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## Against Conduct-Based Immunity for Torture Victim Protection Act Defendants

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## AGAINST CONDUCT-BASED IMMUNITY FOR TORTURE VICTIM PROTECTION ACT DEFENDANTS

Luke Ryan\*

*On October 13, 2016, former Israeli Minister of Defense, Ehud Barak, was granted immunity and dismissed from a civil action alleging he violated the Torture Victim Protection Act of 1991 (TVPA) by authorizing the torture and extrajudicial killing of an American citizen.<sup>1</sup> Both the government of Israel and the United States Department of State called on the court to grant federal common law foreign official immunity by arguing that Barak was protected from suit because he acted “in his official capacity.”<sup>2</sup> The TVPA, however, permits legal action against foreign defendants who have acted in such a capacity—namely, “under actual or apparent authority, or color of law, of any foreign nation.”<sup>3</sup> Nevertheless, the court determined that the TVPA did not abrogate federal common law immunity “where the sovereign state officially acknowledges and embraces the official’s acts,” allowing the court to also avoid the complicated question of whether the executive branch has the power to order a court to grant immunity.<sup>4</sup>*

*This article argues that the text and legislative history of the TVPA prohibit federal common law conduct-based immunity. First, the mere assertion that a TVPA defendant acted “in his official capacity” is not sufficient to dismiss allegations of torture or extrajudicial killing because the TVPA requires such capacity as a prerequisite to liability. Second, the Act’s legislative history, which directs federal courts to look to 42 U.S.C. § 1983 actions for guidance regarding the immunities available to TVPA defendants, demonstrates Congress’ intent to allow government officials to be held personally liable for acts undertaken in an official capacity—regardless of a foreign state’s acknowledgment or embracement.<sup>5</sup> Finally, while federal courts have an interest in avoiding conflict with the executive branch in cases involving foreign affairs, the executive branch lacks the power to mandate conduct-*

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\* J.D., 2017, Fordham University School of Law; B.A., 2002, University of Virginia. Special thanks to Professor Thomas H. Lee and Tess M. Sadler for their guidance and encouragement and the *Barry Law Review* for their invaluable support.

1. See *Dogan v. Barak*, No. 2:15-cv-08130-ODW(GSJx), 2016 WL 6024416 (C.D. Cal. Oct. 13, 2016).

2. Suggestion of Immunity by the United States, *Dogan v. Barak*, No. 2:15-CV-08130 (C.D. Cal. Jun. 10, 2016), ECF No. 48 [hereinafter *Dogan* Suggestion of Immunity]; *Dogan*, 2016 WL 6024416, at \*12.

3. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note (2012)) [hereinafter TVPA].

4. *Dogan*, 2016 WL 6024416, at \*12.

5. “Courts should look to principles of liability under U.S. civil rights laws, in particular section 1983 of title 42 of the United States Code, in construing ‘under color of law’ . . .” S. REP. NO. 102-249, at 8 (1991) [hereinafter SENATE REPORT]. Similarly, the House Report states that “[c]ourts should look to 42 U.S.C. Sec. 1983 is [sic] construing ‘color of law’ . . .” H.R. REP. NO. 102-367, at 5 (1991), reprinted in 1992 U.S.C.A.N. 84, 87 [hereinafter HOUSE REPORT, with page numbers as original].

*based foreign official immunity—especially when, as here, the executive branch asserts an incorrect interpretation of federal law.*

INTRODUCTION .....	2
I. FEDERAL COMMON LAW FOREIGN OFFICIAL IMMUNITY .....	5
II. THE TORTURE VICTIM PROTECTION ACT .....	9
A. Alien Tort Statute .....	10
B. Foreign Sovereign Immunities Act .....	11
C. “Any Individual” .....	13
D. Status-Based and Conduct-Based Federal Common Law Immunity .....	15
III. IMMUNITY OF GOVERNMENT OFFICIALS IN 42 U.S.C. § 1983 ACTIONS .....	17
IV. CONDUCT-BASED IMMUNITY DOES NOT PROTECT TVPA DEFENDANTS .....	19
V. THE EXECUTIVE BRANCH CANNOT UNILATERALLY GRANT IMMUNITY .....	22
CONCLUSION .....	25

## INTRODUCTION

In the landmark 2010 decision *Samantar v. Yousuf*,<sup>6</sup> the Supreme Court of the United States unanimously held that the Foreign Sovereign Immunities Act of 1976 (FSIA)<sup>7</sup> does not provide foreign government officials with immunity in U.S. courts.<sup>8</sup> Instead, the Court declared that foreign individuals may be granted immunity under federal common law but did not establish a framework for the doctrine, remanding that question to the lower court.<sup>9</sup> In the years since *Samantar*, legal scholars have debated the circumstances in which federal common law foreign official immunity applies, and the federal courts have struggled to adopt a uniform standard.<sup>10</sup>

Foreign official immunity determinations raise complicated questions of international and domestic law that are compounded by competing priorities of the executive and judicial branches.<sup>11</sup> On the one hand, foreign official immunity implicates the power of the executive branch over foreign affairs.<sup>12</sup> On the other

6. *Samantar v. Yousuf*, 560 U.S. 305 (2010).

7. Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended at 28 U.S.C. §§ 1330, 1332, 1391, 1441, 1602–1611 (2012)) [hereinafter FSIA].

8. *Samantar*, 560 U.S. at 325.

9. *Id.* at 325–26.

10. See, e.g., Harold Hongju Koh, *Foreign Official Immunity After Samantar: A United States Government Perspective*, 44 VAND. J. TRANSNAT'L L. 1141 (2011) (arguing in favor of executive branch control over foreign official immunity determinations); Ingrid Wuerth, *Foreign Official Immunity Determinations in U.S. Courts: The Case Against the State Department*, 51 VA. J. INT'L L. 915 (2011) (arguing against executive control).

11. See, e.g., Chimène I. Keitner, *The Forgotten History of Foreign Official Immunity*, 87 N.Y.U. L. REV. 704, 704 (2012) [hereinafter Keitner, *The Forgotten History*] (discussing the overlapping and competing interests involved in decisions to grant or deny domestic immunity to foreign government officials).

12. See U.S. CONST. art. II, § 1, cl. 1.

hand, such determinations directly involve the judiciary's exclusive authority to apply U.S. law and resolve disputes.<sup>13</sup> Not surprisingly, determining whether a foreign government official is protected from liability in a civil action brought in a U.S. court has resulted in an open conflict between the two branches.<sup>14</sup> While the U.S. Department of State has declared that its recommendations of immunity are dispositive,<sup>15</sup> some courts have rejected such mandatory deference.<sup>16</sup>

This tug-of-war between the executive and judicial branches has already resulted in a circuit split<sup>17</sup> over the question of whether foreign official immunity is ever appropriate in civil actions alleging the official has violated internationally accepted norms known as *jus cogens*.<sup>18</sup> While *jus cogens* liability arises from customary international law and deference to the views of the executive branch in the exercise of its power over foreign affairs may indeed be appropriate in that context,<sup>19</sup> the executive branch has also asserted absolute control over foreign official immunity in cases alleging torture or extrajudicial killing<sup>20</sup>—*jus cogens*-like violations that are statutorily prohibited by the Torture Victim Protection Act of 1991 (TVPA).<sup>21</sup>

On June 10, 2016, the State Department intervened in the Central District of California case *Dogan v. Barak*,<sup>22</sup> essentially ordering the United States District Court to grant immunity to former Israeli Minister of Defense Ehud Barak.<sup>23</sup> The executive branch's "Suggestion of Immunity" was made at the request of the State of Israel in a civil action alleging Barak had authorized the torture and extrajudicial killing of an American citizen.<sup>24</sup> Both the government of Israel and the executive branch supported dismissal based on Barak's declaration that he was entitled to federal common law foreign official immunity because the allegations against him

13. See U.S. CONST. art. III, § 1.

14. Tension between the executive and judicial branches over the conduct of foreign affairs is nothing new. See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654, 662 (1981) (discussing executive orders as "only one more episode in the never-ending tension between the President exercising the executive authority in a world that presents each day some new challenge with which he must deal and the Constitution under which we all live and which no one disputes embodies some sort of system of checks and balances").

15. See, e.g., Brief for the United States as Amicus Curiae, *Samantar v. Yousuf*, 135 S. Ct. 1528 (2015) (No. 13-1361), 2015 WL 412283, at \*18 [hereinafter *Samantar* Brief for the United States]; *Dogan* Suggestion of Immunity, *supra* note 2, at 1–2. See also *infra* Part V.

16. See, e.g., *Warfaa v. Ali*, 811 F.3d 653, 661 (4th Cir. 2016); Transcript of Motion to Dismiss Proceedings at 3, *Dogan v. Barak*, No. 15-CV-08130 (C.D. Cal. Jul. 25, 2016), ECF No. 53. See also *infra* Part V.

17. Compare *Yousuf v. Samantar*, 699 F.3d 763, 773, 777 (4th Cir. 2012) ("The State Department's determination regarding conduct-based immunity, by contrast, is not controlling" and "officials from other countries are not entitled to foreign official immunity for [international law] violations."), with *Rosenberg v. Pasha*, No. 13-4334-CV, 2014 WL 4211057, at \*23 (2d Cir. Aug. 27, 2014) ("[I]n the common-law context, we defer to the Executive's determination of the scope of immunity" and "[a] claim premised on the violation of [international law] does not withstand foreign [official] immunity." (quoting *Matar v. Dichter*, 563 F.3d 9, 15 (2d Cir. 2009))).

18. *Jus cogens* norms are "norm[s] accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 332; see also *Saleh v. Bush*, 848 F.3d 880, 892 (9th Cir. 2017); *Belhas v. Ya'alon*, 515 F.3d 1279, 1286 (D.C. Cir. 2008).

19. See, e.g., *Pasha*, 2014 WL 4211057, at \*23.

20. See *Dogan* Suggestion of Immunity, *supra* note 2, at 8; see also *infra* Part V.

21. TVPA, *supra* note 3.

22. *Dogan* Suggestion of Immunity, *supra* note 2, at 1.

