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IF THE NON-PERSON KING GETS NO DUE PROCESS, WILL *INTERNATIONAL SHOE* GET THE BOOT?

JAMES COOPER-HILL

In *Price v. Socialist People s Libyan Arab Jamahiriya*,[1] a terrorism suit brought against Libya under the Foreign Sovereign Immunities Act (FSIA), the D.C. Circuit Court of Appeals became the first appellate court to unequivocally hold that a foreign sovereign is not a person entitled to due process pursuant to the Fifth Amendment to the U.S. Constitution.[2] In order to weigh the import of the holding, one must indulge in a two-pronged historical analysis, focusing first on the concept of sovereign immunity and second, on the due process entitlement of any entity, sovereign or otherwise. Of further interest is whether *Price* will affect the benchmark case, *International Shoe v. Washington*,[3] which established the concept of minimum contacts consistent with the traditional notions of fair play and justice.

BRIEF HISTORY OF SOVEREIGN IMMUNITY

The concept of sovereign immunity is said to stem from the quasi-theological notion of the divine right of kings.[4] It was held from the Middle Ages forward that the King could do no wrong, although modern legal scholars differ on the exact origin of sovereign immunity and whether it is truly based on the divine right of kings.[5] Sovereign immunity was supposedly imported to the United States by way of the often cited *Russell v. The Men of Devon*.[6] However, at least one court has

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

2. Foreign Sovereign Immunities Act of 1976, 28 U.S.C.A. §§ 1602-1611 (2004).

3. Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945).

4. *See* Wilcox v. United States, 117 F Supp. 119-20 (S.D.N.Y 1953).

5. *See* Ryll v. Columbus Fireworks Display Co., Inc., 769 N.E.2d 372, 374, 378-379 (Ohio 2002); Butler v. Jordan, 750 N.E.2d 554, 558-59 (Ohio 2001); Hayes v. Cedar Grove, 30 S.E.2d 726, 728 (W Va. 1944).

6. Russell v. Men of Devon, 100 Eng. Rep. 359 (K.B. 1788) (Numerous states have cited to *Russell v. Men of Devon* in cases of first impression involving sovereign immunity including Massachusetts (Hill v. City of Boston, 122 Mass. 344, 346 (Mass. 1877)), West Virginia (Long v. City of Weirton, 214 S.E.2d 832, 851 (W Va. 1975)), Ohio (Bd. of Comm'rs of Hamilton County v.

stressed that the first adoption of the *Russell* theory of immunity was misplaced.[7]

The United States has witnessed all three branches of its government wrestling with the issue of foreign sovereign immunity The concept has evolved over three distinct time periods. First, the U.S. Supreme Court accorded absolute immunity to sovereigns in 1812.[8] Second, in 1952, the U.S. Department of State, on behalf of the Executive branch, imposed a system of qualified immunity[9] In 1976, the Foreign Sovereign Immunities Act (FSIA) laid out broad exceptions to immunity as did further amendments in 1996.[10] Under the concept of absolute immunity noted by the U.S. Supreme Court in the early 19th century and later during the period of qualified immunity the U.S. Department of State wielded the power of the Executive branch.[11]

At least in part, commercial activity in the United States conducted by foreign sovereigns in direct competition with American private enterprise eroded absolute immunity[12] That many foreign states engaged in quasi-private enterprise resulted in the governmental-proprietary dichotomy that prevails at both the state and federal level today[13] Commencing in 1952, the Tate Letter established a qualified immunity that the Executive branch, acting through the State Department, controlled.[14] During the twenty-four years of qualified immunity the Executive branch was clearly in charge of and had apparent authority over the Judicial branch.[15] Qualified immunity was codified by the enactment of the FSIA in

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Mighels, 7 Ohio St. 109, 122 (Ohio 1857)) and Texas (City of Galveston v. Posnainsky, 62 Tex. 118 (Tex. 1884)).

7. *Wilcox*, 117 F Supp. at 119 (mistakenly basing sovereign immunity in the United States on the maxim of the king: "Immunity of the sovereign from suit stemming from the political doctrine that the King can do no wrong, had been transplanted and preserved inviolate as part of the American common law until relatively recent times. *Id.* at 120). However, the Supreme Court of Appeals of West Virginia in *Hayes*, 30 S.E.2d at 728, had earlier taken an opposite position.

8. Schooner Exch. v. McFaddon, 11 U.S. 116, 124 (1812).

9. Changed Policy Concerning the Granting of Sovereign Immunity to Foreign Governments, Letter from Attorney General Legal Advisor, Jack B. Tate to Attorney General Philip B. Perlman, 26 Dept. State Bull. 984-85 (1952) *available in* Dunhill v. Cuba, 425 U.S. 682, 711-16 (1976)) [hereinafter Tate Letter].

10. FSIA, 28 U.S.C.A. §§ 1602-1611, as amended by the Antiterrorism & Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 28 U.S.C.).

11. *See* Tate Letter, *supra* note 9.

12. The governmental/proprietary dichotomy is based on the following distinction: an activity that generates revenue in competition with private enterprise is subject to liability while an activity which is mandated by law as a governmental service is immune. *See* OSBORNE M. REYNOLDS, JR., HANDBOOK OF LOCAL GOVERNMENT LAW § 167 at 670 (2d ed. 2001). Note the commercial exception in the FSIA in 28 U.S.C.A. § 1605(a)(2).

13. *See* Thon v. Los Angeles, 21 Cal.Rptr. 398, 400 (Cal. Dist. Ct. App. 1962) (concluding that fire-fighting is clearly governmental function); Byrnes v. Jackson, 105 So. 861, 863 (Miss. 1925) (finding that operating a zoo is an implied governmental function.).

14. Tate Letter, *supra* note 9.

15. The position of the Department of State was accorded great weight by the court in *Ocean Transport Co. v. Gov. of the Republic of Ivory Coast*, 269 F.Supp. 703, 704 (E.D.La. 1967) and other cases discussed *infra*.

1976.[16] However, the FSIA was interpreted in such a way that no plaintiff prevailed during the first four years of its enactment.[17] Even then, the first non-commercial plaintiff's verdict involved a car-bombing assassination in the District of Columbia, eliminating the minimum contacts-due process issue from consideration.[18]

Similar acts of terrorism perpetrated upon U.S. citizens *outside* the United States were not successfully prosecuted under the 1976 FSIA.[19] The only plaintiff's judgment for what could be considered terrorism under the 1976 FSIA can be attributed to the foreign sovereign's failure to timely seek to set aside a default judgment.[20] It took the enactment of the Anti Terrorism & Effective Death Penalty Act of 1996[21] for the first plaintiffs to obtain judgments against a foreign sovereign.[22] Even then, the basis for bringing such actions, and the trial court exercising both subject matter and personal jurisdiction, was very limited. The four criteria which established subject matter jurisdiction were: extrajudicial killing, aircraft sabotage, hostage taking, and torture.[23] Even when horrendous acts

16. FSIA, 28 U.S.C.A. §§ 1602, 1604.

17. *See generally* Chicago Bridge & Iron Co. v. Islamic Republic of Iran, 506 F Supp. 981 (N.D. Ill. 1980) (finding that government could not waive sovereign immunity based on FSIA waiver provision because Iranian defendants still lacked minimum contacts); Castro v. Saudi Arabia, 510 F Supp. 309 (W.D. Tex. 1980) (finding that none of the exceptions in the FSIA operate to deprive Saudi Arabia of sovereign immunity from suit in the United States); Carey v. Libyan Arab Republic, 453 F Supp. 1097 (S.D.N.Y. 1978) (granting defendants' motion to dismiss on jurisdictional grounds based on immunity provided under the FSIA).

18. *See* Letelier v. Republic of Chile, 488 F Supp. 665, 673-74 (D.D.C. 1980).

19. *See generally* Cicippio v. Islamic Republic of Iran, 30 F.3d 164 (D.C. Cir. 1994) [hereinafter *Cicippio II*] (granting defendant Iran's motion to dismiss for lack of subject matter jurisdiction for suit involving U.S. citizens who were kidnapped in Beirut); Hall v. People's Republic of Iraq, 80 F.3d 558 (D.C. Cir. 1996) (finding district court correctly concluded that it lacked subject matter jurisdiction); Princz v. Federal Republic of Germany, 26 F.3d 1166 (D.D.C. 1994) (finding district court lacked subject matter jurisdiction over suit involving Americans kidnapped in Nazi Germany under either retroactive application of the FSIA or pre-FSIA law of sovereign immunity).

20. Dadesho v. Gov't of Iraq, 139 F.3d 766, 767 (9th Cir. 1998).

21. Antiterrorism & Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1241 (codified as amended at 28 U.S.C. §1605(a)(7) (1996)) (allowing lawsuits against any nation designated as a state sponsor of terrorism, even when the conduct took place outside the United States and was perpetrated against a U.S. citizen).

