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THE PAST IS ANOTHER COUNTRY: AGAINST THE RETROACTIVE APPLICABILITY OF THE FOREIGN IMMUNITIES ACT TO PRE-1952 CONDUCT

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I. INTRODUCTION

In late 2000, fifteen Asian women who had been victims of rape, torture and sexual slavery at the hands of Japanese soldiers during World War II, filed a class-action lawsuit against Japan in the United States District Court for the District of Columbia.[1] In their complaint, the plaintiffs, commonly referred to by the media as "comfort women,"[2] stated that they, and approximately 200,000 other women, were victims of sexual slavery and mass rape instituted by the government of Japan for the purpose of servicing the Japanese army.[3] Treated as mere military supplies, the comfort women "were even catalogued on supply lists under the heading of 'ammunition.'"[4] They were now seeking compensation for the inhumane treatment they experienced, and an apology from the Japanese government.[5]

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1. *See* Hwang Geum Joo v. Japan, 172 F. Supp. 2d 52 (D.D.C. 2001) [hereinafter Hwang I] (granting Japan's motion to dismiss). *See generally* Dana R. Gotfredsen, *Seeking Comfort in America: Why an Amendment to the Foreign Sovereign Immunities Act Is the Most Effective Means of Holding Foreign Governments Accountable for Gender-Based Crimes*, 15 EMORY INT'L L. REV. 647 (2001) (providing more details on the comfort women case and arguing in favor of further eroding foreign sovereign immunities in the narrow context of gender-based crimes).

2. The term derives from "comfort stations," facilities seized or built by the Imperial Japanese Army near the front lines to house sex slaves, recruited through "forcible abductions, deception and coercion." *Hwang I*, 172 F. Supp. 2d at 54-55.

3. *Id.* at 55-56.

4. *Id.* at 55.

5. *Id.* at 56. The complaint asserted that "[i]n the decades after the war, . . . Japan largely ignored and denied allegations concerning the 'comfort women' system." *Id.* Although the Japanese government officially acknowledged the existence of comfort stations in 1992, it had not, by the time of filing the suit, "taken full responsibility for its actions, and has not paid

On October 4, 2001, the district court dismissed the case.[6] The dismissal was affirmed by a panel of the United States Court of Appeals for the District of Columbia Circuit in June 2003.[7]

In its opinion, the circuit court wrote that "as [m]uch as we may feel for the plight of the appellants, the courts of the United States simply are not authorized to hear their case."[8] The court held that the Foreign Sovereign Immunities Act ("FSIA") effectively barred an American court's jurisdiction over the action.[9] Yet, contrary to the court's assertion, the matter is far from simple.[10]

The several enumerated exceptions to foreign sovereign immunity,[11] which do allow the courts to hear actions against foreign governments, have been subject to creative definitional interpretation and considerable judicial inconsistency if not confusion.[12] What might be termed the judicial impulse toward plaintiff-oriented equity has played a larger role in other circuit courts' adjudication of similar claims.[13]

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reparations to the 'comfort women.'" *Id.*

6. *Id. at 67.*

7. *See* Hwang Geum Joo v. Japan, 332 F.3d 679, 687 (D.C. Cir. 2003) [hereinafter Hwang II] (holding that the commercial activity exception to the Foreign Sovereign Immunities Act was not retroactively applicable and that Japan's alleged violations of *jus cogens* norm did not constitute implied waiver of immunity under FSIA), *vacated and remanded by* 124 S. Ct. 2835 (2004).

8. *Id.* at 687.

9. The court emphasized the narrowness of its holding in its conclusion. *Id.*

10. A conviction that the issue has become, perhaps unavoidably, far from simple permeates this entire Comment, and is discussed at length in sections below.

11. *See infra* notes 30-33 and accompanying text.

12. To cite but one example, the Ninth Circuit recently held that application of the FSIA to facts arising from World War II was not impermissibly retroactive, a conclusion directly opposite to the one reached in *Hwang II*. *See* Altmann v. Republic of Austria, 317 F.3d 954, 967 (9th Cir. 2002) [hereinafter Altmann II] (affirming the district court's denial of the defendant's motion to dismiss), *aff'd*, 124 S. Ct. 2240 (2004). Although all appellate courts base their analysis on the same Supreme Court precedents, they gloss over any inconsistencies in their holdings. *See infra* notes 34-48 and accompanying text for a discussion of these precedents. *See also Hwang II*, 332 F.3d at 684 (stating in passing that "[t]he decisions of the Ninth Circuit are, of course, not binding on this court").

