁶²

D. *The Foreign Sovereign Immunities Act*

The Act attempts to provide a statutory framework within which courts can independently determine sovereign immunity.⁶³

57. See, e.g., *Southeastern Leasing Corp. v. Stern Dragger Belogorsk*, 493 F.2d 1223 (1st Cir. 1974) (State Department suggestion of immunity for Soviet fishing vessel); *Isbrandtsen Tankers, Inc. v. President of India*, 446 F.2d 1198 (2d Cir. 1971) (suggestion of immunity for Indian government in admiralty action arising from contract charter for shipment of grain), cert. denied, 404 U.S. 985 (1971); *Rich v. Naviera Yacuba, S.A.*, 295 F.2d 24 (4th Cir. 1961) (suggestion of immunity in admiralty *in rem* action against merchant vessel owned and operated by the Cuban Government); *Chemical Natural Resources, Inc. v. Venezuela*, 215 A.2d 864 (Pa. 1966) (suggestion of immunity in action arising from Venezuela's unilateral cancellation of contract for erection and operation, and confiscation of power plant). See also *Verlinden B. V. v. Central Bank of Nigeria*, 461 U.S. 480, 487 (1983); Gregory Haworth, *Foreign States Sued for Their Acts Abroad: A Uniform Analysis Under the Foreign Sovereign Immunities Act*, 34 *RUTGERS L. REV.* 538, 551 (1982); Weber, *supra* note 38, at 16; Monroe Leigh, Comment, *Sovereign Immunity—The Case of the "Imias"*, 68 *AM. J. INT'L L.* 280, 281 (1974); Murphy, *supra* note 8, at 600-01.

58. See Leigh, *supra* note 57, at 281.

59. *Id.* at 281-82.

60. "In the 12 years between 1960 and 1973 there were a total of 48 cases on which the Department of State reached final decision. Immunity was suggested in 23 cases. During that period there were an average of six cases pending at any one time." Victor Rabinowitz, *Can the Courts Cope with the Foreign Sovereign Immunities Act?*, 1 *N.Y.L. SCH. J. INT'L & COMP. L.* 130, 134 n.13 (1980) (citing *Immunities of Foreign States: Hearings on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 49-51 (1973)).

61. von Mehren, *supra* note 20, at 44.

62. Pub. L. No. 94-583, 90 Stat. 2892 (codified at 28 U.S.C. §§ 1330, 1332(a), 1391(f), 1441(d), 1602-1611).

63. "Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter." 28 U.S.C. § 1602 (1988). For descriptions of the Act's structure see DELLAPENNA, *supra* note 18, § 1.3; Hill, *supra* note 17; George Kahale, III & Matias A. Vega, *Immunity and Jurisdiction: Toward a Uniform Body of Law in Actions Against Foreign States*, 18 *COLUM. J. TRANSNAT'L L.* 211 (1979); von Mehren, *supra* note 20; Melissa L. Werther et al., Note, *Jurisdiction over Foreign Governments: A Comprehensive Review of the Foreign Sovereign*

It begins with a grant of immunity from the jurisdiction of United States courts to foreign states:

Subject to existing international agreements to which the United States is a party at the time of the enactment of this Act, a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.⁶⁴

Section 1605 lists the general exceptions to this initial grant.⁶⁵ The first clause of the "commercial activities exception," contained in section 1605(a)(2)⁶⁶ is the subject of the rest of this Note.

III. *NELSON v. SAUDI ARABIA*: THE COURT'S TREATMENT

A. *The Facts*

In *Nelson v. Saudi Arabia*⁶⁷ the plaintiff alleged that his responsibilities at the King Faisal Specialist Hospital in Riyadh included recommending modifications of existing equipment, purchasing and installing new equipment, assuring "compliance with safety regulations," troubleshooting problems, and imple-

Immunities Act, 19 VAND. J. TRANSNAT'L. L. 119 (1986).

64. 28 U.S.C. § 1604 (1988).

65. H.R. REP. No. 1487, 94th Cong., 2d Sess. (1976), reprinted in 1976 U.S.C.A.N. 6604, 6616 [hereinafter H.R. REP. No. 1487].

66. Section 1605(a)(2) states:

A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . .

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state [Clause 1]; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere [Clause 2]; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States [Clause 3].

28 U.S.C. § 1605(a)(2) (1988). For analysis of the commercial activities exception, see DEL-LAPENNA, *supra* note 18, §§ 3.6-3.10, 6.3-6.8; Mark B. Feldman, *The United States Foreign Sovereign Immunities Act of 1976 in Perspective: A Founder's View*, 35 INT'L & COMP L. Q. 302, 306-18 (1986); David A. Brittenham, Note, *Foreign Sovereign Immunity and Commercial Activity: A Conflicts Approach*, 83 COLUM. L. REV. 1440 (1983); Michael G. Cosby, Comment, "Commercial Activity" Under the Foreign Sovereign Immunities Act of 1976: Toward a More Practical Definition, 34 BAYLOR L. REV. 295 (1982); Deborah Schloss, Note, "Commercial Activity" in the Foreign Sovereign Immunities Act of 1976, 14 J. INT'L L. & ECON. 163 (1979).