22. Alejandre v. Republic of Cuba, 996 F Supp. 1239, 1247 (S.D. Fla. 1997); *see* Daliberti v. Republic of Iraq, 146 F Supp. 2d 19 (D.D.C. 2001) [hereinafter *Daliberti II*]; Sutherland v. Islamic Republic of Iran, 151 F Supp. 2d 27 (D.D.C. 2001); Higgins v. Islamic Republic of Iran, 2000 WL 33674311 (D.D.C. 2000); Jenco v. Islamic Republic of Iran, 154 F Supp. 2d 27 (D.D.C. 2001); Simpson v. Socialist People's Libyan Arab Jamahiriya, 180 F Supp. 2d 78 (D.D.C. 2001); Wagner v. Islamic Republic of Iran, 172 F Supp. 2d 128 (D.D.C. 2001); Weinstein v. Islamic Republic of Iran, 175 F Supp. 2d 13 (D.D.C. 2001); Hill v. Republic of Iraq, 175 F Supp. 2d 36 (D.D.C. 2001); Mousa v. Islamic Republic of Iran, 238 F Supp. 2d 1 (D.D.C. 2001); Boim v. Quranic Literacy Institute, 127 F Supp. 2d 1002 (N.D. Ill. 2001); Price v. Socialist People's Libyan Arab Jamahiriya, 110 F Supp. 2d 10 (D.D.C. 2000); Elahi v. Islamic Republic of Iran, 124 F Supp. 2d 97 (D.D.C. 2000); Eisenfeld v. Islamic Republic of Iran, 172 F Supp. 2d 1 (D.D.C. 2000); Anderson v. Islamic Republic of Iran, 90 F Supp. 2d 107 (D.D.C. 2000); Flatow v. Islamic Republic of Iran, 999 F Supp. 1 (D.D.C. 1998) [hereinafter *Flatow I*]; Cicippio v. Islamic Republic of Iran, 18 F Supp. 2d 62 (D.D.C. 1998) [hereinafter *Cicippio III*].

23. Antiterrorism and Effective Death Penalty Act, 28 U.S.C § 1605(a)(7). See also Alejandre,

of violence were inflicted upon U.S. citizens without justification, foreign sovereigns pleaded "police brutality" and relied on a pre-1996 decision, *Nelson v. Saudi Arabia.*[24]

Finally, in a logical opinion, a trial court held that a foreign sovereign was not a person for purposes of due process, but then went on to consider the minimum contacts analysis, suggesting that the diplomatic relations with the country in question, Iran, were sufficient to find personal jurisdiction.[25] It was not until *Daliberti v. Republic of Iraq*[26] that a contested case was brought before the court and the issue of due process was raised. In *Daliberti*, after the denial of Iraq's motion to dismiss, Iraq chose not to participate in the trial.[27] Subsequently, in *Price et al v. Socialist People's Libyan Arab Jamahiriya*,[28] the due process issue was raised by the defendant sovereign and addressed by the U.S. District Court. The same court which had held that a foreign sovereign was not a person entitled to due process in *Flatow I*,[29] denied Libya's Rule 12 motion to dismiss, based in pertinent part, on the due process argument.[30] The U.S. Court of Appeals for the District of Columbia Circuit became the first appellate court to hand down a decision squarely facing the due process issue and ruling that a foreign sovereign was not a person for purposes of due process.[31] This ruling was not appealed. Given the mandatory venue of the U.S. District Courts for the District of Columbia in terrorism suits brought pursuant to the FSIA, this decision should be the last word on this issue. However, disingenuously Libya has raised this same issue both in the remand to the district court,[32] and in other similarly situated cases now pending in the district court. A more detailed analysis of the Court of Appeals' analysis in the *Price* case follows.

Russell v. Men of Devon and its Progeny: Both Legitimate and Otherwise

Russell v. Men of Devon[33] was cited by courts in the United States over 150 times before a federal statute adopting any concept of foreign immunity was enacted. The *Russell* decision is a far better one on which to provide a foundation for municipal government law than for crossing the Atlantic with a theory based on the power of the King. Factually, the *Russell* decision is simple. A local bridge

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966 F Supp. At 1247

24. *See* Saudi Arabia v. Nelson, 507 U.S. 349, 351 (1993).

25. *Flatow I*, 999 F Supp. at 22.

26. Daliberti v. Republic of Iraq, 97 F Supp. 2d 38, 42 (D.D.C. 2000) [hereinafter *Daliberti I*].

27. *Daliberti II*, 146 F Supp. 2d at 20.

28. Price v. People's Socialist Libyan Arab Jamahiriya, 110 F Supp. 2d 10, 14-15 (D.D.C. 2000) [hereinafter *Price I*].

29. *Flatow I*, 999 F Supp. at 19.

30. *Price II*, 294 F.3d at 96-100

31. *Id.* at 96 (stating "with the issue directly before us, we hold that foreign states are not 'persons' protected by the Fifth Amendment.").

32. *See* Price v. People's Socialist Libyan Arab Jamahiriya, 274 F Supp. 2d 20 (D.D.C. 2003) [hereinafter *Price III*].

33. 100 Eng. Rep. 359 (K.B. 1788).

fell into disrepair resulting in the plaintiff's wagon being damaged.[34] Because Devonshire had no fund with which to compensate the owner of the damaged wagon, it was held immune from judgment.[35] Many of the subsequent citations in American courts have opined that *Russell* was the foundation for the concept of sovereign immunity in the United States but have erroneously added the maxim that the king can do no wrong, which does not appear in *Russell*.[36] However, the first case reciting the infallibility of the king in the newly formed United States was handed down without mention of the *Russell* decision less than a month after George Washington became the first president. The case of *Benedict Calvert's Lessee v. Sir Robert Eden*[37] resolved a knotty title and possession problem which arose under a grant of the Province of Maryland from King Charles I.[38]

The Court went to great lengths to stress the continued importance of the English king's exercise of appellate jurisdiction as had been done since the earliest days of the colonies.[39] Of course, the exercise of appellate authority over land title disputes by the King of England could hardly have continued longer, notwithstanding the Maryland court's genuflection to the king in this case.

While *Benedict Calvert's Lessee* is the earliest case in the United States to refer to the king being unable to commit a wrong, the first United States Supreme Court decision regarding sovereign immunity was *Chisholm v. Georgia*.[40] In *Chisholm*, it was argued that "until the time of Edward I. the King might have been sued in all actions as a common person. but now none can have an action against the King "[41] Justice Wilson finds that it is the people of the United States who are the true sovereign and not the government or the State, thus allowing the suit against Georgia to go forward.[42]

Two decades later the first American citation to the *Russell* case is found in *Riddle v. The Proprietors of the Locks and Canals on Merrimack River* [43] in which no mention of the authority of the king is made. The Supreme Judicial Court of Massachusetts stated that while a county, referred to as a quasi corporation, can be held liable on an indictment for neglect of a public duty, no private action can be maintained, citing *Russell* as the settling authority.[44] A scant two years later, Massachusetts again found that there was no liability for quasi corporations, in this

34. *Russell*, 100 Eng. Rep. at 362.

35. *Id.*

36. For example, *see* cases *supra* note 7.

37. Benedict Calvert's Lessee v. Sir Robert Eden, 2 H. & McH. 279 (Md. 1789).

38. *Id.* In the argument before the court: "The king cannot by his writ command himself *Id.* at 290. Further argument was made: "A tenant in tail, making a feoffment, discontinues the estate-tail. But if the king, being tenant in tail, grants patent of the land, it does not operate as discontinuance, being a wrong, for it is a maxim that the king can do no wrong. *Id.* at 310.

39. *Id.* at 334. The Court noted: "It has been the prevailing doctrine here that the lord proprietary, like the king at home, cannot be disseised.

40. Chisolm v. Georgia, 2 U.S. 419 (1793).

41. *Id.* at 437.

42. *Id.* at 454.

43. Riddle v. Proprietors of the Locks and Canals on Merrimack River, 7 Mass. 169, 187 (1810).

44. *Id.* at 187.

case the inhabitants of Leicester, absent a statute to that effect, citing *Russell* but without any mention of the King.[45]

Countless cases for the next century and a half cited to *Russell* and many others referenced the maxim, "the king can do no wrong."[46] Often both were joined together as if it were the king whose authority prevented the damaged wagon's owner from recovery in *Russell.* Over time, the authority of the king has been invoked in a democratic republic that, since its inception, has never had a king.