13. *See Altmann II*, 317 F.3d at 964-67 (noting the views that other courts have used regarding similar matters). *But cf.* Garb v. Republic of Poland, 72 Fed. Appx. 850, 853 (2d Cir. Aug. 6, 2003) [hereinafter Garb II] (vacating the district court's dismissal in an unpublished summary order). The district court's decision itself was based on the notion that the Act could not be applied retroactively to a claim arising from pre-1952 conduct. *Id.* at 853-54. *See generally* Garb v. Republic of Poland, 207 F. Supp. 2d 16 (E.D.N.Y. 2002) [hereinafter Garb I] (granting a motion to dismiss and holding that FSIA is not retroactively applicable to the extent it overrules prior law, and that defendant's conduct was not in connection to commercial activity within the

The issue of the retroactive applicability of the FSIA is clearly controversial in this age of importing global human rights litigation to the American civil justice system.[14] The controversy has in fact recently caught the attention of the United States Supreme Court, which has agreed to address it in its October 2003 term.[15]

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meaning of the exception to sovereign immunity).

14. The recent increase, if not explosion, in such litigation is largely attributable to the application of the long-forgotten 1789 Alien Torts Claims Act ("ATCA"), which declares that federal 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." 28 U.S.C. § 1350 (2000). *See, e.g.*, Filartiga v. Pena-Irala, 630 F.2d 876, 877-79 (2d Cir. 1980) (applying ATCA to find jurisdiction in an action by Paraguayan nationals seeking asylum in the United States against a Paraguayan national who was in the United States on a visitor's visa for alleged acts of torture and murder). The ATCA is naturally distinct from the FSIA, and only the latter provides jurisdiction against foreign sovereign governments. There exists, of course, a vast body of legal scholarship on the general subject matter of enforcing international law in American domestic courts. *See generally, e.g.*, Judge Edward D. Re, *The Universal Declaration of Human Rights: Effective Remedies and the Domestic Courts*, 33 CAL. W. INT'L L.J. 137 (2003) (commemorating the fiftieth anniversary of the Universal Declaration of Human Rights and assessing progress made in achieving fundamental principles of human rights and freedoms, and focusing on the role of domestic courts in enforcements of these fundamental human rights as legal rights). There are, however, recent signs of a judicial backlash against an expansive application of the ATCA, especially when the complainants attempt to stretch the concept of legal rights beyond the cognizable limits. *See, e.g.*, Flores v. S. Peru Copper Corp., 343 F.3d 140, 160 (2d Cir. 2003) (affirming the dismissal of the plaintiffs' action, which alleged that pollution from the mining company's Peruvian operations caused severe lung disease, for lack of jurisdiction and failure to state claim, and holding "rights to health and life" are insufficiently definite to be binding rules of customary international law required under ATCA).

15. With the present issue already in production, the Supreme Court decision in *Republic of Austria v. Altmann*, due by late June, was indeed handed down on June 7, 2004. *See* Altmann, 124 S. Ct. 2240 (2004). In the majority opinion signed by Justice Stevens, the Court affirmed the Ninth Circuit, and held that the FSIA applied to preenactment conduct and even to conduct that occurred prior to the United States' adoption of the restrictive theory of sovereign immunity in 1952. *Id.* To reach its conclusion, the majority (with Justices Scalia and Breyer and Souter concurring in separate opinions) had to find that *Landgraf's* strong admonition against retroactivity simply did not apply to the FSIA. *Id.* at 2249. In a strong dissent, joined by the Chief Justice and Justice Thomas, Justice Kennedy noted that the Court's decision will "weaken the reasoning and diminish the force of the rule against the retroactivity of statutes, a rule of fairness based on respect for expectations." *Id.* at 2263. He observed that the Court's suggestion that "the Executive Branch has inherent power to intervene in cases like this . . . reintroduces, to an even greater degree than before, the same influences the FSIA sought to eliminate from sovereign immunity determinations." *Id.* (Kennedy, J., dissenting). He concluded with the statement that "the ultimate effect of the Court's inviting foreign nations to pressure the Executive is to

In anticipation of the Supreme Court decision, this Comment aims to analyze the recent FSIA appellate jurisprudence, and, relying on the Supreme Court's own recent retroactivity case law, argue against extending the FSIA's reach to World War II-related actions.[16] Part II will present a brief historical overview of foreign sovereign immunity in federal courts, focusing on the transition from an absolute to a restrictive theory of immunity. It will introduce the two dates critical in discussing the retroactive applicability of the FSIA: 1952 and 1976. Additionally, it will present the Act's chief purposes and provisions.