67. 923 F.2d 1528 (11th Cir. 1991), petition for cert. filed, 60 U.S.L.W. 3294 (U.S. Sept. 26, 1991)(No. 91-522).

menting " 'corrective action.' " ⁶⁸ On March 20, 1984, Nelson found a dangerous grease valve in an oxygen line system which he thought might endanger patients. ⁶⁹ He reported this safety hazard to a Saudi government investigatory commission. ⁷⁰ On September 27, 1984, he was summoned to the hospital's security office and taken to a jail cell where, he alleged, he was "shackled, tortured and beaten" by Saudi government agents or employees, and imprisoned for thirty-nine days. ⁷¹ He also alleged that his wife was told by a Saudi government officer that her husband could be released if she "provided sexual favors." ⁷² Defendant Saudi Arabia maintained, however, that Nelson's detention arose from the discovery that he had submitted a false diploma from the Massachusetts Institute of Technology. ⁷³

B. *The Court's Opinion*

The court held that because the alleged acts taken by Saudi Arabian government officials "resulted from and were directly attributable" to Nelson's performance of the duties of the specific post for which he was hired and recruited in the United States, they were "based upon" this recruitment and hiring. ⁷⁴ It had previously determined that the recruitment and hiring constituted commercial activity carried on in the United States as defined in the Act. ⁷⁵ It therefore found that the district court had jurisdiction under the first clause of section 1605(a)(2). ⁷⁶

Once it had decided that the recruitment and hiring of Nelson

68. *Id.* at 1530, 1535-36.

69. Appellant's Brief at 4, *Nelson* (No. 89-5981).

70. 923 F.2d at 1530.

71. *Id.*

72. *Id.*

73. *Id.* at 1536.

74. *Id.* at 1535.

75. *Id.* at 1533. The Act defines commercial activity carried on in the United States thus:

A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose. . . . A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

28 U.S.C. § 1603(d)-(e) (1988).

76. 923 F.2d at 1530.

was a commercial activity, the court had to determine whether his claims were “based upon” this activity.⁷⁷ Jurisdiction would not exist if all Nelson could maintain was that “but for” this activity he would not have been in Saudi Arabia to be detained. Rather, a jurisdictional “nexus” had to exist between the acts Nelson complained of and the commercial activity.⁷⁸

Originated by the Third Circuit Court of Appeals,⁷⁹ this approach to the scope of the first clause of section 1605(a)(2) was adopted by the Fifth Circuit in *Vencedora Oceanica Navigacion v. Compagnie Nationale Algerienne de Navigation*.⁸⁰ A “nexus” is a bond, link, or causal connection.⁸¹ It is a narrower reading of the first clause’s “based upon” language than the “doing business” test (regardless of connection between business done and acts complained of) enunciated in *In re Rio Grande Transport, Inc.*⁸² by a district court in 1981. According to the Eleventh Circuit, the acts Nelson complained of—detention and alleged torture by Saudi government officials supposedly in retaliation for carrying out his job-required duty to report safety hazards—were so “intertwined” with his employment that the required nexus existed.⁸³ Because the nexus existed, the action was, indeed, based upon commercial activity carried on in the United States by Saudi Arabia.⁸⁴

Here the court distinguished two cases. One of these, *Gregorian v. Izvestia*,⁸⁵ it summarized without further comment.⁸⁶ In that case, the plaintiffs sued *Izvestia*, a Soviet government newspaper, alleging that *Izvestia* had published a libellous article about them enabling two Soviet government commercial organizations to

77. 923 F.2d at 1534.

78. *Id.*

79. See *Velidor v. L/P/G Benghazi*, 653 F.2d 812 (3d Cir. 1981), *cert. denied* 455 U.S. 929 (1982); *Sugarman v. Aeromexico, Inc.*, 626 F.2d 270, 272 (3d Cir. 1980).

80. 730 F.2d 195, 202 (5th Cir. 1984).

81. *Nelson*, 923 F.2d at 1534.

82. 516 F. Supp. 1155, 1162 (S.D.N.Y. 1981). “[T]he first clause of § 1605(a)(2) appears to be a broad grant of subject matter jurisdiction over the commercial activities of foreign states similar to state-exercised long-arm jurisdiction.” *Id.* The court found jurisdiction in an action arising from a collision in the Mediterranean Sea involving a vessel, owned by an Algerian state shipping corporation, bound from Algiers to Europe, because the corporation’s worldwide shipping business had “substantial contact with the United States.” *Id.* The *Vencedora* court called this the “doing business test.” 730 F.2d at 201.

83. *Nelson*, 923 F.2d at 1535.