23. *Id.*

24. *Id.* at 2.

were based on acts he had undertaken “in his official capacity.”<sup>25</sup> The plaintiff’s claims, however, were brought under the TVPA, which fundamentally and explicitly requires that the defendant be an individual who acted “under actual or apparent authority, or color of law, of any foreign nation”<sup>26</sup>—namely, a foreign government official who acted in an official or apparently official capacity. Nevertheless, four months after the State Department intervened, the district court granted Barak’s motion to dismiss, granting him immunity by holding that federal common law entitles a TVPA defendant to immunity “where the sovereign state officially acknowledges and embraces the official’s acts.”<sup>27</sup>

This article examines the federal common law of foreign official immunity in cases arising under the TVPA and argues that the Act’s text and legislative history required a different outcome. The mere assertion that Barak acted in his official capacity was not sufficient to dismiss the plaintiff’s TVPA claims. First, simply admitting that the defendant acted in an “official capacity”—as both the State of Israel and the U.S. State Department declared, without anything more—was not “acknowledge[ment] and embrace[ment]” of the torture and extrajudicial killing sufficient to implicate Israel as a required party so that FSIA sovereign immunity would permit dismissal.<sup>28</sup> Second, “official capacity” does not provide sufficient grounds to justify federal common law immunity against claims of torture or extrajudicial killing because the legislative history of the TVPA, which analogizes the immunities available to TVPA defendants to the immunities available to 42 U.S.C. § 1983 defendants, permits holding government officials personally liable when they act in an official capacity.<sup>29</sup> When the Ninth Circuit decides the *Dogan* appeal later this year, it should reverse Barak’s dismissal because a TVPA defendant is not entitled to conduct-based protection where the TVPA defendant is sued in his personal capacity for money damages to be paid from the defendant’s own pockets.<sup>30</sup>

Part I of this article outlines the federal common law of foreign official immunity and discusses how conduct-based immunity functions. Part II delves into the TVPA’s text and legislative history to examine the immunities Congress intended for foreign government officials sued under the Act. Part III discusses immunities

25. Letter from Brian J. Egan, Legal Adviser, Dep’t of State, to Benjamin C. Mizer, Principal Deputy Assistant Att’y Gen., Dep’t of Justice (Jun. 10, 2016) (attached as Exhibit I to *Dogan* Suggestion of Immunity, *supra* note 2); State of Israel Diplomatic Note (Dec. 31, 2015) (attached as Exhibit H to Dec’l of Christopher M. Egleson in Support of Defendant’s Motion to Dismiss, *Dogan v. Barak*, No. 15-CV-08130 (C.D. Cal. Jan. 19, 2016), ECF No. 26).

26. TVPA, *supra* note 3, at § 2(a).

27. *Dogan*, 2016 WL 6024416, at \*12.

28. The Supreme Court has suggested that Rule 19 of the Federal Rules of Civil Procedure (Required Joinder of Parties) could provide grounds for dismissal of an action against a foreign official “where the sovereign state officially acknowledges and embraces the official’s acts.” *Dogan*, 2016 WL 6024416, at \*12; *see Samantar v. Yousuf*, 560 U.S. 305, 324–25 (2010) (discussing the inability to join an immune foreign sovereign as potential grounds to dismiss under required party joinder); *see also infra* Part V. The TVPA, however, provides an express federal cause of action against individuals independent of any claim or required joinder of a foreign sovereign. *See infra* Part II. Moreover, Israel did not take responsibility for—*i.e.* truly acknowledge and embrace—the alleged torture and extrajudicial killing. *See* State of Israel Diplomatic Note, *supra* note 25. Indeed, the *Dogan* court did not address or support its dismissal on the grounds of failure to join a required party. *Dogan*, 2016 WL 6024416, at \*12; *see also infra* Part V.

29. *See infra* Part III.

30. *See infra* Part IV.

available to government officials sued under 42 U.S.C. § 1983—immunities that Congress instructed courts to look to when evaluating immunity in TVPA actions. Part IV demonstrates that the TVPA does not allow foreign officials (such as Barak) to be granted conduct-based immunity against allegations of torture or extrajudicial killing. Finally, Part V examines and rejects the executive branch’s declaration of authority to intervene in a lawsuit and unilaterally grant conduct-based immunity.

## I. FEDERAL COMMON LAW FOREIGN OFFICIAL IMMUNITY

Defendants haled into federal court are not treated equally. This part provides a foundation for examining *Dogan v. Barak*<sup>31</sup> by discussing the federal common law of foreign official immunity in civil actions alleging torture or extrajudicial killing. As the *Dogan* court correctly determined,<sup>32</sup> federal common law provides some TVPA defendants with protection from suit in U.S. courts.<sup>33</sup> The court, however, erred in granting a certain type of protection, conduct-based foreign official immunity, because TVPA defendants cannot be shielded from liability based on the official nature of their allegedly tortious acts.<sup>34</sup> As a result, the Israeli government’s generic assertion that Barak acted “in an official capacity” is not sufficient to justify immunity, and granting Barak’s motion to dismiss improperly deprived the *Dogan* plaintiffs of their day in court.

Foreign sovereigns—the actual foreign states—are entitled to immunity in U.S. courts under a federal statute (the FSIA),<sup>35</sup> federal common law (the act of state doctrine),<sup>36</sup> and customary international law.<sup>37</sup> In contrast, foreign individuals—natural persons—are only entitled to immunity under federal common law.<sup>38</sup> Individual immunity is commonly called “foreign official immunity” because the more limited protections available to natural persons are an extension of the broader and more generalized immunities available to foreign sovereigns.<sup>39</sup> Lastly, foreign

31. *Dogan*, 2016 WL 6024416, \*1.

32. *See id.* at \*11.

33. *Id.*; *see also infra* Part II. C (discussing TVPA immunity for heads-of-state and diplomats).

34. The U.S. Department of State also incorrectly determined that federal common law conduct-based immunity was available to defendant Barak. *Dogan* Suggestion of Immunity, *supra* note 2, at 2; *see also infra* Part V.

35. FSIA, *supra* note 7.

36. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 416 (1964) (establishing the act of state doctrine); *see also* Curtis A. Bradley & Laurence R. Helfer, *International Law and the U.S. Common Law of Foreign Official Immunity*, 2010 SUP. CT. REV. 213, 258 (2010).

37. *See, e.g.*, Laurence R. Helfer & Ingrid B. Wuerth, *Customary International Law: An Instrument Choice Perspective*, 37 MICH. J. INT’L L. 563, 581 (2016).

38. *Samantar v. Yousuf*, 560 U.S. 305, 325 (2010); *see also* Beth Stephens, *The Modern Common Law of Foreign Official Immunity*, 79 FORDHAM L. REV. 2669, 2675 (2011); Luke Ryan, Note, *The New Tate Letter: Foreign Official Immunity and the Case for a Statutory Fix*, 84 FORDHAM L. REV. 1773, 1805–09 (2016) (proposing a new federal statute to codify the immunity of foreign officials).

39. *See, e.g.*, Stephens, *supra* note 38, at 2675 (“Foreign official immunity is a derivative of the immunity of the official’s state.”); *see also In re Doe*, 860 F.2d 40, 45 (2d Cir. 1988) (“[I]mmunity is a personal right. It derives from and remains an ‘attribute of state sovereignty.’” (quoting *In re Grand Jury Proceedings*, 817 F.2d 1108 (4th Cir. 1987))); *Yousuf v. Samantar*, No. 04-CV-01360 (LMB), ECF No. 147 (E.D. Va. Feb. 15, 2011), *aff’d*, *Yousuf v. Samantar*, 699 F.3d 763 (4th Cir. 2012) (“The immunity protecting foreign officials for their official acts ultimately belongs to the sovereign rather than the official.”).

official immunity is only available to an individual designated as an agent or official of a foreign state.<sup>40</sup>

Federal common law protects foreign officials from the burdens of litigation with two forms of immunity: (1) immunity based on the individual's *status* as a foreign sovereign's head-of-state, diplomat, or consular official; and (2) immunity based on the official's *conduct* that was performed on behalf of the foreign sovereign.<sup>41</sup> Status-based immunity is only available to a narrow group of individuals who hold a specific position—but such immunity provides broad protection over all acts undertaken by that official while occupying the unique role.<sup>42</sup> On the other hand, conduct-based immunity functions almost as the mirror opposite. Conduct-based immunity is broadly available to any foreign official—but is limited to providing protection over narrowly defined “sovereign acts” that can be imputed onto the sovereign itself.<sup>43</sup>

Federal common law conduct-based foreign *official* immunity is a necessary extension of federal statutory and common law foreign *sovereign* immunity. Comity among nations and principles of international law provide foreign states with protection in the legal systems of other states for acts considered “public” or “sovereign.”<sup>44</sup> Those sovereigns, however, can only perform that protected conduct through the actions of individuals.<sup>45</sup> When foreign individuals engage in conduct that is essentially the conduct of the sovereign, the sovereign is the party responsible for any harm that results.<sup>46</sup> Federal common law foreign official immunity exists to protect that sovereign's official against personal liability for the acts undertaken in that official capacity.<sup>47</sup> In the alternative, when foreign individuals engage in conduct that is not official—that is, not attributable to the sovereign—the individual is the party responsible for any harm that results.<sup>48</sup> In this case, neither the sovereign nor the individual is entitled to immunity because the source of immunity—the need to protect a sovereign act—does not exist.<sup>49</sup>

As Professor Chimène I. Keitner recently explained, conduct-based immunity can be understood—and the availability of conduct-based immunity determined—through a framework that focuses on the type of act performed by the official:

1) Acts attributable solely to the state and for which such attribution discharges the individual from personal responsibility, such as

40. See, e.g., Chimène I. Keitner, *Foreign Official Immunity After Samantar*, 44 VAND. J. TRANSNAT'L L. 837, 843 (2011) [hereinafter Keitner, *Foreign Official Immunity*].

41. See VED P. NANDA ET AL., LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS at § 4:1 (2d ed. 2017); Chimène I. Keitner, *The Common Law of Foreign Official Immunity*, 14 GREEN BAG 2D 61, 63 (2010) [hereinafter Keitner, *The Common Law*].

42. See, e.g., *Yousuf*, 699 F.3d at 774; NANDA ET AL., *supra* note 41, at § 4:2–4:5.

43. See, e.g., *Yousuf*, 699 F.3d at 774; NANDA ET AL., *supra* note 41, at § 4:6–4:9.

44. See Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L. J. 2599, 2602 (1997).

45. See Chimène I. Keitner, *Categorizing Acts by State Officials: Attribution and Responsibility in the Law of Foreign Official Immunity*, 26 DUKE J. COMP. & INT'L L. 451, 453 (2016) [hereinafter Keitner, *Categorizing Acts*].

46. *Id.*

47. *See id.*

48. *Id.* at 454.

49. *See id.*

signing a treaty or entering into a commercial transaction on behalf of the state (“Category One”).

2) Acts attributable to the state and for which such attribution does not discharge the individual from personal responsibility under domestic and/or international law, such as ordering torture (“Category Two”).

3) Acts not attributable to the state and for which the individual bears sole responsibility, such as vandalizing a neighbor’s property without actual or apparent state authority (“Category Three”).<sup>50</sup>

Under this category system, a key question when considering whether a foreign official may invoke conduct-based immunity is whether the plaintiff’s claims against the foreign official are attributable to the foreign state.<sup>51</sup> Put another way, the question is: Who is responsible—the foreign official or the foreign sovereign?<sup>52</sup> If the plaintiff’s claims are sovereign acts—that is, acts that may be imputed onto the sovereign—conduct-based immunity essentially substitutes the foreign sovereign for the foreign official as the defendant against whom the plaintiff’s case should have been brought because the foreign sovereign is the real party in interest.<sup>53</sup> If the sovereign would be immune against the plaintiff’s claims (that were first brought against the official), the case is properly dismissed.