Part III will discuss several recent appellate decisions concerning World War II-related claims, and the courts' analysis of, and increasing willingness to permit, the retroactive applicability of the Act. Against the backdrop of the recent Supreme Court retroactive legislation jurisprudence, the discussion will then trace the judicial reasoning in expanding the retroactive application of the FSIA. Part III will also critique the judicial tendency to widen the scope of the immunity exceptions on two grounds: first, as undermining the legislative intent behind the FSIA, and second, as potentially encroaching on the executive and legislative branches of the government.

Finally, Part IV will propose reversing the trend to legitimize the retroactive applicability of the FSIA. Recognizing the genuine

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risk inconsistent results for private citizens who sue, based on changes and nuances in foreign affairs, and to add prospective instability to the most sensitive area of foreign relations." *Id.* (Kennedy, J., dissenting). Justice Kennedy's view that the majority opinion represents "the illogic of [the Court's] own creation" assures this Comment's continued relevance beyond the Court's present holding, as the analysis contained in the following pages remains fundamentally unchanged. *See id.* at 2275 (Kennedy, J., dissenting). The question of the FSIA's retroactive applicability is bound to remain as important as it is complicated, made additionally so by the Court's ruling.

16. The argument against applying the FSIA retroactively has been made before. *See generally* Adam K.A. Mortara, *The Case Against Retroactive Application of the Foreign Sovereign Immunities Act of 1976*, 68 U. CHI. L. REV. 253 (2001) (arguing that courts should not apply FSIA retroactively to commercial transactions occurring before 1952). Although this Comment is in line with Mortara's fundamental argument, our respective emphases differ considerably. Mortara focuses primarily on strictly commercial transactions (such as bond issuance) occurring before 1952, whereas this Comment discusses specifically World War II-related tort claims, most of them postdating the Mortara article, and which can be hardly categorized as commercial in nature. *See Garb I*, 207 F. Supp. 2d at 30-31 (reasoning that the FSIA commercial activity exception is "intended to cover a foreign state's activities as a private player in the marketplace, not to expose a foreign state to liability for its sovereign activities"). Equally important is the discussion of the post-*Landgraf* Supreme Court retroactivity jurisprudence, largely absent in Mortara's analysis. That said, this Comment certainly can, and perhaps should, be construed as bringing the extant FSIA retroactivity discourse to date.

and legitimate grievances brought by plaintiffs in these actions, this Comment will conclude by suggesting that these grievances be addressed by means other than civil litigation.

II. FOREIGN SOVEREIGN IMMUNITY IN CONTEXT

A. *Foreign Sovereign Immunity in Federal Courts: A Historical Overview*

The doctrine of foreign sovereign immunity has been an integral part of American law since at least the early nineteenth century.[17] In 1812, Chief Justice John Marshall wrote that while the jurisdiction of a nation within its own territory "is susceptible of no limitation not imposed by itself," the United States had impliedly waived jurisdiction over activities of foreign sovereigns.[18] Originally, the immunity from suit in the American courts granted to foreign sovereigns was virtually absolute.[19] The courts usually made their jurisdictional decisions by deferring to the will of the executive branch, which in turn ordinarily requested immunity in all actions against friendly foreign sovereigns.[20]

As sovereigns began increasingly engaging in commercial

17. *See generally* The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116 (1812) (holding no jurisdiction existed over an armed vessel in the service of Napoleon, but physically present within the United States territory). In that seminal case, Chief Justice John Marshall dismissed American citizens' claim of ownership over a French vessel on the grounds of sovereign immunity, explaining that the "perfect equality and absolute independence" of sovereign nations required U.S. courts to refrain from exercising jurisdiction over claims against foreign states. *Id.* at 137.

18. *Id.* at 136. Given the "absolute independence" of sovereign nations, a sovereign could be supposed to enter a foreign territory only "in the confidence that [its sovereign immunities] are reserved by implication, and will be extended to him." *Id.* at 137. Espousing this so-called "implied license" theory allowed Chief Justice Marshall to conclude that there was no jurisdiction over the vessel. *Id.* at 147. Although the narrow holding in the case was only that United States courts lacked jurisdiction over an armed ship of a foreign state found in an American port, the opinion came to stand for the absolute doctrine of foreign sovereign immunity. *See Garb I*, 207 F. Supp. 2d at 21 (observing that the doctrine "originated in an era of personal sovereignty, when the assertion of jurisdiction by one sovereign over another" constituted "an affront to the latter's dignity and independence").