84. *Id.*

85. 871 F.2d 1515 (9th Cir. 1989), *cert. denied*, 493 U.S. 891 (1989).

86. *Nelson*, 923 F.2d at 1535.

avoid contractual obligations owed them.⁸⁷ The plaintiffs argued that the article was published in connection with a commercial activity—sale and distribution of the newspaper in the United States.⁸⁸ They claimed the newspaper published the article with the purpose of injuring them commercially. The court first noted that section 1603(d)⁸⁹ required that the determination of commercial activity be made by reference to the nature of the transaction or act rather than its purpose.⁹⁰ It agreed with the United States Statement of Interest that *Izvestia's* writing and publishing of articles were sovereign or governmental activities, and held that “the governmental nature of *Izvestia's* publication and distribution defeats plaintiffs’ argument that its sale is sufficient to afford jurisdiction under Section 1605(a)(2).”⁹¹

The *Nelson* opinion’s reference to *Gregorian* concludes, “[t]he Court found that because *Izvestia* articles are ‘official commentary of the Soviet government’ publishing and writing them ‘constitutes an activity whose essential nature is public or governmental.’ Hence, the libel claim was dismissed for lack of subject matter jurisdiction under Section 1605(a)(2).”⁹² Perhaps by oversight, no mention is made of *Gregorian's* crucial holding that *Izvestia's* sales were not commercial activity on which jurisdiction could be based. That the *Nelson* court took this point, however, seems evident in the next sentence of its opinion: “In the case of *Nelson*, however, we find that the detention and torture of *Nelson* are so intertwined with his employment at the Hospital that they are ‘based upon’ his recruitment and hiring, in the United States, for employment at the Hospital in Saudi Arabia.”⁹³

The second case, *Arango v. Guzman Travel Advisors Corp.*,⁹⁴ involved plaintiffs on a vacation tour whose names were on an undesirable aliens list compiled by Dominican Republic immigration authorities.⁹⁵ When they arrived in Santo Domingo aboard Domin-

87. *Gregorian*, 871 F.2d at 1521.

88. *Id.*

89. In defining “commercial activity,” section 1603(d) states, in pertinent part, “The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.” 28 U.S.C. § 1603(d)(emphasis supplied).

90. *Gregorian*, 871 F.2d at 1521.

91. *Id.* at 1522.

92. *Nelson*, 923 F.2d at 1535.

93. *Id.*

94. 621 F.2d 1371 (5th Cir. 1980).

95. *Id.* at 1373.

icana Airlines, the national airline of the Dominican Republic, immigration officers denied them entry and, assisted by Dominicana employees, forcibly placed them aboard a Dominicana flight to San Juan, Puerto Rico.⁹⁶ Alleging that Dominicana partially sponsored the tour sold to them by Guzman, the Arangos brought an action against Dominicana and other defendants in state court.⁹⁷ On removal to federal court and subsequent dismissal of their claims against Dominicana, the plaintiffs appealed.⁹⁸ The Court of Appeals for the Fifth Circuit dismissed their appeal, but proceeded, "in the interest of expediency . . . to offer [the district] court some guidance in its further handling of these issues."⁹⁹ First, the court found that Dominicana's ticket sales and other airline operations were "commercial activity" within the meaning of section 1603(d)-(e).¹⁰⁰ Then it addressed Dominicana's argument that the plaintiffs' claims arose, not from this commercial activity, but from the acts of the Dominican Republic's immigration officials who expelled the Arangos and from the involuntary, and thus non-commercial, rerouting of the Arangos mandated by those officials.¹⁰¹ The court found that Dominicana was not answerable to the complaints of false imprisonment and of battery stemming from the Arangos being forced aboard the Dominicana flight to San Juan by Dominican Republic immigration officers, with the aid of Dominicana employees, and from their alleged "man-handling" while undergoing this happy travel experience.¹⁰²

The focus of the exception to immunity recognized in § 1605(a)(2) is not on whether the defendant generally engages in a commercial enterprise or activity, as an airline such as Dominicana unquestionably does; rather, it is on whether the particular conduct giving rise to the claim in question actually constitutes or is in connection with commercial activity, regardless of the defendant's generally commercial or governmental character.

Dominicana's actions in connection with the 'involuntary re-routing' were not commercial. Dominicana was impressed into service to perform these functions Dominicana acted

96. *Id.*

97. *Id.*

98. *Arango*, 621 F.2d at 1373.

99. *Id.* at 1378.

100. 621 F.2d at 1379.

101. *Id.*

102. *Id.*

merely as an arm or agent of the Dominican government in carrying out this assigned role, and, as such, is entitled to the same immunity from any liability arising from that governmental function as would inure to the government, itself.¹⁰³

The court found that the Arangos' other claims—for breach of contract and warranty, failure to refund the price of the tour, and failure to warn of the list of undesirables which Dominicana knew the Republic's immigration service maintained—arose directly from the airline's commercial activity in the United States.¹⁰⁴ These claims were not barred by foreign sovereign immunity.¹⁰⁵

The *Nelson* court summarized the facts in *Arango* and carefully noted that the battery and false imprisonment claims were based on official acts while the breach of contract and other contractual claims were based upon Dominicana's commercial activity in the United States.¹⁰⁶ It did not mention the basis of the *Arango* court's distinction: that the focus of the section 1605(a)(2) exception is on whether the particular conduct occasioning the claim constitutes or is in connection with commercial activity.