Conduct-based foreign official immunity for Category One acts—which are attributable solely to the sovereign—is uncontroversial because Category One acts are essentially an exercise of the sovereign’s power and the sovereign takes full responsibility for the act and its consequences.<sup>54</sup> Likewise, non-immunity for Category Three acts—which are acts performed by the foreign official without actual or implied authority, or acts involving conduct that cannot be attributed to the sovereign—is also uncontroversial because Category Three acts are an exercise of power the sovereign has not delegated to the individual.<sup>55</sup> Category Three acts usually involve the sort of conduct the sovereign—which possesses the immunity the official seeks<sup>56</sup>—has declared to be illegal or non-condonable and, therefore, not an act worthy of protection.<sup>57</sup>

The more challenging conduct-based immunity determinations involve Category Two acts, where responsibility for any resulting harm can be attributed to the sovereign, the individual, or both.<sup>58</sup> Category Two acts—such as torture—are often

50. *Id.* at 453–54.

51. *See* Keitner, *Categorizing Acts*, *supra* note 45, at 453–54.

52. *Id.* at 456.

53. *Samantar v. Yousuf*, 560 U.S. 305, 325 (2010) (“[I]t may be the case 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.”); *see infra* Part IV. *See also supra* note 28.

54. Keitner, *Categorizing Acts*, *supra* note 45, at 456–57.

55. *See id.* at 456.

56. *See supra* note 39 and accompanying text.

57. *See supra* note 43 and accompanying text.

58. *See* Keitner, *Categorizing Acts*, *supra* note 45, at 456.



a blend of Category One and Category Three because the nature of the act appears official, but the individual who performed it also appears to have some personal responsibility or appears to have acted beyond their scope of authority. In this case, the usual justification for granting immunity—that the official’s acts are sovereign acts—does not apply.<sup>59</sup> Likewise, the usual justification for rejecting immunity—that the official was acting outside the scope of his or her authority or in a personal, non-official capacity—also does not apply.<sup>60</sup>

The challenge created by Category Two acts is not necessarily confined to international disputes involving foreign governments. The gray area between Category One and Category Three actions also occurs in domestic cases involving U.S. government officials.<sup>61</sup> Fortunately, federal common law conduct-based immunities that apply in domestic cases lend valuable insight when considering conduct-based foreign official immunity and Category Two questions.<sup>62</sup> Indeed, in both foreign and domestic contexts, “the characteristics that make an act attributable to the state for purposes of state responsibility are much broader than those that warrant shielding an individual alleged to have performed such an act from the exercise of foreign jurisdiction.”<sup>63</sup>

While attribution is important to understanding the availability of conduct-based immunity, Professor Keitner also argues that “[a]ttribution cannot be the sole basis for determining whether or not a state official should be held personally responsible by a foreign court.”<sup>64</sup> Professor Keitner’s concern is that by only focusing on whether the act (such as torture or extrajudicial killing) is attributable to the sovereign, courts will reflexively discharge foreign officials from personal responsibility without sufficiently investigating whether conduct-based immunity is even appropriate.<sup>65</sup>

This appears to be what happened in *Dogan*.<sup>66</sup> As soon as the court decided that the defendant’s acts were attributable to the sovereign (because Israel had “acknowledged and embraced” the conduct), the court granted conduct-based immunity.<sup>67</sup> But even under a view of the immunity doctrine that relies on attribution as the sole basis for conduct-based immunity—the view that Professor Keitner warned against<sup>68</sup> and the *Dogan* court appears to have adopted—the court’s decision was still improper because the TVPA prohibits attribution as grounds for immunity—the Act *requires* that the defendant have acted or appeared to have acted in some sort of official or non-personal capacity.<sup>69</sup> By premising liability on official

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59. *Id.* at 458.

60. *See id.*

61. *See infra* Part III.

62. Congress has recognized the similarities between the foreign and domestic official immunity doctrines and has instructed courts to consider principles of domestic immunity when evaluating foreign immunity. *See infra* Part III.

63. Keitner, *Categorizing Acts*, *supra* note 45, at 459.

64. *Id.* at 478. Professor Keitner criticizes “the position that, because accepted doctrines of foreign sovereign immunity [such as the act of state doctrine] shield foreign states themselves from legal consequences for certain Category Two acts [such as torture] in other countries’ domestic courts, foreign official immunity necessarily shields state officials from foreign legal proceedings for the same acts.” *Id.* at 458.

65. *Id.* at 478.

66. *Dogan v. Barak*, No. 2:15-cv-08130-ODW(GSJx), 2016 WL 6024416 (C.D. Cal. Oct. 13, 2016).

67. *Id.* at \*12. “Barak’s acts are irrefutably ‘official public acts’ that entitle him to immunity.” *Id.* at \*9.

68. Keitner, *Categorizing Acts*, *supra* note 45, at 458, 478.

69. *See infra* Part II.

capacity, the TVPA eliminates Category Two ambiguity and establishes express liability on the individual official for torture and extrajudicial killing regardless whether the official acted in a way attributable to the sovereign or with the sovereign's consent, acknowledgement, or embracement.

## II. THE TORTURE VICTIM PROTECTION ACT

On its face, the TVPA is clear and unambiguous, establishing a federal cause of action in a succinct seventy-one words:

LIABILITY.—An individual who, under actual or apparent authority, or color of law, of any foreign nation—

(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or

(2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.<sup>70</sup>

The text draws sharp boundaries on the types of lawsuits that may be brought. First, the use of “individual” establishes that only natural persons are liable under the Act.<sup>71</sup> The TVPA does not apply to organizations such as sovereign states or their agencies or instrumentalities—entities that, at the time the TVPA was enacted, were entitled to immunity under the FSIA (even in civil actions alleging torture or extrajudicial killing).<sup>72</sup> Second, the defendant must be acting under the law of a “foreign nation.”<sup>73</sup> Liability does not extend to individuals acting under U.S. federal or state law.<sup>74</sup> Third, the TVPA only creates liability in a “civil action”—that is, liability for money damages.<sup>75</sup> As a result, the Act does not subject a defendant to criminal prosecution. Fourth, the TVPA only applies in cases involving at least one of two specific offenses (torture or extrajudicial killing) that are clearly defined in the Act.<sup>76</sup> Finally, section 2(b) of the TVPA establishes U.S. courts as forums of last resort for allegations of torture or extrajudicial killing against a non-U.S. defendant

70. TVPA, *supra* note 3, at § 2(a).

71. *Mohamad v. Palestinian Authority*, 132 S. Ct. 1702, 1708 (2012) (“[T]he text of the statute persuades us that the Act authorizes liability solely against natural persons.”); *Mastafa v. Chevron Corp.*, 770 F.3d 170, 174 (2d Cir. 2014).

72. *See* FSIA, *supra* note 7; *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493 (1983) (upholding the constitutionality of the FSIA and Congress's power to codify foreign sovereign immunity).

73. TVPA, *supra* note 3, at § 2(a).

74. 42 U.S.C. § 1983 (state officials) and *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 389 (1971) (federal officials) authorize civil actions against U.S. officials acting under color of U.S. federal or state law for torture or extrajudicial killing.

75. *See* TVPA, *supra* note 3.

76. *See id.* at § 3.

by requiring plaintiffs to “exhaust[] adequate and available remedies in the place in which the conduct giving rise to the claim occurred.”<sup>77</sup>

On its face, the TVPA is remarkably simple: 485 words (including the preamble). That apparent simplicity creates problems, however, because the Act is silent regarding the affirmative defenses and immunities available to TVPA defendants.<sup>78</sup> “In order to abrogate a common-law principle [such as foreign official immunity], the statute must ‘speak directly’ to the question addressed by the common law.”<sup>79</sup> In general, federal courts will not look beyond a statute’s text,<sup>80</sup> but when “the language of the statute does not alone resolve the issue, [courts] must look to the legislative history.”<sup>81</sup> The overall structure and purpose of the statute, as well as its text and legislative history, are important to determining congressional intent and whether the statute “speaks directly” to the common law principle.<sup>82</sup>

Notably, five crucial elements in the TVPA’s legislative history provide a compelling indication of congressional intent regarding a TVPA defendant’s scope of liability:<sup>83</sup> (1) where the statute was included in the U.S. Code; (2) what Congress omitted from the legislative history; (3) the premising of liability to “any individual;” (4) the contrasting discussion of “status” and “conduct” as a basis for liability; and most importantly, (5) the instruction that courts should look to 42 U.S.C. § 1983 when determining a TVPA defendant’s scope of liability. As the House and Senate reports reveal, Congress enacted the Act so that private-party plaintiffs could hold foreign officials personally liable for torture or extrajudicial killing—especially when those officials were acting in an official capacity or within their scope of authority.<sup>84</sup>

### A. Alien Tort Statute

Congress associated the TVPA very closely with the Alien Tort Statute (ATS)<sup>85</sup>—another remarkably short federal law that deals with civil actions in U.S.

77. *Id.* at § 2(b).

78. *See* *Dogan v. Barak*, No. 2:15-cv-08130-ODW(GSJx), 2016 WL 6024416, at \*12 (C.D. Cal. Oct. 13, 2016); *Singh v. G.k.*, No. 1:15-CV-05372 (ALC), 2016 WL 3181149, at \*5 (S.D.N.Y. June 2, 2016).

79. *United States v. Texas*, 507 U.S. 529, 534 (1993); *see also* *Filarsky v. Delia*, 132 S. Ct. 1657, 1665 (2012) (“[W]e ‘proceed[] on the assumption that common-law principles of . . . immunity were incorporated into our judicial system and that they should not be abrogated absent clear legislative intent to do so.’” (alterations and quotations omitted)).

80. *See, e.g., Ex parte Collett*, 337 U.S. 55, 61 (1949) (“[T]here is no need to refer to the legislative history where the statutory language is clear.”).

81. *Fed. Election Comm’n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 246 (1986); *see also* *N. Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 551 (1982); *C.I.R. v. Bosch’s Estate*, 387 U.S. 456, 463 (1967).

82. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992); *see also* *Yousuf v. Samantar*, 552 F.3d 371, 379–80 (4th Cir. 2009), *aff’d and remanded*, 560 U.S. 305 (2010) (“In determining congressional intent, we focus of course on the language of the provision at issue, but we also consider the overall structure and purpose of the statute.”).

83. HOUSE REPORT, *supra* note 5; SENATE REPORT, *supra* note 5.

84. *See infra* Part IV; *see also* TVPA, *supra* note 3, at § 2(a) (stating defendants must be acting “under actual or apparent authority, or color of law”).