Only a few decades after independence from the king, the Court of Appeals of Kentucky found the theory of sovereign immunity more than simply a good idea.[47] Contrary to the conventional wisdom both before and after, however, that court found that the king can indeed do wrong; it is just that when the king errs, he goes unpunished:

> [S]overeignty has a fictitious perfection and purity, which must be taken as real, and which can not be controverted, and of course the abuse of its power can be imputed to a sovereign, in restraint of its legitimate energies. The maxim, that 'the king can do no wrong' is not an idle device of royalty, formed to amuse or beguile the multitude[48]

The same court noted:

> It is not, that the king, in a monarchy, or the people in a democracy can do no wrong ... it is the sovereignty with which they are invested, and in which they are merged, that is incapable of error; and this capacity in the sovereign to err is matter of necessity.[49]

Clearly, a difference of opinion existed just beneath the surface, with one court stating that "[i]mmunity of the sovereign from suit stemming from the political doctrine that the King can do no wrong, had been transplanted and preserved inviolate as part of the American common law until relatively recent times."[50] Note a pragmatic and different approach yet a decade earlier: ... the State should not be deprived or dispossessed of its property without its consent; not on the maxim of the English law that the king can do no wrong, a maxim which has no existence in American law."[51]

It took a twenty-first century Ohio court to provide the most thorough historical analysis of both the American concept of sovereign immunity and the reliance on the *Russell* case, although it overlooked the *Riddle* case as the initial mention of *Russell.* The Ohio Supreme Court in *Butler v. Jordan*[52] recited that the

45. Mower v. Inhabitants of Leicester, 9 Mass 247, 250 (Mass. 1812).
46. *See supra* notes 6-7.
47. *See* Commonwealth v. Morrison, 2 A.K. Marsh 75, 93 (Ky. 1819).
48. *Id.*
49. *Id.*
50. *Wilcox*, 117 F Supp. at 119.
51. *Hayes*, 30 S.E.2d at 728-29.
52. Butler v. Jordan, 750 N.E.2d 554 (Ohio 2000).

doctrine of sovereign immunity was associated with the English common-law concept that "the King can do no wrong."[53] While that is not an accurate portrayal of the first two American cases citing to *Russell,* the Ohio court did allude to the analogy now found in the sovereign immunity privilege in the U.S. courts of immunity extending to freedom from trial and not just from judgment.[54] In the English feudal system, any lord of the manor who held his own lower level court could not be brought into his own court.[55] The king, being the highest authority, likewise enjoyed such "protection on the theory that no court was above him."[56]

The *Butler* court explained in detail the *Russell* decision and concluded that "[t]his rule of local government immunity then became the general American rule."[57] Sovereign immunity in the United States was born starting with government at the most local level. It quickly led to a higher level. Soon thereafter, the same court stated that the concept of sovereign immunity had evolved from the English common law concept that "the king can do no wrong" and cited to *Russell.*

The U.S. Supreme Court, in deciding that sovereign immunity law of Nevada was not applicable to a cause of action arising in the State of California,[58] foreshadowed the coming conflict that would arise out of the passage of the 1996 FSIA Amendment. Mr. Justice Stevens speaking for the Court found that sovereign immunity has two faces: "The doctrine of sovereign immunity is an amalgam of two quite different concepts, one applicable to suits in the sovereign's own courts and the other to suits in the courts of another sovereign."[59]

The Absolute Immunity Period

The Absolute Immunity era began with the involvement of a foreign sovereign, albeit not a king. The government involved was that of France and the case condoned piracy on the high seas based on sovereign immunity.[60] The year was 1812 and the case *The Schooner Exchange v. McFaddon.*[61] McFaddon and his partner Greetham were the owners of the schooner Exchange that was forcibly and violently taken from them by the French pursuant to orders from Napoleon.[62] The vessel, having been converted to a military vessel for France, encountered great stress of weather and sailed into the port of Philadelphia for repairs.[63] McFaddon and Greetham filed suit for the vessel's return.[64] At the time the schooner sailed

53. *Id.* at 564.
54. *See id.* at 566.
55. *Id.* at 559.
56. *Id.*
57. *Id.* at 560.
58. Nevada v. Hall, 440 U.S. 410 (1978).
59. *Id.* at 414.
60. Schooner Exchange v. McFaddon, 11 U.S. 116 (1812).
61. *Id.* at 116.
62. *Id.* at 117.
63. *Id.*
64. *Id.*

into port, a state of peace existed between France and the United States.[65] McFaddon lost in the trial court but appealed to the Circuit Court of the United States, which reversed and ordered the vessel returned to McFaddon and Greetham.[66]

Justice Marshall, in reversing the Court of Appeals, concluded in part: "It seems then to the Court, to be a principle of public law, that national ships of war, entering the port of a friendly power open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction."[67] Justice Marshall's holding is that the vessel of a foreign sovereign entering a U.S. port in a friendly manner during a time of peace should be exempt from the jurisdiction of a United States Court.[68] This demonstrates a serious regard for a foreign sovereign whose ownership of the vessel in question arose from piracy on the high seas. If the Schooner McFaddon were put in the context of the 1996 FSIA amendment, and if the French had treated the owners of the schooner accordingly the result might have been different, provided that the erring sovereign was designated a terrorist state and thus amenable to an exception from immunity

The Tate Letter and Qualified Immunity from 1952-1976

In 1952, there was a shift from absolute immunity In a letter issued by Jack B. Tate, Acting Legal Advisor at the U.S. Department of State, to Acting Attorney General Philip B. Perlman, the State Department unilaterally purported to restrict immunity to governmental or public acts, thus creating a qualified sovereign immunity [69] While the State Department's position was justified by the increase in commercial activity by nations competing with private enterprise of the capitalist countries, the letter itself clearly reflected an extension of power by the U.S. Department of State.[70] The State Department's success in this regard was enhanced by an abdication of Congressional power for twenty-four years and the courts' acquiescence during the same period.

The Tate Letter required a foreign sovereign to seek a ruling of immunity from the State Department, which in turn would file with the court in which that sovereign had been sued, a "suggestion of immunity,"[71] not unlike a suggestion of bankruptcy to stop judicial proceedings against one who has sought the protections of the Bankruptcy Act. Courts differed in their reaction to the Tate Letter, but by

65. *See id.* at 118.

66. *Id.* at 117.

67. *Id.* at 145-146.

68. *Id.* at 147.

69. Tate Letter, *supra* note 9 (suggesting that immunity be recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with regard to private acts (*jure gestionis*)); *see also* Pan Am. Tankers Corp. v. Republic of Vietnam, 296 F Supp. 361, 363 (S.D.N.Y 1969) (applying restrictive interpretation of sovereign immunity set forth in the Tate Letter).

70. *See id.* Although Congress constrained State's authority by enacting the FSIA and its subsequent amendments *supra note* 2, at 10, the State Dept. has been reluctant to cede authority.

71. *See Pan Am. Tankers Corp.*, 296 F Supp. at 363.

and large concurred with the authority of State.[72] The courts' deferential attitude towards the State Department was approved by the U.S. Supreme Court in *National City Bank of New York v. Republic of China.*[73] This attitude led to critical commentary by noted legal scholar and jurist, Michael H. Cardozo.[74]

The general attitude of the courts was that whatever suggestion was made by the State Department, the courts lacked discretion to take a differing position.[75] A trial court in the District of Columbia, in finding an absence of immunity noted: "The State Department's determination that immunity need not be extended is binding on this Court."[76] The appellate court in the same jurisdiction concluded: "In delineating the scope of a doctrine designed to avert possible embarrassment to the conduct of our foreign relations, the courts have quite naturally deferred to the policy pronouncements of the State Department."[77] Another court, while finding immunity, agreed with the process: Accordingly, both parties agree that a suggestion of immunity is conclusive and binding on the courts."[78]

Other courts criticized the absence of criteria by which public acts could be distinguished from private acts, whether by the courts or by the State Department, but one court concluded that the suggestion or absence thereof of immunity by the State Department was "highly persuasive and the authorities dictate that it must be given great weight."[79]

The Tate Letter differentiated the public acts of foreign governments, *jure imperii*, from private acts, *juri gestionis.*[80] Similar differentiation has been followed regarding the liability of state governments engaged in quasi or non-governmental activity [81]

That a foreign government should escape liability and even trial while engaged in commerce and competing with non-government business entities is hardly justified and seems to warrant inroads into absolute sovereign immunity. It seems questionable today that the interests of American business or U.S. citizens

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72. *See id.*

73. *See* Nat'l City Bank of New York v. Republic of China, 348 U.S. 356, 360-61 (1955).

74. *See generally* Michael H. Cardozo, *Judicial Deference to State Department Suggestions: Recognition of Prerogative or Abdication to Usurper* 48 CORNELL L.Q. 461, 498 (1963) (advocating judicial deference to the State Department in foreign relations to present unified voice, not as abdication of judiciary's responsibility but as recognition of the executive's prerogative).