Obviously, the *Nelson* court believed that there was no connection between the official acts perpetrated upon the Arangos, and the commercial activity of the defendant in selling tickets and travel cards.¹⁰⁷ Instead, the battery and false imprisonment claims of the Arangos were based upon an official activity of expulsion.

IV. AN ALTERNATIVE INTERPRETATION OF SECTION 1605(a)(2)

A. *Jurisdictional Nexus: A Misused Tool*

The requirement that there be a jurisdictional nexus between the acts giving rise to the complaint and a sovereign's commercial activities in the United States for an action to be based upon section 1605(a)(2) is a creation of the courts.¹⁰⁸ Like the requirement of causal connection for tort liability, it is a limiting device.¹⁰⁹ The nexus test is "necessary to satisfy both the congressional policy of

103. *Id.* (citations omitted).

104. *Id.* at 1379-80.

105. *Id.*

106. *Nelson*, 923 F.2d at 1535.

107. *Nelson*, 923 F.2d at 1535-36. See Matias A. Vega, *International Decisions*, *Nelson v. Saudi Arabia*, 923 F.2d 1528 (11th Cir. 1991), 85 Am. J. INT'L L. 557 (1991).

108. See, e.g., *Nelson*, 923 F.2d at 1534.

109. *Id.*

the [Foreign Sovereign Immunities Act] and sound principles of comity."¹¹⁰

The *Nelson* court applied the jurisdictional nexus test to a sequence of events which certainly were intertwined. It began with a foreign state's commercial activity in the United States, and concluded with that state's law enforcement activities in its own territory. Because this test appeared to fit, the court found that Nelson's grievances were based upon Saudi commercial activity in the United States, thereby severing the shield of sovereign immunity from Saudi law enforcement activity in its own territory.¹¹¹ In a triumph of literalism, the court brandished a judicial tool fashioned to implement the Act's establishment of the restrictive doctrine of sovereign immunity. In so doing, it created an unnecessary richness of embarrassments, and contravened Congress's intent in adopting the Act.¹¹²

The jurisdictional nexus, like many sharp, double-edged tools, can harm its user if wielded inappropriately. The Supreme Court of the United States has invited the Solicitor General to brief the position of the United States on Saudi Arabia's presently pending petition for certiorari.¹¹³ The State Department's strong interest in this case indicates that judgement of one nation's police activities on its own territory by the courts of another state is a matter of international sensitivity.¹¹⁴ Internal law enforcement activities are precisely the public acts to which the restrictive doctrine grants immunity.¹¹⁵ Courts should refrain from using a judge-made tool when its use defeats the purpose of the legislation it was designed to interpret.

A better reading of the facts in *Nelson* is that the official acts on Saudi territory arose from Mr. Nelson's activities at the Saudi hospital. The circumstances of his arrival in Saudi Arabia were of no greater relevance to the jurisdictional inquiry than were Dominica's ticket sales and air carriage of the *Arango* plaintiffs which lead to their unhappy encounter with immigration officials at Santo Domingo. In both cases there was a "nexus" (*i.e.*, a causal

110. *Id.*

111. *Id.* at 1536.

112. See Statement of Interest of the United States in Support of Rehearing and Suggestion for Rehearing in Banc, *Nelson* (No. 89-5981) at 2-3 [hereinafter Statement of Interest]; Vega, *supra* note 107, at 557.

113. *Saudi Arabia v. Nelson*, 112 S.Ct. 436 (1991).

114. Statement of Interest, *supra* note 112, at 2-3.

115. H.R. REP. No. 1487, *supra* note 65, at 6605.

connection) between the plaintiffs' grievances and a foreign state's commercial activities in the United States, but in neither case was this connection a *jurisdictional* nexus because the effective, legal cause of the tortious official acts complained of arose in the foreign nation itself. Determination of a legal cause, like the presence of a jurisdictional nexus, is very much a matter of policy.¹¹⁶ Whether a holding in *Nelson* that there was no jurisdictional nexus between law enforcement activities in Saudi Arabia and Saudi commercial activities in the United States best satisfies the "congressional policy of the FSIA"¹¹⁷ requires examination of that policy.