85. Judiciary Act of 1789, ch. 20, s 9(b), 1 Stat. 73, 77 (1789) (codified at 28 U.S.C. § 1350 (2012)) (“The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”).

courts involving foreign defendants.<sup>86</sup> Similar to the TVPA, the ATS's lack of specificity has resulted in confusion and changing interpretations of the ATS.<sup>87</sup> When the TVPA was enacted in 1991, Congress<sup>88</sup> and the courts<sup>89</sup> viewed the ATS in light of the Second Circuit's landmark case, *Filartiga v. Peña-Irala*.<sup>90</sup> In *Filartiga*, the Second Circuit adopted a broad reading of the ATS, holding that non-U.S. citizen plaintiffs were allowed to bring civil actions in U.S. courts against foreign government officials for alleged torture or other violations of customary international law that were committed outside the United States.<sup>91</sup> The House and Senate reports establish the TVPA as an extension of the ATS by explaining that the TVPA's purpose was to clarify confusion about the ATS recently raised in a District of Columbia Circuit case<sup>92</sup> and add to *Filartiga* by providing "a clear and specific remedy, not limited to aliens, for torture and extrajudicial killing."<sup>93</sup>

Congress's discussion of the ATS clarifies congressional intent regarding the liability of foreign officials under the TVPA because, when the TVPA was enacted in 1991, the ATS permitted federal court jurisdiction over civil actions against foreign officials for torture or summary execution.<sup>94</sup> When Congress enacted the TVPA, codified it in the same section of the U.S. Code, and expressed support for *Filartiga*, the ATS—and now the TVPA—expressly allowed foreign officials to be held personally liable for two specific torts that were committed outside the United States—even though the foreign sovereign itself was immune.<sup>95</sup>

## B. Foreign Sovereign Immunities Act

The second indication that Congress intended foreign officials to bear personal liability for acts of torture or extrajudicial killing is contained in the House and

86. The TVPA and ATS are codified in the same part of the U.S. Code. See 28 U.S.C. § 1350 (2012) (ATS); 28 U.S.C. § 1350 note (2012) (TVPA).

87. See generally Thomas H. Lee, *The Three Lives of the Alien Tort Statute: The Evolving Role of the Judiciary in U.S. Foreign Relations*, 89 NOTRE DAME L. REV. 1645 (2014) (providing a full discussion of the ATS).

88. HOUSE REPORT, *supra* note 5, at 3–4; SENATE REPORT, *supra* note 5, at 4.

89. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 731 (2004) ("The position we take today has been assumed by some federal courts for 24 years, ever since the Second Circuit decided *Filartiga v. Peña-Irala* . . ."); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1539–40 (N.D. Cal. 1987) (following *Filartiga* and holding the ATS grants a cause of action against officials for violations of international law).

90. *Filartiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980).

91. *Id.* at 885–86.

92. See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 801 (D.C. Cir. 1984) (Bork, J., concurring), *cert. denied*, 470 U.S. 1003 (1985). In response to concerns raised in *Tel-Oren*, the House Report declared that the TVPA would create an "explicit" and "contemporary" "grant by Congress of a private right of action" allowing U.S. courts to "consider cases likely to impact [] U.S. foreign relations." HOUSE REPORT, *supra* note 5, at 3–4; see also SENATE REPORT, *supra* note 5, at 4–5.

93. HOUSE REPORT, *supra* note 5, at 3; see also SENATE REPORT, *supra* note 5, at 5.

94. SENATE REPORT, *supra* note 5, at 4 ("The TVPA would establish an unambiguous basis for a cause of action that has been successfully maintained under an existing law . . ." (referring to the ATS)). See Lee, *supra* note 87, at 1665.

95. SENATE REPORT, *supra* note 5, at 5, 7–9; HOUSE REPORT, *supra* note 5, at 3–5. See *Filartiga v. Peña-Irala*, 630 F.2d 867, 889–90 (2d Cir. 1980) (citing *Ex parte Young*, 209 U.S. 123, 167 (1908) (holding a state official could be subject to suit for constitutional violations despite the immunity of the state)); Lee, *supra* note 87, at 1647 ("With the end of the Cold War, a modern Congress implicitly endorsed the *Filartiga* interpretation of the ATS by enacting the Torture Victim Prevention Act of 1991.").

Senate reports' discussion of the FSIA.<sup>96</sup> At the time the TVPA was enacted, foreign *official* immunity was sometimes confused with foreign *sovereign* immunity.<sup>97</sup> Ever since 1976, the FSIA provided foreign sovereigns with freedom from suit in U.S. courts—and Congress did not intend for the TVPA to change that state-specific protection.<sup>98</sup> Congress, however, also understood that foreign individuals were sometimes entitled to immunity—but in 1991, the source and availability of that protection was unclear.<sup>99</sup> In 2010, eighteen years *after* the TVPA's enactment, the confusion over the source of foreign official immunity was resolved with *Samantar v. Yousuf*,<sup>100</sup> when the Supreme Court held the FSIA did not apply to foreign officials.<sup>101</sup>

Fortunately, the House and Senate TVPA reports demonstrate that when Congress passed the TVPA, Congress viewed foreign official immunity differently than foreign sovereign immunity and expressly intended for foreign officials to be liable under the new Act—and thus, not entitled to FSIA immunity—even when the official was acting on behalf of a foreign sovereign that was itself entitled to FSIA protection.<sup>102</sup> The legislative history shows that Congress believed torture and extrajudicial killing involved state action of some sort<sup>103</sup> and while foreign states were immune under the FSIA, the TVPA's purpose was to *create liability* for foreign individuals.<sup>104</sup> Put another way, eighteen years before the Supreme Court's landmark decision in *Samantar*, Congress had already decided that TVPA defendants were not entitled to FSIA immunity.<sup>105</sup>

The most compelling evidence of this Congressional understanding is what the House and Senate omitted from the legislative history. The year before the TVPA was enacted, the Ninth Circuit issued its landmark decision, *Chuidian v. Philippine National Bank*,<sup>106</sup> holding that foreign officials were “agencies or instrumentalities” of a foreign sovereign and thus entitled to immunity under the FSIA.<sup>107</sup> Remarkably, neither congressional report mentions *Chuidian*, nor endorses the applicability of the

96. HOUSE REPORT, *supra* note 5, at 5; SENATE REPORT, *supra* note 5, at 7–8; FSIA, *supra* note 7.

97. See *Samantar v. Yousuf*, 560 U.S. 305, 312–13 (2010) (discussing the history of foreign sovereign immunity); Keitner, *The Forgotten History*, *supra* note 11, at 705–07.

98. HOUSE REPORT, *supra* note 5, at 5; SENATE REPORT, *supra* note 5, at 8.

99. See *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1099–1103 (9th Cir. 1990) *abrogated by Samantar*, 560 U.S. at 310 n.3, 312–13.

100. *Samantar v. Yousuf*, 560 U.S. 305 (2010).

101. *Id.* at 325–26.

102. HOUSE REPORT, *supra* note 5, at 5; SENATE REPORT, *supra* note 5, at 8; TVPA, *supra* note 3, at § 2(a).

103. See HOUSE REPORT, *supra* note 5, at 3 (“Despite universal condemnation of these abuses, many of the world’s governments still engage in or tolerate torture of their citizens, and state authorities have killed hundreds of thousands of people in recent years.”); SENATE REPORT, *supra* note 5, at 3 (“Despite universal condemnation of these abuses, many of the world’s governments still engage in or tolerate torture of their citizens, and state authorities have employed extrajudicial killings to execute many people.”).

104. See TVPA, *supra* note 3, at § 2(a).

105. The TVPA became public law in 1992, eighteen years before the *Samantar* court held that foreign sovereign immunity and foreign official immunity were two distinct principles, and a foreign official could not claim immunity under the FSIA. *Samantar*, 560 U.S. at 325. Congress’ explanation of the TVPA in the House and Senate Reports indicate that this was the intended result of the Act. HOUSE REPORT, *supra* note 5, at 3–4; SENATE REPORT, *supra* note 5, at 1–5.

106. *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095 (9th Cir. 1990), *abrogated by Samantar*, 560 U.S. at 325–26.

107. *Id.* at 1102.

FSIA to foreign officials—with good reason, because when *Chuidian* was decided, the State Department openly rejected the Ninth Circuit’s decision,<sup>108</sup> and twenty years later, the Supreme Court ultimately agreed, abrogating *Chuidian*’s holding with *Samantar*.<sup>109</sup>

### C. “Any Individual”

The third indication that Congress viewed foreign official immunity differently than FSIA sovereign immunity is provided in the text of the House and Senate reports, which repeatedly state that liability under the TVPA applies to “any individual.”<sup>110</sup> The reports argue against conduct-based foreign official immunity by carving out an exception for status-based immunity and omitting an exception for conduct-based immunity.<sup>111</sup> Acknowledging that “[p]ursuant to the FSIA, ‘a foreign state,’ or an ‘agency or instrumentality’ thereof, shall be immune from the jurisdiction of the courts,” the House Report declares that “sovereign immunity would not generally be an available defense”<sup>112</sup>—clearly the case where the FSIA was not applicable to individuals—and TVPA defendants would not be able to avoid liability by claiming that the tortious conduct was a sovereign act.<sup>113</sup>

The Senate Report also discusses the FSIA,<sup>114</sup> and initially seems to confuse the issue by stating, “To avoid liability by invoking the FSIA, a former official would have to prove an agency relationship to a state, which would require that the state ‘admit some knowledge or authorization of relevant acts.’ 28 U.S.C. § 1603(b).”<sup>115</sup> At first glance, this might demonstrate support for the sort of conduct-based immunity that the *Dogan* court granted, but the language “admit some knowledge or authorization of relevant acts” is actually an incorrect quotation of the FSIA

108. See *id.* (“[W]e disagree with the government that the Act can reasonably be interpreted to leave intact the pre-1976 common law with respect to foreign officials.”). In the years after *Chuidian*, the executive branch consistently rejected the FSIA’s application to individuals. See, e.g., Brief for the United States as Amicus Curiae Supporting Affirmance at 6–8, *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010) (No. 08-1555), 2010 WL 342031, at \*8.

109. *Samantar*, 560 U.S. at 325–326.

110. HOUSE REPORT, *supra* note 5, at 2 (“The purpose of H.R. 2092 is to provide a Federal cause of action against any individual . . .”), 4 (“The legislation authorizes the Federal courts to hear cases brought by or on behalf of a victim of any individual . . .”), 7 (“The bill makes any person . . .”); SENATE REPORT, *supra* note 5, at 3 (“The purpose of this legislation is to provide a Federal cause of action against any individual . . .”), 6 (“The legislation authorizes courts in the United States to hear cases brought by or on behalf of a victim of any individual . . .”), 11 (“The bill makes any person . . .”).