75. *Id.*

76. Amkor Corp. v. Bank of Korea, 298 F Supp. 143, 144 (S.D.N.Y. 1969).

77. Victory Transp. Inc. v. Comisaria General de Abastecimientos Transportes, 336 F.2d 354, 358 (2d Cir. 1964).

78. Renchard v. Humphreys & Harding, Inc., 381 F Supp. 382, 383 (D. D.C. 1974).

79. Ocean Transp. Co. v. Gov't of the Republic of the Ivory Coast, 269 F Supp. 703, 705 (1967).

80. Tate Letter, *supra* note 9

81. *See* REYNOLDS, *supra* note 12, at 670. For an activity which is exclusively governmental in nature, there is generally no liability for a tort which causes injury or damage to a person. *Id.* However, for an activity which is proprietary, such as the operation of business which competes with private enterprise, there can be liability. *Id.* The difficulty arises in those cases which do not clearly fall into one category or the other, such as garbage collection. *Id.* The distinction has been extended to the federal law as applicable to foreign governments doing business. FSIA, 28 U.S.C.A. §1605(a)(2) imposes liability on foreign sovereigns engaged in commerce.

injured at the hand of foreign governments should be left to the State Department instead of the judicial system. However, at least one court justified its deference on the grounds of separation of powers:

> Just as the Executive is not permitted, under the separation of powers, to interfere with the Judiciary, so also the Judiciary should avoid any conflict with the Executive in the field of international relations. The President, as the elected representative of the people of the United States, is the final word on the subject in the absence of Congressional legislation.[82]

The concept of separation of powers is a subject somewhat blurred today in light of the position of the State Department regarding the 1996 amendments to the FSIA and Congress' action permitting judgment creditors against foreign terrorist states to have such judgments satisfied from the terrorist states' frozen assets.[83]

One troublesome aspect of the theory of qualified immunity was the diplomatic pressure brought to bear on the State Department for political considerations.[84] This resulted in the State Department issuing a "suggestion of immunity" which would ordinarily not be available in similar circumstances absent the political considerations.[85] The other difficulty arose when foreign sovereigns ignored litigation in U.S. courts. Absent a diplomatic note to the State Department seeking a suggestion of immunity, it was left to the State Department to determine whether immunity should be extended or not.[86] The two-branch approach in these situations failed to establish consistent standards or uniformity of application.[87]

Litigation with Foreign Sovereigns under the FSIA 1976-1996

In 1976, Congress codified the previous policy and eliminated the "suggestion of immunity" procedure which the State Department had implemented for twenty-four years.[88] This act of Congress clearly put the courts in charge instead of having to yield to the dictates of the State Department. For the first time, the bases for immunity were established by statute.[89]

The first case clearly worthy of the terrorism label resulted in a plaintiff's verdict due to the fact that the event, a car bombing assassination, occurred within

82. Rich v. Naviera Vacuba, S.A. and Republic of Cuba, 197 F Supp. 710, 724 (E.D. Va. 1961).

83. *Price II*, 294 F.3d at 99. In holding that a foreign State was not a person entitled to due process, the appellate court referred to the frozen assets of such nations, which have long been the goal of virtually all plaintiffs who filed suits based on terrorism after the 1996 Amendment to the FSIA. The *Price II* court said: "For example, the power of Congress and the President to freeze the assets of foreign nations, or to impose economic sanctions on them, could be challenged as deprivations of property without due process of law. *Id.*

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

85. *Id.*

86. *See id.*

87. *Id.* at 488.

88. *See id.*

89. FSIA, 28 U.S.C.A. §§ 1602-1611.

the District of Columbia.[90] Chile's ambassador to the United States under the Allende government, who was in disfavor with the usurping Pinochet regime, was assassinated.[91]

Although the judgment entered against the Republic of Chile was the first under the FSIA for an act of terrorism before the 1996 amendment, it is less significant in that during the qualified immunity period, it is unlikely that Chile would have been afforded immunity for an act of assassination.

The important cases of this era are the ones involving American victims of foreign terrorism that occurred outside the United States but that the courts dismissed for lack of subject matter or personal jurisdiction. Some of these cases returned for a second bite at the immunity apple after the enactment of the 1996 Amendment.[92] Only one case reached judgment for an act of intended but unsuccessful terrorism.[93] That judgment continued to accrue interest and became one of but three judgments to receive satisfaction from Iraq's frozen assets upon the commencement of the second war against Iraq.[94] Others were resolved without further litigation,[95] while some are still pending.[96]

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90. *Letelier* 488 F Supp. at 665.

91. *See* Vernon Loeb, *Documents Link Chile Pinochet to Letelier Murder*, WASHINGTON POST, Nov. 14, 2000, at A16.

92. Joseph Cicippio's pre-1996 case was dismissed without prejudice for lack of jurisdiction. Cicippio v. Islamic Republic of Iran, 1993 WL 730748, *3 (D.D.C. 1993) [hereinafter *Cicippio II*]. However, it reached judgment in a later suit. *Cicippio III*, 18 F Supp. 2d at 70. Likewise, the dismissal of Chad Hall's 1992 suit was affirmed without opinion in Hall v. Iraq, 80 F.3d 558 (D.C. Cir. 1996). Hall later became a successful plaintiff in Daliberti v. Republic of Iraq, 146 F Supp. 2d 19, 27 (D.D.C. 2001).

93. Dadesho v. Gov't of Iraq, 139 F.3d 766, 766-67 (9th Cir. 1998) (dismissing defendant's appeal of judgment for plaintiff). Sargon Dadesho was the intended victim in hired assassination case. After the assassin was apprehended and incarcerated, Dadesho filed suit in 1992 against the Government of Iraq for plotting to murder him. *Id.* at 766. A default judgment was entered in the plaintiff's favor. *Id.* at 767. The court ruled that the plaintiff was not entitled to default judgment, but granted judgment for plaintiff on one count of intentional infliction of emotional distress. *Id.* Iraq was tardy in attempting to set aside the default. *Id.* at 767 Dadesho was one of three judgments against Iraq which were within the parameters of the President's Executive Order which confiscated Iraq's frozen assets. *See* Exec. Order No. 13,290, 68 Fed. Reg. 14,307 § 1(b) (Mar. 20, 2003) [hereinafter Exec. Order 13,290]. Dadesho, having levied on frozen bank account of Iraqi funds and qualified under the exception spelled out in the Executive Order, was paid his judgment in full, $2,407,000 from Iraqi funds controlled by the U.S. Treasury. Sargon Dadesho v. Government of Iraq; Garnishment in the Supreme Court of the State of New York, County of New York, Execution with Notice to Garnishee, based on a federal judgment in California, Action No. CV- 92-05491-REC.

94. Exec. Order No. 13,290 at 14,307 § 1(b).

95. *See* Princz v. Fed. Republic of Germany, 813 F Supp. 22 (D.D.C. 1992). Princz would not have qualified as plaintiff after the 1996 amendment since his defendant was the Republic of Germany, not terrorist nation. However, it was reported that Princz was ultimately paid a settlement from the re-unified government of Germany.

96. *See, e.g.*, Smith v. Socialist People's Libyan Arab Jamahiriya, 886 F Supp. 306 (E.D.N.Y. 1995), *aff'd*, 101 F.3d 239 (2d Cir 1991). The initial suit brought by the families of the victims of the bombing of Pan Am Flight 103 was dismissed for lack of subject matter jurisdiction, the bombing having occurred in Scotland in 1988. *Smith*, 886 F Supp. at 315. However, after the passage of the 1996 amendment, the suit was re-filed as Rein v. People's Socialist Libyan Arab Jamahiriya, 995 F Supp. 325, 328 (E.D.N.Y. 1998), *aff'd*, 162 F3d 748 (2d Cir 1998).

Litigation under the Anti Terrorism & Effective Death Penalty Act of 1996

After the enactment of the Anti Terrorism & Effective Death Penalty Act of 1996, half a dozen cases reached judgment, all in cases against Iran,[97] except *Alejandre v. Cuba*,[98] known as the *Brothers-to-the Rescue* case. In 2000, Congress addressed the issue of satisfaction of these outstanding judgments with the passage of what amounted to special legislation for a few victims of terrorism.[99] The act provided for payment to judgment creditors of several judgments against Iran from taxpayer funds although a subrogation clause provided that ultimately the compensation would come from frozen Iranian assets.[100] However, two suits against Iran that had not reached judgment were also included so that when judgment was entered in those suits, satisfaction was made. While mentioned in the Conference Committee report, pending suits against Libya and Iraq received no authorization for payment in the 2000 legislation.[101]

THE EARLY DUE PROCESS CASES

The issue of due process arose with the ratification of the Fourteenth Amendment to the Constitution of the United States.[102] Until that time, the only issue of due process arose out of the Fifth Amendment, applicable only to the federal government.[103] However, the Fourteenth Amendment extended this requirement to all the States of the Union.[104] Given commerce across borders among the citizens of the States, conflicts were inevitable. A resolution of these conflicts and a system used for such resolution ultimately giving rise to such phrases as "traditional notions of fair play and justice" and "substantial contacts"

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97. *See, e.g.*, Anderson v. Islamic Republic of Iran, 90 F Supp. 2d 107, 113-4 (D.D.C. 2000); *Cicippio III*, 18 F Supp. 2d at 70; *Flatow I*, 999 F Supp. at 34.

98. Alejandre v. Republic of Cuba, 996 F Supp. 1239 (S.D. Fla. 1997)

99. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000) (codified as amended in scattered sections of 22 U.S.C.).

100. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464, 1541 § 2002 (codified as amended at scattered sections of 8, 20, 22, 27, 28, and 42 U.S.C.).

101. Victims of Trafficking and Violence Protection Act, 22 U.S.C. § 2002(b)-2. The Conference Committee Report stated:

> The Committee intends that this legislation will similarly help other pending and future Antiterrorism Act plaintiffs as and when U.S. courts issue judgments against the foreign state sponsors of specific terrorist acts. The Committee shares the particular interest of the sponsors of this legislation in ensuring that the families of the victims of Pan Am flight 103 should be able to collect damages promptly if they can demonstrate to the satisfaction of a U.S. court that Libya is indeed responsible for that heinous bombing. The Committee is similarly interested in pending suits against Iraq.

H.R. REP. NO. 106-939 at 118 (2000).

102. U.S. CONST. amend. XIV § 1.

103. U.S. CONST. amend. V

104. U.S. CONST. amend. XIV § 1.

arose primarily in three cases: *International Shoe v. State of Washington*,[105] *Milliken v. Meyer* [106] and *Pennoyer v. Neff*.[107]

The effectiveness of service by publication to establish *in personam* jurisdiction arose in the *Pennoyer* case.[108] Pennoyer brought an action against Neff in the state courts of Oregon and effected service by publication on the defendant who was a California resident.[109] Neff failed to appear and the court entered a default judgment resulting in an execution sale by the Oregon sheriff of land Neff owned in Oregon.[110] Neff subsequently brought suit to recover title to the land, asserting his ownership based on a patent issued by the United States.[111] The controlling issue was the effectiveness of a judgment based on obtaining personal jurisdiction against a non-resident by publication of service.[112]

The Oregon statute provided that subject matter jurisdiction was established over a non-resident who owned property within Oregon through publication.[113] Oregon law also provided for *in rem* jurisdiction if the subject matter was property located within the State of Oregon. However, *in rem* jurisdiction was inapplicable since the suit was brought *in personam* and the real property became involved in post-judgment proceedings.[114] The language of the opinion setting forth the possibility of an Oregon court's jurisdiction over persons outside the territory of the State sovereign is analogous to the process established by the 1996 FSIA Amendment.[115]

In distinguishing between subject matter and personal jurisdiction, the *Pennoyer* court relied on a Massachusetts decision,[116] one of the earliest to distinguish the two types of jurisdiction. That case, *Bissell v. Briggs*,[117] required both subject matter and personal jurisdiction in order to issue a judgment entitled to full faith and credit in other states.[118] The *Pennoyer* court adopted that same simple principle.[119]

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105. Int'l Shoe Co. v. State of Washington, 326 U.S. 310 (1945).

106. Milliken v. Meyer, 311 U.S. 457 (1940).

107. Pennoyer v. Neff, 95 U.S. 714 (1877).

108. *Id.* at 715.

109. *Id.* at 714.

110. *Id.* Neff was sued in Oregon at time when he was resident of California. *Id.* at 717 He was served by publication and never given personal or actual notice. *Id.* at 716.

111. *Id.* at 715.

112. *Id.* at 720.

113. *Id.*

114. *Id.*

115. *See id. See also* Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 221(a).

116. *See Pennoyer*, 95 U.S. at 731.

117 Bissell v. Briggs, 9 Mass. 462 (1 Tyng) (Mass. 1813).

118. "In order to entitle the judgment rendered in any court of the *United States* to the full faith and credit mentioned in the federal constitution, the court must have had jurisdiction, not only of the cause, but of the parties. *Id.* at 468.

119. *Pennoyer* 95 U.S. at 731 (citing *Bissell*, 9 Mass. at 468-469) ("[I]t was held that over the property within the State the court had jurisdiction by the attachment, but had none over his person; and that any determination of his liability, except so far as was necessary for the disposition of the property, was invalid.").

The conclusion that could be asserted by a foreign sovereign, relying on the *Pennoyer* case alone, is that the Constitution demands due process for its citizens, thus precluding the exercise of authority over persons, or property, outside the territory of the United States.[120]

Following this logic, one must determine, *ipso facto*, that the 1996 FSIA Amendment is unconstitutional.[121] The escape from this inevitable conclusion is the absence of status as a person, eliminating the need for due process.

Fourteenth Amendment due process based on service on a non-resident gave rise to the phrase "traditional notions of fair play and substantial justice" in *Milliken v. Meyer* [122] turning on factual considerations and the adequacy of notice given. That the defendant Meyer was personally served and received actual notice of Wyoming proceedings while located in the State of Colorado gave him the opportunity to assert his defense in the Wyoming court.[123] The Court found that Meyer had in fact been afforded due process and noted the difference between its holding and the earlier finding in *Pennoyer* based on service by publication.[124]

Next, in the case of *International Shoe*, the Court distinguished *Pennoyer* and said that previously, the presence of a defendant within the territory of the court's jurisdiction was a prerequisite to a binding personal judgment.[125] However, *International Shoe* did not require the physical presence of the defendant in the territory of the court's jurisdiction, but only that the defendant have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice."[126]

Further, *International Shoe* extended the concept of the due process requirement beyond humans to corporations without addressing the issue of who is

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120. *See id.*

121. If a foreign sovereign is person requiring due process, it follows that it must have minimum contacts for the U.S. Courts to have jurisdiction. Since the 1996 amendment to the FSIA provides for jurisdiction over foreign sovereigns for acts outside the United States in a setting which precludes any contacts, then it follows that either the act is unconstitutional or the sovereign is not person entitled to due process. It must be one or the other.

122. 311 U.S. 457 (1940).

123. The court said:

> Its adequacy so far as due process is concerned is dependent on whether or not the form of substituted service provided is reasonably calculated to give him actual notice of the proceedings and an opportunity to be heard. If it is, the traditional notions of fair play and substantial justice implicit in due process are satisfied. Here there can be no question on that score.

Id. at 463 (internal citation omitted).

124. *Id.*

125. Int'l Shoe, 326 U.S. at 316. See also Pennoyer, 95 U.S. at 733.

126. 326 U.S. at 316. Moreover, the court concluded:

> But now that the *capias ad respondendum* has given way to personal service of summons or other form of notice, due process requires only that in order to subject defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice.

Id.

a person for purposes of due process. The appellant, International Shoe Company, was a Delaware corporation which had no office in Washington.[127] However, during the pertinent time period, it did employ salesmen in Washington who were merely order-takers.[128] All contracts for the purchase of merchandise were consummated in Missouri.[129] The merchandise was shipped f.o.b. from Missouri to Washington so that the corporation had no dominium over the merchandise once it was delivered to the shipper.[130]

The issue, arising out of a suit to collect a portion of the commissions paid pursuant to Washington's Unemployment Compensation Act,[131] was whether personal service on the salesmen in Washington and service by registered mail in Missouri conferred personal jurisdiction of the Washington court over the International Shoe, so that it was afforded due process.[132] Because International Shoe's activities in Washington were neither casual nor irregular; and, because the service by registered mail was reasonably calculated to give such defendant actual notice, it could not be said that the corporation was not afforded due process.[133] The Court noted of the demands of due process:

> Those demands may be met by such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there. An "estimate of the inconveniences" which would result to the corporation from a trial away from its "home" or principal place of business is relevant in this connection.[134]

The concept which evolved in *Pennoyer Milliken*, and *International Shoe*, was logically extended in the FSIA substituting "direct effect" for minimum contacts, thus enabling litigation in U.S. courts for conduct occurring wholly outside the United States but perpetrated upon U.S. citizens.[135]

The Early Non-Human Persons Afforded Due Process

Until the ratification of the Fourteenth Amendment, due process existed only in the context of the Fifth Amendment, limiting the focus to the federal government.[136] International Shoe extended Fourteenth Amendment due process arising from State action to various entities other than corporations: partnerships,[137]

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127. *Id.*

128. *Id.* at 313-14.

129. *Id.* at 314.

130. *Id.*

131. Washington Unemployment Compensation Act, Wash. Rev. Stats., §§ 9998-103a-9998-123a, (1941) (codified as amended at WASH. REV CODE § 50.24.010 (2004)).

132. 326 U.S. at 311-12.

133. The Corporation received due process so status as a person was not a deciding factor. *Id.* at 316.

134. *Id.* at 317.

135. FSIA, 28 U.S.C.A. § 1605(a)(2).

136. U.S. CONST. amend. V

137. Kaffenberger v. Kremer, 63 F Supp. 924, 926 (E.D. Pa. 1945).

mutual life insurance companies,[138] and labor unions.[139] The issue of whether a State of the Union was considered a person entitled to due process was raised when South Carolina filed suit to avoid enforcement of recently passed civil rights laws.