B. *Argument from Legislative Intent*

Congress intended the Act to place the determination of claims by foreign states to sovereign immunity in United States courts, rather than in the executive branch.¹¹⁸ Its aim was to "protect the rights of both foreign states and litigants" in the courts.¹¹⁹ The drafters envisioned that courts would afford this protection by determining claims under standards recognized by international law and embodied in the Act.¹²⁰

The principal standard embodied in the Act was the restrictive doctrine of immunity, particularly the exception from immunity of states' commercial activities.¹²¹ The central purpose of the restrictive doctrine, and the reason for the commercial activities exception, is to balance justly the right of sovereign governments to carry out their political and administrative functions free from interference and the interest of private individuals conducting business with these governments to have their legal claims heard in their own countries' courts.¹²² Congress clearly recognized that the courts would have broad discretion in determining what was and

116. See WILLIAM L. PROSSER & W. PAGE KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 42 (5th ed. 1984).

117. *Nelson*, 923 F.2d at 1534.

118. 28 U.S.C. § 1602; see also H.R. REP. NO. 1487, *supra* note 65, at 6606 ("A principal purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process.").

119. 28 U.S.C. § 1602.

120. H.R. REP. NO. 1487, *supra* note 65, at 6613.

121. *Id.*

122. *Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354, 360 (2d Cir. 1964).

what was not commercial activity.¹²³ Its intention to restrict immunity to the sovereign or governmental acts of a foreign state cannot have included a grant of discretion for courts to find such acts not immune merely because they are tenuously connected to commercial acts in the United States.¹²⁴

Two relatively recent cases confirm that a foreign nations' administrative and law enforcement acts should not be heard by American courts. In the first, *Tucker v. Whitaker Travel, Ltd.*,¹²⁵ plaintiffs, injured in a fall from a horse rented at a livery stable in the Bahamas, complained of that government's refusal to investigate the accident, to take action against the livery business operators involved, or to properly regulate horseback riding.¹²⁶ The court held that the Bahamian government was immune from its jurisdiction because the decisions not to investigate or regulate were "peculiarly governmental" and not subject "to scrutiny in the United States courts."¹²⁷

In the second case, *Herbage v. Meese*,¹²⁸ the court dealt with claims of a British citizen who was convicted of mail fraud after being extradited to the United States.¹²⁹ The British citizen claimed that British officials had illegally assisted in his extradition.¹³⁰ Noting that the acts complained of were "official government functions classically belonging to the discretion of the executive, and classically immune from suit," the court held that whether or not the acts were legal, it lacked jurisdiction under the Act.¹³¹

123. H.R. REP. No. 1487, *supra* note 65, at 6615. For an indication that courts have faced this discretionary challenge with less than overwhelming enthusiasm see *Callejo v. Bancomer*, 764 F.2d 1101, 1107 (5th Cir. 1985) (quoting *Gibbons v. Udaras na Gaeltachta*, 549 F. Supp. 1094, 1105, 1106 (S.D.N.Y. 1982)) ("The FSIA has aptly been called a 'remarkably obtuse' document, a 'statutory labyrinth that, owing to the numerous interpretive questions engendered by its bizarre structure and its many deliberately vague provisions, has during its brief lifetime been a financial boon for the private bar but a constant bane of the federal judiciary.'"). No judge or commentator has yet improved on Sompong Sucharitkul's understated elegance: "Sub-section (a) of Section 1605 is not altogether free of difficulties." Sucharitkul, *supra* note 40, at 494.

124. H.R. REP. No. 1487, *supra* note 65, at 6613.

125. 620 F. Supp. 578 (D.C. Pa. 1985), *aff'd*, 800 F.2d 1140 (3d Cir. 1986), *cert. denied*, 479 U.S. 986 (1986).

126. *Id.* at 584.

127. *Id.*

128. 747 F. Supp. 60 (D.D.C. 1990).

129. *Id.*

130. *Id.*

131. *Id.* at 67.

The sole significant difference between the facts in these cases and those in *Nelson* is that in *Nelson* the sovereign acts are "intertwined" with a commercial activity in the United States by the foreign nation. Here, surely, the private interest of the claimant must give way to the right of a sovereign state not to have official domestic acts of its law enforcement officers tried in a foreign court. The restrictive doctrine, which the Act was intended to effect, suggests plainly that on this peculiar set of facts, a United States court should not exercise jurisdiction over Saudi Arabia.¹³²

C. *Argument from the History of the Restrictive Immunity Doctrine*

Inherent in the restrictive doctrine of sovereign immunity is a balance between the need of states to carry out their essential governmental functions free from the harassment and expense of law suits and the just desire to allow private claimants the opportunity to have their claims heard in their country's courts.¹³³ The doctrine achieved this balance by distinguishing between a foreign state's public acts and its private (or commercial) acts and by restricting immunity to the former. Because all state acts can be classed as "public" in their purpose, the doctrine required that courts examine the nature rather than the purpose of acts from which claims arise.¹³⁴

It does not appear that the courts or theorists whose combined work produced the restrictive doctrine ever contemplated the withdrawal of immunity for a state's law enforcement activities within its own territory. Published in 1932, the influential *Harvard Research's Draft Convention on the Competence of Courts in Regard to Foreign States* included a list of activities with various countries' court decisions as to whether the activities were or were not commercial.¹³⁵ Law enforcement activities were not on the list, which included operating a railroad, leasing real property, carrying on a government trading monopoly, buying arms, purchasing supplies for army use, selling excess supplies, and purchasing goods to

132. See *Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354, 360 (2d Cir. 1964); Lauterpacht, *supra* note 41, at 237-38.