111. See HOUSE REPORT, *supra* note 5, at 5 (“While sovereign immunity would not generally be an available defense, nothing in the TVPA overrides the doctrines of diplomatic and head of state immunity. These doctrines would generally provide a defense to suits against foreign heads of state and other diplomats visiting the United States on official business.”). The Senate Report also discusses the non-abrogation of status-based immunities and omits including conduct-based immunities. SENATE REPORT, *supra* note 5, at 7–8. See generally Kietner, *The Common Law*, *supra* note 41, at 62–68, for a discussion of the distinction between conduct-based and status-based immunities.

112. HOUSE REPORT, *supra* note 5, at 5.

113. See HOUSE REPORT, *supra* note 5, at 4; SENATE REPORT, *supra* note 5, at 8.

114. SENATE REPORT, *supra* note 5, at 7 (“[T]he TVPA is not meant to override the Foreign Sovereign Immunities Act (FSIA) of 1976, which renders foreign governments immune from suits in U.S. courts.”) (footnote omitted).

115. *Id.* at 8 (incorrectly citing the FSIA (28 U.S.C. § 1603(b))); cf. FSIA, *supra* note 7, at § 1603(b) (absence of quoted language).

(specifically, § 1603(b)).<sup>116</sup> The FSIA did not—and to this day does not—contain such an avenue to immunity.<sup>117</sup> The drafters of this passage in the Senate Report appear to have mistakenly lifted the text from an article discussing the post-*Filartiga* ATS that was published in the *Harvard International Law Journal* in 1981.<sup>118</sup>

In that article, Jeffrey Blum and Ralph Steinhardt identified three abstention doctrines foreign individual-defendants could use to dismiss cases arising under the post-*Filartiga* ATS.<sup>119</sup> The authors argued that *forum non conveniens*, FSIA sovereign immunity, and the act of state doctrine were possible defenses, but “none is automatically fatal to claims [such as torture or summary execution which were] involved in *Filartiga*.”<sup>120</sup> *Forum non conveniens* is not an issue in TVPA actions because the Act only provides a cause of action in U.S. courts once the plaintiff has exhausted adequate and available remedies in the most convenient forum: “the place in which the conduct giving rise to the claim occurred.”<sup>121</sup> As to the act of state doctrine, the Senate Report explicitly rejected that common law doctrine as an available source of individual immunity.<sup>122</sup>

While FSIA sovereign immunity was not as clearly rejected as the act of state doctrine or *forum non conveniens*, examining the Blum and Steinhardt article—which the Senate Report appears to have relied upon—provides additional support for congressional intent.<sup>123</sup> Ten years before Congress enacted the TVPA, Blum and Steinhardt suggested that courts look to principles of liability in 42 U.S.C. § 1983 actions for help determining foreign official liability in ATS cases.<sup>124</sup> Notably, both House and Senate Reports also instruct courts to look to immunities available in § 1983 actions for guidance when determining the liability of foreign officials in TVPA actions.<sup>125</sup> As Blum and Steinhardt suggested for the ATS—and Congress

116. FSIA, *supra* note 7, at § 1603(b).

117. See 28 U.S.C. § 1603 (1988). When the TVPA was enacted in 1991, the 1988 edition of the U.S. Code was the most current edition of the FSIA. The FSIA has never included the “admit some knowledge or authorization of relevant acts” language. If a claim made was against a sovereign, the sovereign was immune—regardless of the sovereign’s knowledge or authorization. See FSIA, *supra* note 7. Knowledge or authorization is only a factor when an individual is seeking conduct-based immunity; but when the FSIA was enacted, individuals were not supposed to be protected by the Act. See *Samantar v. Yousuf*, 560 U.S. 305, 325–26 (2010).

118. Compare Jeffrey M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction Over International Human Rights Claims: The Alien Tort Claims Act After Filartiga v. Peña-Irala*, 22 HARV. INT’L. L.J. 53, 106–07 (1981) (arguing that the “agency or instrumentality” language in the FSIA should be interpreted to “require that the defendants *prove an agency relationship to the state, which would need in turn to admit some knowledge or authorization of the relevant acts.*” (emphasis added)), with SENATE REPORT, *supra* note 5, at 7 (“To avoid liability by invoking the FSIA, a former official would have to *prove an agency relationship to a state, which would require that the state ‘admit some knowledge or authorization of relevant acts.’*” (emphasis added)).

119. Blum & Steinhardt, *supra* note 118, at 103–08.

120. *Id.* at 103.

121. TVPA, *supra* note 3, at § 2(b).

122. SENATE REPORT, *supra* note 5, at 8 (“[T]he committee does not intend the ‘act of state’ doctrine to provide a shield from lawsuit for former officials.”).

123. Compare Blum & Steinhardt, *supra* note 118, at 107, with SENATE REPORT, *supra* note 5, at 7.

124. Blum & Steinhardt, *supra* note 118, at 107 (“There is no indication in the legislative history of the FSIA that individuals would be entitled to sovereign immunity, and a clear analogy is available to the domestic context, where courts are familiar with the statutory and constitutional analysis by which state officials may be held civilly liable for wrongs committed within the scope of their employment or under color of state law.”) (footnote omitted) (citing 42 U.S.C. §§ 1981–83 and *Ex parte Young*, 209 U.S. 123 (1908)).

125. SENATE REPORT, *supra* note 5, at 7; HOUSE REPORT, *supra* note 5, at 5.

later suggested for the TVPA—the ATS and TVPA statutes modify the foreign official immunity doctrine by allowing (as § 1983 allows<sup>126</sup>) government officials to be held personally liable for tortious conduct undertaken in an official capacity.<sup>127</sup> Put another way, the ATS and TVPA change conduct-based foreign official immunity from an absolute immunity (automatically available when the official acts in an official capacity) to a qualified immunity (not automatically available).<sup>128</sup>

This makes congressional silence regarding *Chuidian* notable for another reason: If Congress agreed with the Ninth Circuit’s interpretation of the FSIA or intended for TVPA defendants to be able to invoke the FSIA’s “agency or instrumentality” immunity, there would be no need for both reports’ discussion of status-based immunities or immunities available in § 1983 actions.<sup>129</sup> The fact that both the House and Senate specifically addressed each,<sup>130</sup> combined with the fact that neither report endorses or even mentions *Chuidian*, demonstrates that Congress did not intend foreign officials to be entitled to absolute or automatic immunity merely because the officials acted on behalf of a foreign sovereign or engaged in official conduct. A foreign sovereign’s acknowledgement and embracement of a TVPA defendant’s conduct has no bearing on the official’s own personal liability for torture or extrajudicial killing.

#### D. Status-Based and Conduct-Based Federal Common Law Immunity

The fourth indication that Congress wanted to eliminate traditional conduct-based foreign official immunity for TVPA defendants is demonstrated by the legislative history’s contrasting discussion of an official’s *status* and an official’s *conduct* as a basis for liability. As discussed above, Congress intended for the TVPA to apply to “any individual”<sup>131</sup> who commits torture or extrajudicial killing while acting “under actual or apparent authority, or color of law.”<sup>132</sup> Both House and Senate Reports, however, explicitly state that status-based immunities remain unchanged as a source of protection against TVPA liability.<sup>133</sup> As to conduct, the overall structure and purpose of the TVPA indicates a clear intention to modify foreign official immunity in cases of torture and extrajudicial killing by premising TVPA liability on an individual’s conduct that must be undertaken in an official (or under color of official) capacity.<sup>134</sup> For help navigating congressional silence

126. See *infra* Part III.

127. Compare SENATE REPORT, *supra* note 5, at 7–8, and HOUSE REPORT, *supra* note 5, at 5, with Blum & Steinhardt, *supra* note 118, at 107 (citing 42 U.S.C. §§ 1981–83; *Ex parte Young*, 209 U.S. 123 (1908)).

128. See *infra* Part IV.

129. Compare *Chuidian v. Philippine Nat’l Bank*, 912 F.2d 1095, 1100–03 (9th Cir. 1990) (finding that individuals could be an “agency or instrumentality” under the FSIA), with HOUSE REPORT, *supra* note 5, at 5 (indicating that an action may be brought against an individual acting “under actual or apparent authority, or color of law,” as in 28 U.S.C. § 1983 actions), and SENATE REPORT, *supra* note 5, at 7–8 (using the term “‘individual’ to make crystal clear that foreign states or their entities cannot be sued under this bill under any circumstances: only individuals may be sued” and drawing analogy to 28 U.S.C. § 1983).

130. HOUSE REPORT, *supra* note 5, at 4–5; SENATE REPORT, *supra* note 5, at 7–8.

131. See *supra* note 110 and accompanying text.

132. TVPA, *supra* note 3, at § 2(a).

133. HOUSE REPORT, *supra* note 5, at 5; SENATE REPORT, *supra* note 5, at 7–8.

134. See HOUSE REPORT, *supra* note 5, at 4; SENATE REPORT, *supra* note 5, at 8.



regarding conduct-based immunity, Congress is explicit: “Courts should look to principles of liability under U.S. civil rights laws, in particular section 1983 of title 42 of the United States Code.”<sup>135</sup>

The Senate Report provides additional evidence that the TVPA changes traditional conduct-based immunity by declaring that the scope of TVPA liability even extends to foreign officials who have acted fully within the scope of their authority or official capacity<sup>136</sup>—the foundational element necessary for conduct-based immunity.<sup>137</sup> The mere fact that conduct was an official act or was undertaken within an official capacity does not shield a defendant from TVPA liability.<sup>138</sup>

[A] higher official need not have personally performed or ordered the abuses in order to be held liable. Under international law, responsibility for torture, summary execution, or disappearances extends beyond the person or persons who actually committed those acts—anyone with higher authority who authorized, tolerated or knowingly ignored those acts is liable for them.<sup>139</sup>

In the section titled, “Scope of Liability,” the Senate Report cites two cases in which foreign officials were acting in their official capacity and within their supervisory authority but were nevertheless held liable for the tortious conduct of their subordinates.<sup>140</sup> In both cases, conduct-based immunity was not granted to foreign officials in actions involving allegations of torture or extrajudicial killing.<sup>141</sup>

In summary, the legislative history of the TVPA shows that Congress did not intend the Act to eliminate FSIA immunity protecting foreign *sovereigns* and did not intend for other foreign *organizations* to be liable for an official’s tortious conduct.<sup>142</sup> However, requiring “some governmental involvement in the torture or killing” and instructing courts to apply § 1983 principles of immunity clearly demonstrates an

135. SENATE REPORT, *supra* note 5, at 8; *see also* HOUSE REPORT, *supra* note 5, at 5 (“Courts should look to 42 U.S.C. Sec. 1983 i[n] construing ‘color of law’ and agency law in construing ‘actual or apparent authority.’”).

136. *See* SENATE REPORT, *supra* note 5, at 8 (“[T]he phrase ‘actual or apparent authority or under color of law’ is used to denote torture and extrajudicial killings committed by officials both within and outside the scope of their authority.”); *see also* HOUSE REPORT, *supra* note 5, at 5 (“The phrase ‘under actual or apparent authority, or color of law’ makes clear that the plaintiff must establish some governmental involvement in the torture or killing to prove a claim.”).