A State of the Union is not Entitled to Due Process: Katzenbach v. South Carolina[140]

The case which acted as a benchmark for the *Price* decision was *Katzenbach v. South Carolina.* South Carolina had brought suit against the Attorney General to suppress enforcement of certain civil rights acts passed during 1964-1965.[141] One basis for resisting enforcement of these acts was the denial of due process.[142] The *Katzenbach* decision squarely addressed the issue, holding that a State was not a person for purposes of due process.[143] The case left little doubt that if a State of the Union could not be a person for purposes of due process, then neither could a foreign sovereign.[144]

The Weltover Conflict

The next case to address the due process issue took a giant step backwards by merely assuming that a foreign sovereign was in fact a person entitled to due process.[145] Making the due process assumption for a foreign sovereign would have rendered the provisions of the 1996 FSIA Amendment unconstitutional, except for acts that occurred within U.S. territory. This might have been the last word on this issue but for a cryptic "but see" reference in the *Weltover* case, citing to *Katzenbach.*[146]

In *Weltover* the holders of bonds payable in dollars issued by the Republic of Argentina's central bank, which extended the date of payment, brought suit against the Republic of Argentina.[147] Issuing government bonds sold in the United States was considered a commercial activity, because Argentina was acting as a private player and not as a regulator of the bond market.[148] The unilateral extension of the payment date by Argentina caused a "direct effect" in the United States, thus creating jurisdiction under 28 U.S.C. § 1605(a)(2).[149] But did the statutory "direct effect" equate to minimum contacts sufficient to satisfy traditional notions of fair play and substantial justice? Or was Argentina even required to be afforded due process?

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138. Conn. Mut. Life Ins. Co. v. Moore, 333 U.S. 541, 551(1948).
139. American Fed'n of Labor v. Watson, 60 F Supp. 1010 (1945).
140. Katzenbach v. South Carolina, 383 U.S. 301, 323-24 (1966).
141. *Id.* at 307.
142. *Id.* at 323.
143. *Id.*
144. *Id.*
145. *See* Republic of Argentina v. Weltover, Inc., 504 U.S. 607 (1992).
146. *Id.* at 619.
147. *Id.* at 609.
148. *Id.* at 620.
149. *Id.*

The Court assumed, without deciding, that a foreign state was a person for purposes of due process but side-stepped the issue by holding that the issuance of bonds sold in the United States and paid in U.S. dollars amounted to sufficient minimum contacts to satisfy the constitutional test.[150] It is the reference to *Katzenbach* which raised the issue by pointing out that States of the Union were not persons for purposes of due process. This not only left the door open to a finding that a foreign sovereign could not be a person for due process purposes, but also it gave subsequent courts a road map for resolving these issues.

THE THREE CASES LEADING TO A DUE PROCESS RESOLUTION

Personal due process hardly created an issue in the context of the 1976 Act, in that most cases were commercial in nature, thus creating either the minimum contacts or direct effect in the United States. In non-commercial cases, until *Letelier* there was a finding of no jurisdiction by the courts, so that due process did not arise.[151] However, in the context of the 1996 FSIA Amendment, due process clearly became an issue for courts and commentators. The reaction was wide and disparate, ranging from supportive[152] to critical[153] to indifferent.[154] However, a series of three cases dealt with the issue.

The first, *Flatow v. Islamic Republic of Iran*,[155] was unchallenged by the defendant but the issue was raised *sua sponte*. In the second case, *Daliberti et al. v. Republic of Iraq*,[156] the defendant Republic of Iraq raised the issue in its Rule 12 motion to dismiss but abandoned its defense upon an unfavorable ruling and failed to appeal. In the third such case, *Price et al. v. Socialist People s Libyan Arab Jamahiriya*,[157] the defendant not only asserted the absence of due process, but appealed when the court denied its motion to dismiss on such grounds. *Price* yielded the only appellate decision.

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150. *Id.* at 619.

151. *Letelier*, 488 F Supp. at 672 n.6.

152. *See* Kevin Todd Shook, *State Sponsors of Terrorism are Persons Too: The Flatow Mistake*, 61 OHIO ST. L.J. 1301 (2000) (describing 1996 Amendment as compatible with due process based on general jurisdiction and the reasonableness prong of the minimum contacts analysis); Lee M. Caplan, *The Constitution and Jurisdiction over Foreign States: The 1996 Amendment to the Foreign Sovereign Immunities Act in Perspective*, 41 VA. J. INT'L L. 369, 420-22 (2001) (asserting that the 1996 amendment withstands constitutional scrutiny because minimum contacts should not control personal jurisdiction over foreign states).

153. Keith Sealing, *State Sponsors of Terrorism is Question, Not an Answer: The Terrorism Amendment to the FSIA Makes Less Sense Now Than it did Before 9/11*, 38 TEX. INT'L L.J. 119, 141 (2003) (criticizing the FSIA and arguing that foreign states are "persons" entitled to due process).

154. *See* Karen Halverson, *Is Foreign State 'Person'? Does it Matter?: Personal Jurisdiction, Due Process and the Foreign Sovereign Immunities Act*, 34 N.Y.U. J. INT'L. L. & POL. 115, 142 (2001) (arguing that jurisdiction over foreign states should be analyzed not on due process grounds but under international law).

155. *Flatow I*, 999 F Supp. 1 (D.D.C. 1998)

156. *Daliberti I*, 97 F Supp. 2d 38 (D.D.C. 2001).

157. *Price II*, 294 F.3d at 85.

Flatow v. Islamic Republic of Iran

Since the 1996 FSIA Amendment, the issue has remained whether the foreign sovereign defendant is a person for purposes of due process, raising the substantial contacts factor. In order for a foreign sovereign to be exempt from traditional immunity under the FSIA, that sovereign must be on the list of terrorist states.[158] Once on that list, diplomatic relations no longer exist with the country, with the exception of Syria, thus limiting or eliminating contacts between that nation and the United States.[159] If a foreign sovereign lacks the presumed substantial contacts, how can that nation be subjected to trial, that which immunity avoids? While two trial courts dealt with the issue more than peripherally, neither utilized a finding that a foreign sovereign could not be a person for purposes of due process as the basis for the court's ruling.[160] Further, it is a less onerous task for the court to raise *sua sponte* the issue of due process in a matter being tried without the presence of the defendant in the courtroom.

In the *Flatow I* case, Iran had never appeared and the matter was tried with no defense whatsoever on its part.[161] The court, quite properly, conducted the trial as if there were a defendant present, raising *sua sponte* those issues which required resolution in order to enter a judgment. The court in *Flatow I* said that the U.S. Supreme Court had only addressed the issue of due process for a foreign sovereign twice, citing to both *Verlindin*[162] and *Weltover*[163] and in those cases only in dicta.[164] *Weltover* the *Flatow I* court noted, particularly avoided the issue by: (1) assuming without deciding that a foreign sovereign was a person for due process; (2) finding minimum contacts sufficient to establish the due process requirement; and (3) contradicting itself through the *Katzenbach* reference.[165]

The *Flatow III* court then found it unnecessary, much like the court in *Weltover* to base its decision on the non-person status of the foreign sovereign, but gave a cogent discussion of the merger of subject matter jurisdiction and personal jurisdiction and the confusion this has caused courts and legal scholars.[166] Particularly, the *Flatow III* court did find a close resemblance between "minimum contacts" and "direct effects" by finding that in fact and in law due process had been afforded to Iran.[167]

It should be noted that while the *Flatow III* court gave a thoughtful and thorough analysis of its many considerations, the argument was all raised *sua*

158. FSIA, 28 U.S.C.A. § 1605(a)(7)(A).

159. Glenn Kessler, *Powell to Detail Concerns to Syria; At Meeting Intended to Ease Tensions, Secretary to Seek Specific Action*, WASHINGTON POST, May 3, 2003, at A14.

160. *Flatow II*, 67 F Supp. 2d 535 (D. Md. 1999); *Flatow III*, 74 F Supp. 2d 18 (D.D.C. 1999).

161. Mona Conway, *Terrorism, the Law and Politics as Usual: A Comparison of Anti-Terrorism Legislation Before and After 9/11*, 18 TOURO L. REV 735, 743 n.46 (2002).

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

163. Republic of Argentina v. Weltover, Inc., 504 U.S. 607 (1992).

164. *Flatow III*, 74 F Supp. 2d at 19-20.

165. *Id.*

166. *Id.*

167. *See id.* at 20-21.

sponte, as Iran filed no pleadings and made no appearance whatsoever in the *Flatow III* case.[168] Its importance is that it is the first post-1996 FSIA amendment case in which personal due process is mentioned.[169]

Daliberti v. Republic of Iraq

The next such case, *Daliberti v. Republic of Iraq*, went one step further in that Iraq, as it had done in two previous FSIA cases, both pre-1996, sought dismissal and vigorously contested the plaintiffs' assertions.[170] Iraq had appeared by counsel and had argued a motion to dismiss in *Hall v. People s Republic of Iraq*[171] and had appealed, without success, the entry of a default in *Dadesho v. Government of Iraq*.[172] However, once its motion to dismiss in *Daliberti I* had been denied, Iraq abandoned the courtroom, rendering the trial for all practical purposes a default hearing.[173]

Iraq sought dismissal on constitutional grounds in the *Daliberti* case, including the denial of equal protection by treating state sponsors of terrorism differently from other nations and by abrogating the minimum contacts requirements essential for personal jurisdiction.[174] It is the latter of these that is germane to the appellate case of first impression and the question that decision raises.[175] Iraq's motion to dismiss specifically alleged that because the behavior of that which Plaintiffs complained occurred outside the United States, and within the Republic of Iraq (as well as in Kuwait for at least one plaintiff), that the defendant did not have fair warning that a particular activity would subject it to the

168. Conway, *supra* note 166, at 743 n.46.

169. *See Flatow III*, 74 F Supp. 2d at 19.