133. See *Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354 (2d Cir. 1964); Hill, *supra* note 17, at 171-72.

134. 28 U.S.C. § 1603(d); HARVARD RESEARCH, *supra* note 39, at 597.

135. HARVARD RESEARCH, *supra* note 39, at 609-11.

be resold to nationals.¹³⁶ The authors annotated the list with extracts from foreign courts which had thus far considered claims against other states arising from commercial or non-public acts: none involved law enforcement activities.¹³⁷ Section 1605 of the Act uses the "based upon" language found in Article 11 of the Draft Convention. It is difficult to believe that the authors of the proposed convention intended that the immunity of a state should be denied when the claim against it arises from law enforcement activities in that state's own territory which happen to have a nexus with the state's commercial activities in the forum country.

Professor Lauterpacht published his well-known article in 1951.¹³⁸ It seems just to say that he represented the "cutting edge" of the restrictive school at the time, since he proposed that states be no more immune in the courts of other countries than they were in their own.¹³⁹ Even he, however, specified that the abolition of the rule of immunity must be subject to safeguards, one of which was:

[T]here must be immunity from jurisdiction in respect of the executive and administrative acts of the foreign state within its territory, such as alleged unjustified expulsion or, generally, denial of justice. In particular no action shall lie for torts committed by foreign states in their own territory.¹⁴⁰

His article cites no case or scholarly proposition that represents an exception to this safeguard. Given his abolitionist position, Lauterpacht would not likely have missed the opportunity to bring such authority to his readers' attention.

In 1955 Professor (as he then was) Edward D. Re, the author of the *Nelson* opinion, published an article which left little doubt about his support for the restrictive doctrine.¹⁴¹ He carefully reported and analyzed "progress" on the restrictive front in British and American courts, remarking ruefully of one British case, "[f]or those who wish to see a complete repudiation of the doctrine of sovereign immunity, the *Juan Ysmael* case does not go far

136. *Id.*

137. *Id.* at 611-40.

138. Lauterpacht, *supra* note 41.

139. *Id.* at 237.

140. *Id.* at 237-38.

141. Edward D. Re, *Judicial Developments in Sovereign Immunity and Foreign Confiscations*, 1 N.Y.L.F. 160 (1955).

enough."¹⁴² Yet,

The English case of [*Ysmael*] cannot at all be regarded as a retrogression in the development of sovereign immunity. On the contrary, it continues the judicial trend to restrict the applicability of the doctrine of sovereign immunity. Surely, it should be obvious to legal scholars on both sides of the Atlantic that revolutionary changes of position concerning doctrines that have existed for centuries cannot be expected overnight.¹⁴³

Like Lauterpacht, Professor Re surely would have drawn his readers' attention to any court's exercise of jurisdiction in an action arising from a foreign nation's law enforcement activities in its own territory had a court ever done this.

The leading case in the era between the 1952 Tate Letter and the 1976 passage of the Act was *Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes*,¹⁴⁴ involving a suit to compel arbitration over the charter of a vessel transporting wheat to Spain. The State Department made no recommendation regarding the Spanish government's claim of immunity, thus leaving the court to decide for itself whether, under the Tate Letter, immunity should be granted.¹⁴⁵ Neither the nature test nor the purpose test, the court thought, was an adequate criterion for deciding whether acts were public or private.¹⁴⁶ Because "[s]overeign immunity is a derogation from the normal exercise of jurisdiction by the courts and should be accorded only in clear cases,"¹⁴⁷ the court said it would be disposed to deny a claim for immunity not recognized by the State Department "unless it is plain that the activity in question falls within one of the categories of strictly political or public acts about which sovereigns have traditionally been quite sensitive."¹⁴⁸ The restrictive theory required the sacrifice of private claimants' interests to international comity only if the acts in question fell in these "strictly political or public" activities:

- (1) internal administrative acts, such as expulsion of an alien,

142. *Id.* at 172 (citing *Juan Ysmael & Co., Inc. v. Government of Indonesia*, [1954] 3 W.L.R. 531 (Eng.)).

143. *Id.* at 173.

144. 326 F.2d 354 (2d Cir. 1964). For its significance, see Hill, *supra* note 17, at 181-83; Murphy, *supra* note 8, at 601-02 (remarking on its "rather conservative" grants of immunity).

145. 326 F.2d 354, 358-59 (1964).

146. *Id.* at 359-60.

147. *Id.* at 360.