137. *See supra* Part I.

138. *See* SENATE REPORT, *supra* note 5, at 8; *see also* HOUSE REPORT, *supra* note 5, at 5.

139. SENATE REPORT, *supra* note 5, at 9 & 9 n.16 (citing with approval Organization of American States, Inter-American Convention to Prevent and Punish Torture art 3, Dec. 9, 1985, 25 I.L.M. 519, 521, O.A.S.T.S. No. 67 (“The following shall be held guilty of the crime of torture: (a) A public servant or employee who, acting in that capacity, orders, instigates or induces the use of torture, or directly commits it or who, being able to prevent it, fails to do so.”)).

140. *Id.* at 9 (discussing *Forti v. Suarez Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987) (holding Argentinian general liable for acts of torture and extrajudicial killing committed by officers under his command) and *In re Yamashita*, 327 U.S. 1 (1947) (holding Japanese general liable for war crimes committed by officers under his command)).

141. SENATE REPORT, *supra* note 5, at 9.

142. *See, e.g.*, *Schermerhorn v. Israel*, 235 F. Supp. 3d 249, 261–62 (D.D.C. 2017) (holding the State of Israel and its ministries of Defense, Foreign Affairs, Justice, and Public Security were immune in an action involving the same events as *Dogan*); *Mohamad v. Palestinian Auth.*, 566 U.S. 449, 456 (2012) (holding the TVPA did not apply to a non-sovereign organization because Congress only intended for natural persons to be liable).

intent to eliminate traditional conduct-based immunity and allow foreign officials to be held liable under the new Act.<sup>143</sup>

### III. IMMUNITY OF GOVERNMENT OFFICIALS IN 42 U.S.C. § 1983 ACTIONS

The fifth and most significant indication that Congress intended for the TVPA to change traditional federal common law foreign official immunity is demonstrated by the House and Senate Reports' instruction that courts should look to 42 U.S.C. § 1983 when determining a TVPA defendant's scope of liability for torture or extrajudicial killing.<sup>144</sup> Section 1983 is a powerful civil rights statute that grants private-party plaintiffs the authority to bring civil actions against U.S. state and local government officials accused of violating federal law.<sup>145</sup> The Statute is remarkable because of the way it enables private individuals to enforce federally protected rights against state and local governments—even though the Eleventh Amendment to the U.S. Constitution entitles states to immunity in federal courts.<sup>146</sup> Section 1983 protects victims of tortious *state* action by providing them with a cause of action against the *individuals* who take the harmful action on behalf of the state or local government entity.<sup>147</sup> As a result, government officials may be held personally liable for their official acts—even Category One acts<sup>148</sup>—which violate the U.S. Constitution or federal law, despite the fact that the state itself could not be haled into court for the same violation.<sup>149</sup>

Section 1983 liability, however, is not unlimited.<sup>150</sup> Government officials sued under § 1983 can sometimes assert “absolute immunity” or “qualified immunity” depending on the plaintiff's type of claim.<sup>151</sup> Absolute immunity—which is closely related to status-based immunity<sup>152</sup>—is only available to defendants in unique positions, such as judges, prosecutors, witnesses, or legislators.<sup>153</sup> Qualified immunity—which is closely related to conduct-based immunity<sup>154</sup>—is available to

143. See *supra* notes 134–138 and accompanying text.

144. See HOUSE REPORT, *supra* note 5, at 5; SENATE REPORT, *supra* note 5, at 8.

145. See generally MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION (Fed. Judicial Ctr., 3d ed. 2014). Federal officials are not subject to liability under 42 U.S.C. § 1983, but may be sued in their personal capacity for official acts under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971); *cf. Wood v. Moss*, 134 S. Ct. 2056, 2066 (2014) (stating *Bivens* “recognized an implied right of action against federal officers”); *Minnecci v. Pollard*, 565 U.S. 118, 120 (2012) (arguing the same).

146. U.S. CONST. amend. XI (“The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”).

147. 42 U.S.C. § 1983 (2012); see also SCHWARTZ, *supra* note 145, at 12.

148. See *supra* Part I.

149. See SCHWARTZ, *supra* note 145, at 12; see also *Rehberg v. Paulk*, 566 U.S. 356, 361 (2012); *Ex parte Young*, 209 U.S. 123, 159–60 (1908).

150. See *Rehberg*, 566 U.S. at 361 (“Despite the broad terms of § 1983, [the Supreme] Court has long recognized that the statute was not meant to effect a radical departure from ordinary tort law and the common-law immunities applicable in tort suits.”).

151. See *id.*; see also *Kalina v. Fletcher*, 522 U.S. 118, 127 (1997) (“[I]n determining immunity, we examine ‘the nature of the function performed, not the identity of the actor who performed it.’” (quoting *Forrester v. White*, 484 U.S. 219, 229 (1988))).

152. See *supra* note 41 and accompanying text.

153. SCHWARTZ, *supra* note 145, at 128.

154. See *supra* note 43 and accompanying text.

any government official but only “so long as the official did not violate *clearly established* federal law.”<sup>155</sup>

Viewing immunity in a TVPA action as Congress instructed leads to a remarkable result. Applying § 1983 immunities to the TVPA, foreign judges, prosecutors, witnesses, and legislators accused of committing torture or extrajudicial killing could be entitled to immunity, but only when the torture or extrajudicial killing was a judicial, prosecutorial, testimonial, or legislative act<sup>156</sup>—namely, clear Category One conduct.<sup>157</sup> For example, applying § 1983 to a judge who orders torture or extrajudicial killing could result in immunity if the order “is one normally performed by a judge.”<sup>158</sup> Judges are entitled to absolute immunity for all judicial acts and “will not be deprived of immunity because the action [the judge] took was in error . . . or was in excess of his authority.”<sup>159</sup> Section 1983 absolute immunity—remarkably similar to status-based foreign official immunity—functions the same way for prosecutors,<sup>160</sup> witnesses,<sup>161</sup> and legislators.<sup>162</sup> If TVPA immunities are interpreted as Congress intended, foreign officials acting in a judicial, prosecutorial, testimonial, or legislative capacity would be entitled to absolute or status-based immunity against allegations of torture or extrajudicial killing where the torture or extrajudicial killing was a judicial, prosecutorial, testimonial, or legislative act.

Setting aside the rare instances in which absolute or status-based immunity may be available (for example if a judge or prosecutor orders an individual to be tortured), foreign officials in TVPA actions will usually only be able to seek qualified immunity because “no state commits torture as a matter of public policy.”<sup>163</sup> “[W]hen qualified [or conduct-based] immunity is asserted as a defense, the critical issue is whether the defendant-official violated federal law that was clearly established at the time she acted.”<sup>164</sup> In TVPA cases, the conduct the foreign official seeks to protect is the conduct that the plaintiff alleges constitutes torture or extrajudicial killing. In a domestic § 1983 action, if an allegation of torture or extrajudicial killing is plausibly<sup>165</sup> made, the § 1983 defendant-official would not be entitled to qualified immunity because acts that constitute torture or extrajudicial killing are a violation

155. SCHWARTZ, *supra* note 145, at 143.

156. *See id.* at 128–42 (discussing § 1983 absolute immunity).

157. *See supra* Part I. Category One conduct would be entitled to immunity under the FSIA. *See id.*

158. SCHWARTZ, *supra* note 145, at 130. In this example, a foreign judge who sentences an individual to imprisonment in a labor camp would be immune from allegations of ordering torture if the sentence was normally imposed by a judge in the foreign state.

159. *Mireles v. Waco*, 502 U.S. 9, 13 (1991) (quoting *Stump v. Sparkman*, 435 U.S. 349, 356 (1978)).

160. *See* SCHWARTZ, *supra* note 145, at 132–39; *see also* *Van de Kamp v. Goldstein*, 555 U.S. 335, 345 (2009) (holding prosecutors are entitled to absolute immunity when engaging in conduct that is intimately associated with the judicial phase of the criminal process).

161. *See* SCHWARTZ, *supra* note 145, at 139–41; *see also* *Briscoe v. LaHue*, 460 U.S. 325, 332–33 (1983) (holding witnesses are entitled to absolute immunity against the effects of their testimony—even when the witness commits perjury).

162. *See* SCHWARTZ, *supra* note 145, at 141–42; *see also* *Bogan v. Scott-Harris*, 523 U.S. 44, 49 (1998) (holding legislators are entitled to absolute immunity for legislative acts).

163. SENATE REPORT, *supra* note 5, at 8; *see also* HOUSE REPORT, *supra* note 5, at 2.

164. SCHWARTZ, *supra* note 145, at 143 (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

165. Under *Ashcroft v. Iqbal*, plaintiffs are required to allege a “plausible” claim that the foreign official’s conduct (if proven true) constitutes torture or extrajudicial killing as defined by the TVPA. 556 U.S. 662, 678 (2009); TVPA, *supra* note 3, at § 3.

of clearly established federal law.<sup>166</sup> Imputing that same analysis to the TVPA, if an allegation of torture or extrajudicial killing by the foreign official is plausibly made in a TVPA action, that foreign official is not entitled to qualified or conduct-based immunity because torture and extrajudicial killing are violations of clearly established federal law—in this case, the TVPA itself. Viewed from the alternate vantage of the foreign official's state's law, a TVPA defendant would also not be entitled to immunity if torture and extrajudicial killing are prohibited the foreign state's own clearly established law.

#### IV. CONDUCT-BASED IMMUNITY DOES NOT PROTECT TVPA DEFENDANTS

Unlike the Eleventh Amendment—which provides U.S. states with a constitutional immunity from suit in federal courts<sup>167</sup>—Congress has the authority to abrogate the scope of immunity available to foreign sovereigns because the source of foreign sovereign immunity is statutory and common law-based, not constitutional.<sup>168</sup> In addition, as the continued enforcement of § 1983 demonstrates,<sup>169</sup> Congress also has the authority to enact statutes that abrogate the scope of immunity available to government officials sued in their personal capacity for actions undertaken in their official capacity.<sup>170</sup> Foreign officials who are sued in U.S. courts in their personal capacity for money damages payable from the foreign officials' own pockets are only entitled to immunity (if at all) under federal common law—there is no statutory or constitutional source the official can invoke for protection.<sup>171</sup>

Federal common law recognizes two forms of foreign official immunity: status-based (which is similar to § 1983 absolute immunity) and conduct-based (which is similar to § 1983 qualified immunity).<sup>172</sup> The TVPA does not change traditional status-based foreign official immunity.<sup>173</sup> The Act did, however, dramatically alter federal common law conduct-based immunity for allegations of torture or extrajudicial killing.<sup>174</sup> TVPA defendants cannot be granted conduct-based

166. See U.S. CONST. amend. VIII (prohibiting cruel and unusual punishment); *Wilkerson v. Utah*, 99 U.S. 130, 136 (1878) (“[P]unishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden by [the Eighth Amendment] to the Constitution.”); see also 18 U.S.C. § 2340A (2012) (“Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.”).