170. 97 F Supp. 2d 38 (D. D.C. 2000).

171. 80 F.3d 558 (D.C. Cir. 1996).

172. 139 F.3d 766 (9th Cir. 1998).

173. Judge Oberdorfer commented at the commencement of the *Daliberti I* trial:

> I have been sensitive to the fact that—to the effect on the trial of there being no defense counsel present. I've been tempted but haven't interjected what would be, in effect, objections to leading questions and to the admission of what—if there were alert defense counsel, they would probably be tested as to whether the evidence or the material was hearsay. I'm toying with an idea. I want to mention it to you now so you may think about it, of having you, maybe you've done it anyway, annotate your findings with reference to the transcript or document that is the item of evidence which would when you look at it as a lawyer you would believe conscientiously to be manifestly admissible. Trial tr., at 273, Daliberti v. Republic of Iraq, 97 F Supp. 2d 38 (D.D.C. 2000). Judge Oberdorfer also engaged trial counsel in a dialogue as if objections were made by an opposing counsel and ruled upon: "Court: Now what would your objection be if you were defense counsel to the admission?" Cooper-Hill: If I were the defense counsel I would object on the basis of hearsay and if I were the Court I would overrule the objection on the basis of business records. Court: You are a lawyer. What would you answer? Cooper-Hill: It's a business record, your Honor, under 803 of the Federal Rules of Evidence. Court: So I ratify the Order receiving it.

Trial tr., at 306, Daliberti v. Republic of Iraq, 97 F Supp. 2d 38 (D.D.C. 2000).

174. *Daliberti I*, 97 F Supp. 2d at 52.

175. *See id.*

jurisdiction of the United States, citing *Burger King*.[176] Iraq further alleged that maintenance of the *Daliberti I* suit would offend traditional notions of fair play and substantial justice, citing *International Shoe*.[177] When the testimony adduced at trial demonstrated that one of the plaintiffs was stripped naked, blindfolded and threatened with electrocution through his testicles if he did not sign a confession of espionage,[178] it is difficult to suggest that Iraq had no warning that such conduct might subject it to the jurisdiction of an American court.

Judge Friedman, in denying Iraq's motion to dismiss, quoted from the Congressional Report[179] on the 1976 enactment of the FSIA which equated the conduct giving rise to subject matter jurisdiction with sufficient contacts. He went on to state:

> In the context of this statute, the purpose for which it was enacted, and the nature of the activity toward which it was enacted, and the nature of the activity toward which it is directed, the Court concludes that it is reasonable that foreign states be held accountable in the courts of the United States for terrorist actions perpetrated against U.S. Citizens anywhere.[180]

Further, in the opinion denying Iraq's motion to dismiss based on due process, the judge in *Daliberti I* first cited to *Flatow, Weltover* and *Katzenbach* but stated: "It would seem that a foreign sovereign should enjoy no greater due process rights than the sovereign States of the Union. As Judge Richey noted: 'If the States of the Union have no due process rights, then a "foreign mission" *qua* "foreign mission" surely can have none.'"[181]

Daliberti I was the first post-1996 FSIA Amendment case in which the defendant sovereign raised the issue of due process; this makes *Daliberti I* the second of the three case evolution on the due process issue. Notwithstanding that the opinion in *Daliberti I*denying Iraq's motion to dismiss was straightforward and did not hesitate to hold Iraq to trial in a United States court, it still is but a trial court opinion. It fell to the U.S. Court of Appeals for the District of Columbia Circuit to make the first appellate ruling as to the lack of due process being afforded a foreign sovereign.

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176. *Id.* at 53 (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985)).

177. *Daliberti I*, 97 F Supp. 2d at 53 (citing *Int'l Shoe*, 326 U.S. at 316).

178. Chad Hall: "He said to get started we'll pull your fingernails out. If that doesn't work we'll cut your knuckles off one at time. Question: Cut your what? Your fingertips off one at a time? Chad Hall: Yes. He said if that doesn't work. .(indicating). Question: What did he say? Chad Hall: He said we'll take an electric cord to you and shock you. Question: Shock you where? Chad Hall: In the gonads. Question: In your testicles, correct? Chad Hall: Yes. *in* Trial tr., at 121-122, Daliberti v. Republic of Iraq, 97 F Supp. 2d 38 (D.D.C. 2000).

179. H.R. REP. NO. 94-1487, at 13-14 (1976) (footnotes omitted), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6612, *quoted in* Thos. P Gonzalez Corp. v. Consejo Nacional de Produccion de Costa Rica, 614 F.2d 1247, 1255 n.5 (9th Cir. 1980).

180. *Daliberti I*, 97 F Supp. 2d at 54.

181. *Id.* at 49 (citing Palestine Information Office v. Shultz, 674 F Supp. 910, 919 (D.D.C. 1987)).

Price v. Socialist People s Libyan Arab Jamahiriya

The *Price I* case became the first post-1996 FSIA Amendment case in which the defendant designated terrorist state not only appeared by filing a motion to dismiss, but also appealed the denial of such motion.[182] After first reciting the *International Shoe* criteria of certain minimum contacts, and in their absence, the protection a person has from the burden of litigating in the forum in which suit has been commenced, the *Price I* court first found that Libya has no contacts, minimum or otherwise, sufficient to satisfy due process requirements.[183]

However, Libya's argument asserted that, as a matter of law, it was a person for purposes of due process.[184] The court acknowledged having previously proceeded as if this were true but had never so held.[185] The U.S. Supreme Court in the *Weltover* case, as noted above, assumed without holding that Argentina was entitled to due process, notwithstanding its cryptic footnote to *Katzenbach,* but did not find due process lacking.[186] The same court which decided *Price* had previously stated that a foreign state being entitled to constitutional due process was an unchallenged assumption in *Creighton Ltd. V Government of Qatar* [187] But in *Price II* the issue of due process, as a means of challenging the personal jurisdiction over Libya, was placed squarely before the court and contested by the plaintiffs.[188]

Noting that prior decisions had danced around the issue both before and after the *Katzenbach* case, the *Price II* court found nothing equivocal about its ruling which could conceivably support Libya's position.[189] The incongruity of holding a State of the Union not a person entitled to due process but providing due process comfort to a foreign state alien to our system of constitutional law was pointed out.[190]

Of all the compelling arguments the court put forth to justify the negative finding regarding a foreign sovereign, the most significant in the context of an FSIA suit brought for acts of terrorism was related to the practical problems arising

182. *Price I,* 110 F Supp. 2d 10 (D. D.C. 2000); *aff'd Price II,* 294 F.3d 82 (D.C. Cir. 2000).

183. *Price I,* 110 F Supp. 2d at 14 (noting that "Libya has no presence in the United States, does not conduct any business in the United States either directly or through an agent, and has no other affiliating contacts with the United States").

184. *Price II,* 294 F.3d at 95.

185. *Id.*

186. *Weltover,* 504 U.S. at 619.

187. 181 F.3d 118, 125 (D.C. Cir. 1999).

188. *Price II,* 294 F.3d at 85.

189. *See id.* at 90. The Court of Appeals in *Price* acknowledged the absence of due process, if applicable, by stating: "Thus, §1605(a)(7) now allows personal jurisdiction to be maintained over defendants in circumstances that do not appear to satisfy the 'minimum contacts' requirement of the Due Process Clause. *Id.* at 90. However, the Court of Appeals further stated that the term 'person' did not include a sovereign, and, unequivocally denied the right of due process to foreign sovereign: "Indeed, we think it would be highly incongruous to afford greater Fifth Amendment rights to foreign nations, who are entirely alien to our constitutional system, than are afforded to the states, who help make up the very fabric of that system. *Id.* at 96.

190. *Price II,* 294 F.3d at 96, 99.

from vesting a foreign state with such constitutional protections as Libya sought.[191] Foremost among these was the power of the executive branch to freeze the assets of foreign nations or to impose sanctions upon them, thus giving rise to the argument that such executive conduct deprived the foreign state of its property without benefit of due process.[192] It should be noted that ultimately the issue of granting U.S. courts jurisdiction over foreign sovereigns coincided inextricably with the right to collect judgments from those frozen assets.