148. *Id.*

- (2) legislative acts, such as nationalization,
- (3) acts concerning the armed forces,
- (4) acts concerning diplomatic activity,
- (5) public loans.¹⁴⁹

Commentators have noted that from 1964 until the passage of the Act in 1976, courts considering claims of immunity on which the State Department made no recommendations tended to follow *Victory's* lead in applying the restrictive doctrine.¹⁵⁰

Plainly the restrictive doctrine in theory and in the courts' practice prior to the Act never contemplated jurisdiction over claims arising from a nation's law enforcement activities in its own territory.

D. Arguments from Policy

1. Dignity

As a consideration in questions of foreign sovereign immunity, dignity, if not altogether dead, is in dire disrepute.¹⁵¹ Lauterpacht despatched her decisively: "These strained emanations of the notion of dignity are an archaic survival and . . . they cannot continue as a rational basis of immunity."¹⁵² Others suggest that the replacement of monarchs with soulless modern bureaucracies makes her moot.¹⁵³ All unite in maintaining that when a nation deigns to trade, its dignity is better preserved by submission to law than by claiming superiority to it.¹⁵⁴

Despite her archaic, unfashionable robes, in this particular case, dignity may demonstrate her utility. When Chief Justice Marshall wrote his famous opinion in *The Schooner Exchange*, the United States was a young, weak republic in a world of warring

149. *Id.*

150. See, e.g., DELLAPENNA, *supra* note 18, § 1.2, at 8 n.44; Haworth, *supra* note 57, at 550-51 (maintaining that the only deviation from the *Victory* standard "occurred when the judiciary deferred to recommendations from the executive that immunity be granted in particular cases" and providing a list); Hill, *supra* note 17, at 180 n.115.

151. See R. Higgins, *Certain Unresolved Aspects of the Law of State Immunity*, 29 NETHERLANDS INT'L L. REV. 265, 271 (1982); Hill, *supra* note 17, at 165; Moses Aldrin Kimuli, *The Application of the Doctrine of Foreign Sovereign/State Immunity to Public Corporations*, 13 MELANESIAN L.J. 52, 76-77 (1985); Lauterpacht, *supra* note 41, at 230-32.

152. Lauterpacht, *supra* note 41, at 231.

153. See Hill, *supra* note 17, at 165.

154. *Id.*

monarchs.¹⁵⁵ Indeed, the Napoleonic Wars occasioned the case.¹⁵⁶ Eager to establish the power of the federal government, and of his court, at home, Marshall had great motivation to establish the equality of sovereign states in the law and to emphasize the idea of dignity in their relations with each other.¹⁵⁷ In 1812, neither Britain nor France, locked in a world war, hesitated to affront minor states' dignity by commandeering their ships and impressing their seamen.¹⁵⁸

Many of the world's nations are in positions analogous to that of the United States when Marshall penned *The Schooner Exchange*, and the ideas of sovereignty, dignity, and the equality of states before the law which sound so quaint and archaic to modern American lawyers have real significance to these countries.¹⁵⁹ This in no way invalidates the restrictive doctrine of immunity. As one commentator has remarked, contracts designed to further the economic growth of developing countries are not likely to be promoted by policies that provide for their unenforceability.¹⁶⁰ It does suggest, however, that an unnecessary affront, such as requiring a young, proud nation¹⁶¹ to submit to the jurisdiction of our courts in an action arising from the law enforcement activities of its officials on its own territory, should be avoided.

In a country where dignity is at a discount and where torture is reduced to a tort for which money damages are payable, it may be more illuminating to equate denigration of national dignity with unconscionable expense:

The object of the [foreign sovereign immunity] doctrine—to be sure with some important exceptions—is to relieve the sovereign of the burdens and indignities of civil litigation in a foreign forum; if the sovereign had to prove its entitlement to immunity by preliminary litigation and had to undergo the burdens of dis-

155. See HENRY ADAMS, 2 HISTORY OF THE UNITED STATES OF AMERICA DURING THE SECOND ADMINISTRATION OF THOMAS JEFFERSON 1-54, 105-27 (Scribners, 1890); SAMUEL FLAGG BEMIS, A DIPLOMATIC HISTORY OF THE UNITED STATES 138-58 (3d ed. 1950).

156. See ALBERT J. BEVERIDGE, 4 THE LIFE OF JOHN MARSHALL 125-26 (1919).

157. *Id.*

158. See ADAMS, *supra* note 155; ALFRED THAYER MAHAN, 1 SEA POWER IN ITS RELATIONS TO THE WAR OF 1812 141-282 (1918).

159. See Ifeanyi Achebe, *The Act of State Doctrine and Foreign Sovereign Immunities Act of 1976: Can They Coexist?* 13 MD. J. INT'L L. & TRADE 247, 278-80 (1989).