167. U.S. CONST. amend. XI.

168. See *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493 (1983) (“Congress has the undisputed power to decide, as a matter of federal law, whether and under what circumstances foreign nations should be amenable to suit in the United States.”).

169. See, e.g., *Hafer v. Melo*, 502 U.S. 21, 25–31 (1991) (holding government officials may be liable in their personal capacities, even though the tortious conduct relates to their official actions).

170. See *supra* Part III; see also SENATE REPORT, *supra* note 5, at 5 (“Congress clearly has authority to create a private right of action for torture and extrajudicial killings committed abroad.”).

171. *Samantar v. Yousuf*, 560 U.S. 305, 325 (2010) (“[T]his case, in which respondents have sued petitioner in his personal capacity and seek damages from his own pockets, is properly governed by the common law . . .”).

172. See, e.g., *NANDA ET AL.*, *supra* note 41, at § 4:1; Keitner, *The Common Law*, *supra* note 41, at 63.

173. See, e.g., *Manoharan v. Rajapaksa*, 711 F.3d 178, 179–80 (D.C. Cir. 2013) (holding the TVPA did not abrogate status-based foreign official immunity); see also HOUSE REPORT, *supra* note 5 and accompanying text.

174. See *supra* Part II.

immunity when accused of torture or extrajudicial killing because to be liable under the TVPA the defendant must be engaged in official or seemingly official conduct—the very foundation that would have entitled the defendant to immunity under the traditional federal common law doctrine.<sup>175</sup>

Consistent with § 1983 actions and congressional intent, conduct-based immunity in TVPA actions is most appropriately viewed as a “[q]ualified immunity [which] balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.”<sup>176</sup> Because “[o]fficial torture and summary execution violate standards accepted by virtually every nation,”<sup>177</sup> foreign officials who perform such acts cannot perform their duties reasonably and should not be protected from TVPA liability. A federal common law doctrine cannot deprive TVPA plaintiffs of their rights because the TVPA is a “controlling legislative act” that overrides—and essentially eliminates—conduct-based foreign official immunity for allegations of torture or extrajudicial killing.<sup>178</sup>

Viewed through Professor Keitner’s category framework,<sup>179</sup> the TVPA has altered the legal playing field by ensuring Category Three personal liability for torture and extrajudicial killing—even though such acts were traditionally Category Two.<sup>180</sup> While the TVPA does not expressly eliminate attribution or a foreign sovereign’s liability for torture or extrajudicial killing, the inclusion of such language is not necessary to ensure foreign individuals are subject to suit. When the TVPA was enacted, foreign sovereigns were already immune in civil actions alleging torture or extrajudicial killing.<sup>181</sup> Moreover, Congress did not believe torture or extrajudicial killing could be attributable to a foreign sovereign in the first place.<sup>182</sup> If foreign states cannot take legal responsibility for acts of torture or extrajudicial killing, there is no underlying immunity blanket with which foreign officials can wrap themselves for their own personal or conduct-based protection.

Final support in favor of a broad reading of conduct-based TVPA liability is provided by the ATS.<sup>183</sup> When Congress enacted the TVPA and linked it with the post-*Filartiga* ATS, foreign officials were not immune against allegations of torture or extrajudicial killing—even though the official acted in an official capacity.<sup>184</sup>

175. See TVPA, *supra* note 3, at § 2(a) (stating defendants must have acted “under actual or apparent authority, or color of law”).

176. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (discussing government official immunity in § 1983 actions).

177. HOUSE REPORT, *supra* note 5, at 2; SENATE REPORT, *supra* note 5, at 3.

178. See Bradley & Helfer, *supra* note 36, at 266.

179. See Keitner, *Categorizing Acts*, *supra* note 45, at 453–54; *supra* Part I.

180. See *supra* Part II. C.

181. See *supra* Part II. B.

182. HOUSE REPORT, *supra* note 5, at 2 (“Official torture and summary execution violate standards accepted by virtually every nation.”); SENATE REPORT, *supra* note 5, at 8 (“[N]o state commits torture as a matter of public policy.”).

183. See *supra* Part II. A.

184. See *Filartiga v. Peña-Irala*, 630 F.2d 876, 889–90 (2d Cir. 1980) (“Paraguay’s renunciation of torture as a legitimate instrument of state policy, however, does not strip the tort of its character as an international law violation, if it in fact occurred under color of government authority.” (citing *Ex parte Young*, 209 U.S. 123 (1908))).

Unlike the ATS, which is only a subject matter jurisdictional statute giving federal courts authority to hear cases involving foreign plaintiffs and defendants,<sup>185</sup> the TVPA is a rights-creating statute that gives U.S. citizens a cause of action against current and former foreign government officials.<sup>186</sup> As a result, the TVPA is unaffected by the Supreme Court's recent narrowing of the ATS to "claims [that must] touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application."<sup>187</sup> Although the two statutes are codified in the same part of the U.S. Code, judicially imposed jurisdictional limitations on the ATS do not impact the TVPA. Federal courts have jurisdiction over TVPA claims because the TVPA is a federal statute and 28 U.S.C. § 1331 provides federal subject matter jurisdiction.<sup>188</sup> If policymakers and legal experts believe subjecting foreign individuals to liability in U.S. courts should be minimized (as appears, in part, to have justified the Supreme Court's recent limitation of the ATS<sup>189</sup>), Congress is the only body with authority to change the text of the TVPA statute.<sup>190</sup>

Traditional conduct-based immunity analysis boils down to assigning blame: Either the official is liable for his or her conduct because the sovereign is unwilling or unable to take responsibility, or the sovereign is liable because the conduct constitutes an act of the state.<sup>191</sup> The TVPA changes that bedrock immunity analysis by expanding the scope of individual liability for acts of torture or extrajudicial killing.<sup>192</sup> Now, the foreign official acting in an official capacity is wholly liable for torture or extrajudicial killing, even when the sovereign is willing to take responsibility or the tortious acts constitute acts of state. Under the TVPA, the analysis is no longer either-or.

185. See, e.g., *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 105 (2d Cir. 2000); see also Pamela J. Stephens, *Beyond Torture: Enforcing International Human Rights in Federal Courts*, 51 SYRACUSE L. REV. 941, 975 (2001); *Kadic v. Karadzic*, 70 F.3d 232, 246 (2d Cir. 1995) ("Though the Torture Victim Act creates a cause of action for official torture, this statute, unlike the Alien Tort Act, is not itself a jurisdictional statute. The Torture Victim Act permits the appellants to pursue their claims of official torture under the jurisdiction conferred by the Alien Tort Act and also under the general federal question jurisdiction of [28 U.S.C. §] 1331."); *Singh v. G.K.*, No. 1:15-CV-05372 (ALC), 2016 WL 3181149, at \*5 (S.D.N.Y. June 2, 2016).

186. See HOUSE REPORT, *supra* note 5, at 2 ("The purpose of [the TVPA] is to provide a Federal cause of action against any individual who, under actual or apparent authority, or color of law, of any foreign nation, subjects any individual to torture or extrajudicial killing."); SENATE REPORT, *supra* note 5, at 3; see also Lee, *supra* note 87, at 1647–48.

187. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013).

188. See 28 U.S.C. § 1331 (2012) ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."); U.S. CONST. art. III, § 2 ("The judicial power shall extend to all Cases . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."); see also SENATE REPORT, *supra* note 5, at 5.

189. See Lee, *supra* note 87, at 1648 ("The Supreme Court's 2013 decision in *Kiobel v. Royal Dutch Petroleum Co.* marks an attempt to end the cosmopolitan second life of the ATS launched by *Filartiga*.").

190. See Ryan, *supra* note 38, at 1797–99, 1805–09 (recommending a new federal statute to codify federal common law foreign official immunity similar to the FSIA's codification of foreign sovereign immunity).

191. See *supra* Part I.

192. See *supra* Part II. C; SENATE REPORT, *supra* note 5, at 9.

## V. THE EXECUTIVE BRANCH CANNOT UNILATERALLY GRANT IMMUNITY

Because the TVPA permits foreign officials acting in an official capacity to be sued for money damages payable from their own pockets, the *Dogan v. Barak*<sup>193</sup> decision granting immunity to the defendant should be reversed. Before issuing that order, however, the Ninth Circuit must consider two final complications: required party joinder and whether the executive branch may unilaterally grant immunity to a foreign official.

The first complication, which is created by any statute that authorizes action against government officials (such as the TVPA or § 1983), involves required party joinder. As the Supreme Court noted in *Samantar*:

Even when a plaintiff names only a foreign official, it may be the case that the foreign state itself, its political subdivision, or an agency or instrumentality is a required party, because that party has “an interest relating to the subject of the action” and “disposing of the action in the person’s absence may . . . as a practical matter impair or impede the person’s ability to protect the interest.” FED. RULE CIV. PROC. 19(a)(1)(B). If this is the case, and the entity is immune from suit under the FSIA, the district court may have to dismiss the suit, regardless of whether the official is immune or not under the common law.<sup>194</sup>

Section 1983 suits against state officials, and *Bivens* actions against federal officials,<sup>195</sup> demonstrate that the sovereign is not a required party in civil actions against officials who are sued in their personal capacity.<sup>196</sup> Rule 19 of the Federal Rules of Civil Procedure<sup>197</sup> does not compel courts to dismiss actions against foreign or domestic government officials where the plaintiffs seek money damages only from the officials and do not pursue judicial action against the sovereign.<sup>198</sup> Moreover, required party joinder may not even be an issue in the *Dogan* appeal because the *Dogan* court did not justify dismissal on such grounds.<sup>199</sup> Nevertheless, if required party joinder is raised at the Ninth Circuit or at the district court on remand, the argument should fail because: (1) the TVPA creates a situation where

193. *Dogan v. Barak*, No. 2:15-cv-08130-ODW(GSJx), 2016 WL 6024416, at \*1 (C.D. Cal. Oct. 13, 2016) on appeal No. 16-56704 (9th Cir. Nov. 14, 2016).

194. *Samantar v. Yousuf*, 560 U.S. 305, 324–25 (2010) (citing *Republic of Philippines v. Pimentel*, 553 U.S. 851, 867 (2008)).

195. See *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 399 (1971) (holding individuals may bring civil lawsuits against federal government officials for violations of constitutionally protected rights).

196. See *F.D.I.C. v. Meyer*, 510 U.S. 471, 485 (1994) (holding plaintiffs can sustain civil actions against individual officials even though the government is immune and not able to be joined).