In an earlier draft of an FSIA amendment that never made it to the floor of the senate, the sponsor Arlen Specter (R.-PA) testified that his then pending bill would not only grant a forum but a means to satisfy any judgment awarded.[193] The form of the FSIA under which *Flatow, Daliberti* and *Price* were brought included language instructing the Secretaries of State and Treasury to use their best efforts to "fully, promptly and effectively assist any judgment creditor "[194] The refusal to so do and the relentless resistance to be of any assistance to former hostage judgment creditors resulted in additional litigation in the *Daliberti I* case against those Secretaries in a mandamus action.[195] This internal conflict was resolved by two events involving the frozen assets of Iraq. First, the enactment of the Terrorism Risk Insurance Act of 2002 amended by the addition of the Terrorism Victims Access to Compensation[196] clearly conferred upon judgment creditors that right which had only been hinted at in committee reports and the

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191. *Id.*

192. *Id.*

193. The Senator noted:

> This legislation would amend the Foreign Sovereign Immunities Act by giving Federal courts jurisdiction over any suit brought in this country against any foreign country that has been formally listed by the State Department as supporter of international terrorism, if that foreign state has committed, caused, or supported an act of terrorism against an American citizen. The legislation would also enable the court to freeze all assets of the defendant country located within the United States sufficient to satisfy judgment.

Hearing before the Subcomm. on Courts and Admin. Practice of the Comm. on the Judiciary; for Consideration on S. 825 S. Hrg. 103-1077 June 21, 1994 (statement of Senator Arlen Specter). While approved by the committee, the bill was never brought to the floor of the Senate and thus died at the end of the session in 1994.

194. FSIA, 28 U.S.C.A. § 1610(f)(2)(A). The FSIA sets out:

> At the request of any party in whose favor a judgment has been issued with respect to claim for which the foreign state is not immune under section 1605(a)(7), the Secretary of the Treasury and the Secretary of State should make every effort to fully, promptly and effectively assist any judgment creditor or any court that has issued any such judgment in identifying, locating, and executing against the property of that foreign state or any agency or instrumentality of such state.

FSIA, 28 U.S.C.A. § 1610(f)(2)(A).

195. When the Secretaries of State and Treasury refused to comply with the requirements of 28 U.S.C. 1605(a)(2), the plaintiffs in Daliberti, post-judgment, collectively filed Civil Action 02-CV-1120-(LFO) in the U.S. District Court for the District of Columbia, Daliberti et al v. Colin L. Powell, Secretary of State of the United States and Paul H. O'Neil, Secretary of Treasury of the United States, a Petition for a Writ of Mandamus. The matter was continued on several occasions at the request of the Department of Justice for ten months, at which time plaintiffs received satisfaction of their judgment. The mandamus action was then dismissed.

196. Terrorism Risk Insurance Act of 2002, 15 U.S.C. §§ 6701, 1610, 12 U.S.C. § 248 (2002).

suggestion of help from State and Treasury· access to the frozen assets for purposes of satisfaction of judgments.[197] Even after that statutory enactment, the combined resistance of State and Treasury was only overcome by the Executive Order of the President.[198] That Order confiscated all frozen assets of the Republic of Iraq, over 2 billion in U.S. dollars, except for assets previously located by judgment creditors, accomplished in three cases without the aid of State and Treasury, and subject to levy or writ.[199] Had Iraq been afforded due process, the *Daliberti* plaintiffs and plaintiffs in two other cases could not have been paid. The confiscation of Iraq's frozen assets by Executive Order would in and of itself have been a denial of due process.

The same Court of Appeals earlier had said: "No one would suppose that a foreign national had a due process right to notice and a hearing before the Executive imposed an embargo on it for the purpose of coercing a change in policy."[200]

IS *INTERNATIONAL SHOE* IN DANGER OF LOSING ITS EFFECT?

Judges and lawyers should not construe the *Price II* case to mean the end of *International Shoe*'s requirement of minimum contacts so that the maintenance of a suit does not offend the traditional notions of fair play and justice. The *Price II* court specifically left open the prospect that entities other than a specific government of a foreign sovereign might still be considered persons for purposes of due process.[201] Consistent with this specific reservation by the *Price II* court, the U.S. District Court for the Eastern District of New York in post-judgment proceedings in *Daliberti* allowed bank accounts of the government of Iraq, frozen by Executive Order,[202] to be disbursed forthwith to satisfy the *Daliberti* and *Frazier* judgments, while requiring specific notice, translated into Arabic, and thirty days opportunity within which to come into such court and be heard by subsidiary corporations which were wholly owned by the Republic of Iraq.[203]

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197. *See id.*

198. Exec. Order No. 13,290, 68 Fed. Reg. 14,307 (Mar. 20, 2003).

199. *Id.*

200. *Price II*, 294 F.3d at 99 (citing People's Mojahedin Org. of Iran v. Dep't of State, 182 F.3d 17, 22 (D.C. Cir. 1999)).

201. *Price II*, 294 F.3d at 99-100.

202. Exec. Order No. 12,724, 55 Fed. Reg. 33,089 (Aug. 9, 1990). President Bush's Executive Order No. 12,724 included the agencies, instrumentalities, controlled interests and the Central Bank of Iraq.

203. The District Court in post-judgment proceedings in *Daliberti v. Iraq* and *Frazier v. Iraq* required thirty day notice in Arabic, with the opportunity to be heard, for the Central Bank of Iraq, Bank Rashid and Raffidan Bank, all wholly owned and operated agencies of the Republic of Iraq. Judge Sprizzo's Order for providing notice to the banks which were wholly owned by the Republic of Iraq provided alternative means of notice as follows:

> (a) [B]y delivery by U.S. Global Express Mail, together with the Cover Memorandum. .initiated by the Clerk of the Court and by JPM Chase and Bank of New York. .with proof of delivery to be provided with the procedures established for U.S. Global Express Mail; (b) by delivery by any other mail or courier service. .that will provide either proof or acknowledgment of delivery; (c) by delivery to the Permanent

While not specifically expressing the issue of due process, the Court in those proceedings clearly set forth a procedure of its own design which would undoubtedly have been held to amount to due process for the Iraqi subsidiaries whose assets were subject to levy and execution. The *Price II* court left open the possibility that a subsidiary corporation, such as Rafidain Bank in the *Daliberti* case, might require treatment affording due process.[204]

The *Price II* court finally reiterated the availability of *forum non conveniens* not withstanding the unavailability of due process for foreign sovereigns, thus mitigating the concern that "United States courts will become the courts of choice for local disputes between foreign plaintiffs and foreign sovereign defendants and thus be reduced to international courts of claims."[205]

Given the possible exceptions to the opinion which the court left available in *Price II*, it is unlikely that *International Shoe*, and the rule regarding minimum contacts, will fade away Conversely, if a designated terrorist sovereign mistreats U.S. citizens in a manner which fulfills the criteria of the FSIA that such treatment amounts to having a direct effect in the United States, notwithstanding the fact that the contacts occur outside the United States, minimum contacts should not be an issue. *International Shoe* still has many miles to travel.

Mission of Iraq to the United Nations and to the Iraq Interest Section of the Algerian Embassy to the United States with instructions for transshipment of same to the Iraqi bank; (d) by delivery to any agent appointed for service of process or to any other person designated by the Iraqi Banks to receive notification with respect to any activity in their accounts within or outside the United States in connection with accounts maintained in New York, or identified in agreements entered into with JPM Chase or BNY by any of the Iraqi Banks; (e) by delivery to the branch of Rafidain Bank located in Amman, Jordan; (f) by delivery to the branch of Rafidain Bank located in Amman, Jordan, with instructions for transshipment of same to the Iraqi Banks' head offices in Baghdad, Iraq, as per BNY's arrangement with Rafidain Bank for delivery of periodic account statements to the Central Bank of Iraq, Bank Rafidain or Bank Rashead; and, (g) by electronic delivery (including fax, e-mail and/or telex) to the Iraqi Banks

Judge Sprizo's Order, *In re* Daliberti v. J.P Morgan Chase & Co., *et al.*, Cause No. 2002 CV 9778 in the United States District Court for the Southern District of New York. After service of such notice but before the thirty days had expired, the Executive Order carved out an exception to the President's confiscation of all of Iraq's frozen assets which was applicable only to *Daliberti v. Republic of Iraq*, *Frazier v. Republic of Iraq* and *Dadesho v. Government of Iraq*. Exec. Order No. 13290: Confiscating & Vesting Certain Iraqi Property, March 20, 2003.

204. *Price II*, 294 F.3d at 96 (noting that .with the issue directly before us, we hold that foreign states are not 'persons' protected by the Fifth Amendment").

205. The *Price II* court, after noting the remaining availability of the doctrine of forum *non conveniens*, concluded: "the forum *non conveniens* doctrine helps mitigate the concern that 'United States courts will become the courts of choice for local disputes between foreign plaintiffs and foreign sovereign defendants and thus be reduced to international courts of claims.'" *Id.* at 100 (quoting Proyecfin de Venezuela, S.A. v. Banco Industrial de Venezuela, S.A., 760 F.2d 390, 394 (2d Cir. 1985)).