160. CHRISTOPH H. SCHREUER, STATE IMMUNITY: SOME RECENT DEVELOPMENTS 17 (1988).

161. Ibn Saud was pronounced King of the Hijaz on January 8, 1926, and he proclaimed the foundation of the Kingdom of Saudi Arabia in 1932. For a participant's account of the formation of the Kingdom, see H. ST. JOHN PHILBY, SA'UDI ARABIA 265-91 (1955).

covery, the purpose of immunity doctrine would be gravely undermined. [The judge] could see that participation in pre-trial discovery, American style, might be about as much of an indignity for a foreign country as participation in a trial¹⁶²

Pre-trial discovery for the determination of jurisdiction appears inevitable under the Act, but requiring the sovereign defendant to incur the costs of trial is truly adding injury to insult.¹⁶³

2. Reciprocity

A further argument for declining to exercise jurisdiction in the *Nelson* case is that it could lead to retaliatory or reciprocal extension of foreign jurisdictions to encompass the actions of American law enforcement agencies whenever these acts have what the foreign courts perceive to be a jurisdictional nexus with some United States government commercial activity in the forum country.¹⁶⁴ At present the State Department uses the Act as its standard for determining whether it should claim immunity in other nations' courts.¹⁶⁵ Even, therefore, when there is no retaliatory expansion of foreign jurisdictions, the United States will only be able to claim immunity in such a case if it adopts for itself a less exacting standard than it applies to others.¹⁶⁶

3. Effect on Americans' Employment Abroad

If subject matter jurisdiction of United States courts encompasses claims by Americans employed by foreign states arising

162. Andreas F. Lowenfeld, *Litigating a Sovereign Immunity Claim—The Haiti Case*, 49 N.Y.U.L. Rev. 377, 415 (1974).

163. For a discussion of the burden of proof and discovery, see DELLAPENNA, *supra* note 18, §§ 9.3-9.4. On the burden of trial as perceived by non-Americans, consider:

As a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune. At no cost to himself; and at no risk of having to pay anything to the other side. The lawyers there will conduct the case 'on spec' as we say, or on a 'contingency fee' as they say. The lawyers will charge the litigant nothing for their services but instead they will take 40 per cent of the damages, if they win the case in court, or out of court on a settlement. If they lose, the litigant will have nothing to pay to the other side. The courts in the United States have no such costs deterrent as we have All this means that the defendant can be readily forced into a settlement. The plaintiff holds all the cards.

Smith Kline Ltd. v. Bloch, 1983 W.L.R. 730, 733 (Eng. C.A. 1982).

164. Statement of Interest, *supra* note 112, at 2-3.

165. *Id.*

166. *Id.*

from law enforcement activities in these states which have some jurisdictional nexus with the countries' commercial activities in the United States, the attractiveness of American employees vis-à-vis those from nations with narrower definitions of jurisdiction will suffer. Why recruit a law suit?

It is worth noting that the British State Immunity Act,¹⁶⁷ that of Australia¹⁶⁸ and the European Convention,¹⁶⁹ all have special provisions for contracts of employment which deny immunity to a foreign state employer *unless* the contract provides otherwise. The reason for these provisions is recognition that in some respects a government's relations with its employees are exclusively within that government's own jurisdiction.¹⁷⁰ The transfer or removal of employees, particularly senior ones, often is a matter of significance in the government's administration.¹⁷¹ The writer's own observations in one African state were that such an employee's temporary detention or deportation was equally significant.¹⁷² Citizens of countries that allow state employers to contract out of foreign jurisdiction will be more attractive employment candidates than those who carry in their duffel bags the expensive delights of American legal process.

V. CONCLUSION

Congress intended the Foreign Sovereign Immunities Act to codify the restrictive doctrine of sovereign immunity. It designed the Act to ensure that decisions on when a party could maintain an action against a foreign state and when such a state was entitled to immunity should be made exclusively by the courts of the United States. The Act grants states immunity with exceptions. The commercial activities exception in section 1605(a)(2) denies immunity to states in actions which are based upon these states' commercial activities in the United States. This provision was not intended to encompass a state's law enforcement activity in its own territory.

167. State Immunity Act of 1978, *reprinted in* 17 I.L.M. 1123 (1978).

168. Foreign States Immunities Act 1985 §§ 11-12, *reprinted in* 25 I.L.M. 715, 718 (1986).

169. European Convention on State Immunity, art. 5, *EUROP. T.S. No. 74* (1972), *reprinted in* 11 I.L.M. 470 (1972).

170. *See* Crawford, *supra* note 29, at 92.

171. *Id.*

172. Personal observation based on service (without detention) as University Librarian, University of Malawi, Zomba, Malawi, 1977-1980.

The court's inappropriate application of a jurisdictional nexus measure in *Nelson v. Saudi Arabia* resulted in a holding for the first time that a United States court had jurisdiction under section 1605(a)(2) over a claim arising from such law enforcement activity. This result will have adverse consequences for the United States, its citizens, and foreign nations. It should have been avoided by following earlier courts' refusal to find a jurisdictional nexus between official acts in a nation's own territory linked to commercial activities in the United States when the official acts have an effective, legal cause in the foreign nation.

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