197. FED. R. CIV. P. 19.

198. See, e.g., *Warfaa v. Ali*, 33 F. Supp. 3d 653, 665–666 (E.D. Va. 2014), *aff’d*, 811 F.3d 653 (4th Cir. 2016); *In re Terrorist Attacks on Sept. 11, 2001*, 122 F. Supp. 3d 181, 185 (S.D.N.Y. 2015); *Yousuf v. Samantar*, No. 1:04-cv-01360 (LMB/JFA), 2011 WL 7445583 (E.D. Va. Feb. 15, 2011), *aff’d*, 699 F.3d 763 (4th Cir. 2012).

199. *Dogan v. Barak*, No. 2:15-cv-08130-ODW(GSJx), 2016 WL 6024416, at \*12 (C.D. Cal. Oct. 13, 2016) on appeal No. 16-56704 (9th Cir. Nov. 14, 2016).

foreign officials can be held liable independent of the foreign state (therefore, the sovereign is not required for the action against the official to proceed); and (2) states do not have a legitimate protectable interest in conduct that constitutes torture or extrajudicial killing (and thus, the sovereign does not have an interest that can be impaired or impeded).<sup>200</sup>

The second complication the Ninth Circuit will have to address—which was on the *Dogan* court’s mind<sup>201</sup> and which is not analogous to § 1983 actions involving domestic government officials—involves the competing constitutional powers of the executive and judicial branches in the context of foreign affairs. After both the defendant and plaintiff submitted their briefs supporting and opposing Barak’s motion to dismiss, the executive branch filed a fifteen-page “Suggestion of Immunity” that essentially ordered the court to grant conduct-based immunity to Barak and dismiss the plaintiff’s case.<sup>202</sup> The *Dogan* court avoided deciding whether the executive branch has the authority to require such judicial action by holding that: the TVPA permitted federal common law conduct-based immunity and the court itself was granting immunity independent of the mandate by the executive branch.<sup>203</sup> When the Ninth Circuit reverses that interpretation of the TVPA, however, it will be forced to choose sides in a split between the Second and Fourth Circuits over the amount of deference courts must give to executive branch determinations of immunity.<sup>204</sup>

The Ninth Circuit has not established whether executive branch determinations of conduct-based foreign official immunity are binding, but the arguments put forth by the executive branch in favor of mandatory deference are fatally flawed.<sup>205</sup> First, the executive branch relies on two Supreme Court decisions from the early 1940s to argue that “the State Department’s determination regarding immunity is, and long has been, binding in judicial proceedings.”<sup>206</sup> While the two cases, *Republic of*

200. See FED. R. CIV. P. 19; HOUSE REPORT, *supra* note 5, at 2 (“Official torture and summary execution violate standards accepted by virtually every nation.”); SENATE REPORT, *supra* note 5, at 8 (“[N]o state commits torture as a matter of public policy.”).

201. Transcript of Motion to Dismiss Proceedings, *supra* note 16, at 3–4.

202. See *Dogan* Suggestion of Immunity, *supra* note 2, at 2 (“The Department of State has made the determination, to which the Court must defer, that Barak is immune from suit under the common law.”).

203. *Dogan*, 2016 WL 6024416, at \*12.

204. Compare *Warfaa v. Ali*, 811 F.3d 653, 661–62 (4th Cir. 2016), and *Yousuf v. Samantar*, 699 F.3d 763, 773, 777 (4th Cir. 2012) (“The State Department’s determination regarding conduct-based immunity, by contrast, is not controlling” and “officials from other countries are not entitled to foreign official immunity for [international law] violations.”), with *Rosenberg v. Pasha*, 577 F. App’x 22, 23 (2d Cir. 2014) (“[I]n the common-law context, we defer to the Executive’s determination of the scope of immunity” and “[a] claim premised on the violation of [international law] does not withstand foreign [official] immunity.” (quoting *Matar v. Dichter*, 563 F.3d 9, 15 (2d Cir. 2009))).

205. On appeal to the Ninth Circuit, the executive branch filed an amicus brief again arguing that “courts are required to defer to the Executive Branch’s suggestion of immunity on behalf of a foreign official named as a defendant in a civil suit in the United States.” Brief for the United States of America as Amicus Curiae Supporting Affirmance at 2, *Dogan v. Barak*, No. 16-56704 (9th Cir. Nov. 14, 2016), ECF No. 41 [hereinafter *Dogan* Brief for the United States]. The Executive has made the same argument in previous briefs. See, e.g., *Samantar* Brief for the United States, *supra* note 15, at 13–20; *Dogan* Suggestion of Immunity, *supra* note 2, at 2, 9–10; *Rosenberg v. Lashkar-e-Taiba*, 980 F. Supp. 2d 336 (E.D.N.Y. 2013) (No. 10-CV-05381 (DLI)), ECF No. 35 (“[I]t is for the Executive Branch, not the courts, to determine whether the conduct alleged was taken in a foreign official’s official capacity.”).

206. *Dogan* Brief for the United States, *supra* note 205, at 12–14.



*Mexico v. Hoffman*<sup>207</sup> and *Ex parte Republic of Peru*,<sup>208</sup> did support absolute deference to the executive branch, the decisions were made under a vastly different legal framework than exists today and are no longer relevant.<sup>209</sup> Up until the early 1950s (well after *Hoffman* and *Ex parte Peru* were decided), foreign sovereigns were entitled to absolute immunity. That all changed, however, with the adoption of the restrictive theory of foreign sovereign immunity in the 1952 Tate Letter<sup>210</sup> and enactment of the FSIA in 1976.<sup>211</sup> Under the now-outdated absolute immunity legal framework, courts were required to defer to the executive branch because immunity was essentially a product of the executive branch's exclusive authority to recognize foreign sovereigns.<sup>212</sup> When the State Department adopted the restrictive theory in the Tate Letter and the Executive later supported its codification under the FSIA, the executive branch waived the sort of absolute control *Hoffman* and *Ex parte Peru* allowed and the Executive currently advocates.

In 1970, the Supreme Court confronted a similar question about the appropriate relationship between federal common law and changes to federal statutory law.<sup>213</sup> In that case, the Court's unanimous "opinion noted that whatever the correctness of [the prior common law based judgment (such as *Hoffman* or *Ex parte Peru*)] at the time of its decision, legislative developments had changed the legal background against which the Court must assess the common law."<sup>214</sup> "It has always been the duty of the common-law court to perceive the impact of major legislative innovations and to interweave the new legislative policies with the inherited body of common-law principles."<sup>215</sup>

The second flaw with the argument in favor of mandatory deference is that ordering courts to defer to executive branch determinations of immunity exceeds the scope of the executive branch's authority.<sup>216</sup> Federal common law foreign official immunity flows directly out of foreign sovereign immunity.<sup>217</sup> In 1976, Congress

207. *Republic of Mexico v. Hoffman*, 324 U.S. 30, 35 (1945) ("It 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.").

208. *Ex parte Republic of Peru*, 318 U.S. 578, 589 (1943) ("The certification and the request that the vessel be declared immune must be accepted by the courts. . .").

209. See RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 692–94 (7th ed. 2015) (discussing the relationship of federal statutory and common law); see also Wuerth, *supra* note 10, at 924 (arguing "that the Court's cursory reasoning in *Ex parte Peru* and *Republic of Mexico v. Hoffman* is unconvincing in the light of the text and structure of the Constitution").

210. Letter from Jack B. Tate, Acting Legal Adviser, Dep't of State, to Philip B. Perlman, Acting Att'y Gen., Dep't of Justice (May 19, 1952), reprinted in 26 DEP'T ST. BULL. 984, 985 (1952).

211. See, e.g., Koh, *supra* note 10, at 1142–46 (discussing the history of foreign sovereign immunity); Ryan, *supra* note 38, at 1787–94.

212. See, e.g., *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2086 (2015) (affirming the executive branch's exclusive authority to grant formal recognition to a foreign sovereign).

213. See *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970); see also FALLON ET AL., *supra* note 209, at 692–94.

214. FALLON ET AL., *supra* note 209, at 692–93.

215. *Moragne*, 398 U.S. at 392.

216. See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J. concurring) (dividing executive power into three categories and noting that executive power is at its weakest when "the President takes measures incompatible with the expressed or implied will of Congress").

217. See *supra* Part I; *supra* note 39 and accompanying text.

enacted the FSIA to codify foreign sovereign immunity and vest the courts with the exclusive authority to grant foreign sovereigns the source of the protection that foreign officials seek under federal common law.<sup>218</sup> If the Executive cannot compel courts to grant immunity to foreign sovereigns, why would courts be required to defer to executive branch determinations of foreign official immunity, when foreign official immunity necessitates the same immunity analysis that the FSIA purposefully vested with the judiciary?

The final argument against mandatory deference is practical. If the executive branch is given absolute power to immunize foreign officials, what happens when the Executive makes a mistake or adopts an incorrect interpretation of a federal statute? *Dogan v. Barak* should serve as a warning. In this case, the executive branch adopted an improper view of the TVPA that will only be reexamined because the district court adopted the same interpretation and the plaintiffs were able to appeal the decision to the Ninth Circuit. If the executive branch has the power to unilaterally grant immunity to a foreign official whenever the President deems it necessary, the ability to ensure that federal laws are correctly applied becomes unreviewable. As the Ninth Circuit recently declared:

There is no precedent to support this claimed unreviewability, which runs contrary to the fundamental structure of our constitutional democracy. *See Boumediene v. Bush*, 553 U.S. 723, 765 (2008) (rejecting the idea that, even by congressional statute, Congress and the Executive could eliminate federal court habeas jurisdiction over enemy combatants, because the “political branches” lack “the power to switch the Constitution on or off at will”). Within our system, it is the role of the judiciary to interpret the law, a duty that will sometimes require the “[r]esolution of litigation challenging the constitutional authority of one of the three branches.”<sup>219</sup>

### CONCLUSION

By premising liability on conduct that must be undertaken in an official or under color of official capacity, the TVPA eliminated the federal common law of conduct-based foreign official immunity in civil actions alleging torture or extrajudicial killing. As a result, defendant Barak was not entitled to dismissal, and the Ninth Circuit cannot uphold the district court’s decision and State Department’s interpretation of the TVPA. The Ninth Circuit should also reject absolute deference to executive branch determinations of conduct-based foreign official immunity—if for no other reason than in this case, the Executive incorrectly interpreted and applied a federal statute. The President should not have unilateral and unchecked power to

218. H.R. REP. NO. 94-1487, at 7 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6606 (“A principle purpose of [the FSIA] is to transfer the determination of sovereign immunity from the executive branch to the judicial branch.”).

219. *Washington v. Trump*, 847 F.3d 1151, 1161–62 (9th Cir. 2017), *reconsideration en banc denied*, No. 17-35105, 2017 WL 992527 (9th Cir. Mar. 15, 2017) (quoting *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012)).

pick winners and losers in civil actions arising under a federal law. That authority—to apply U.S. law and resolve disputes—must remain vested in the judiciary and protected by the appeals process.