19. The doctrine arose and took shape, significantly, not on constitutional or statutory grounds but rather as a matter of inter-governmental grace and comity. *See* Berizzi Bros. Co. v. S.S. Pesaro, 271 U.S. 562, 575 (1926) (refusing to exercise jurisdiction over foreign sovereign property "within its territory, and, therefore, but for the common agreement, subject to its jurisdiction").

20. In 1943, the Supreme Court expressly endorsed deference to "suggestions of immunity" from the executive branch. *See* Ex parte Republic of Peru, 318 U.S. 578, 586 (1943) (noting that claims against "a friendly sovereign state [are] normally presented and settled in the course of the conduct of foreign affairs by the President and by the Department of State").

activities, the international law concept of sovereign immunity evolved. Over time, an international consensus emerged that when a sovereign state enters the marketplace and acts as a private party, there is no justification for allowing it to avoid the economic cost of breached agreements and accidents. This theory, known as the "restrictive" theory of immunity, draws a distinction between causes arising out of a foreign state's governmental activities (public acts or *jure imperii*) and its commercial or proprietary acts (private acts or *jure gestionis*).[21] In 1952, the restrictive theory of foreign sovereign immunity officially replaced the old absolute doctrine in the United States.[22]

After 1952, the State Department continued to decide most foreign sovereign immunity claims. Absent a foreign government's request for the executive intervention, however, the courts took it upon themselves to resolve the immunity question.[23] Not surprisingly, the resulting rules were neither clear nor uniform.[24]

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21. For more details on the international law developments leading to the 1952 adoption of the restrictive theory, see William R. Dorsey, III, *Reflections on the Foreign Sovereign Immunities Act After Twenty Years*, 28 J. MAR. L. & COM. 257, 258-59 (1997) (discussing the background and purpose of FSIA as well as its amendments and judicial interpretations).

22. The change was effectuated by the State Department's issuance of the Tate Letter. *See* Letter from Jack B. Tate, Acting Legal Adviser, Department of State, to Philip B. Perlman, Acting Attorney General of the United States (May 19, 1952) [hereinafter Tate Letter] (quoted in full in Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 711-15 (1976)). The letter expressed the State Department's conclusion that "immunity should no longer be granted in certain types of cases." *Dunhill*, 425 U.S. at 711. The Department found it "evident that with the possible exception of the United Kingdom little support has been found except on the part of the Soviet Union and its satellites for continued full acceptance of the absolute theory of sovereign immunity." *Id.* at 714. The letter therefore declared that the State Department's recommendation to the courts would be henceforth governed by the restrictive theory. *Id.* Over time, courts came to use the Tate Letter standard as a default rule to be applied in cases where the State Department remained silent. *See* Heany v. Gov't of Spain, 445 F.2d 501, 503 (2d Cir. 1971) (dismissing a contract claim against Spain based on Tate Letter standards, and noting that courts have "deferred to the policy pronouncements of the State Department" to avoid the "possible embarrassment to those responsible for the conduct of the nation's foreign relations").

23. As sovereign immunity determinations were made in two separate branches of the government, they were subject to a variety of frequently conflicting factors, including diplomatic considerations and pressures. *See* Verlinden B. V. v. Cent. Bank of Nig., 461 U.S. 480, 486-88 (1983) (discussing the history behind the FSIA).

24. *See* Danny Abir, *Foreign Sovereign Immunities Act: The Right to a Jury Trial in Suits Against Foreign Government-Owned Corporations*, 32 STAN. J. INT'L L. 159, 165 (1996) (discussing practical difficulties in applying restrictive theory before 1976); Michael A. Tessitore, *Immunity and the Foreign Sovereign: An Introduction to the Foreign Sovereign Immunities Act*, 73 FLA. B.J. 48, 48-49 (Nov. 1999) (noting that the courts found application of the restrictive theory difficult, finding establishing standards for differentiating

To redress the situation, Congress enacted the FSIA in 1976.[25] Intended to "free the Government from the case-by-case diplomatic pressures" and to clarify the governing standards, the Act purported to guarantee litigants that "decisions are made on purely legal grounds and under procedures that insure due process."[26] The law was designed to codify the restrictive theory of sovereign immunity and to insulate the subject from diplomatic pressures by "transferring such decisions to the judiciary."[27] To accomplish these goals, the FSIA "contains a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies or instrumentalities."[28]

Since its enactment, the FSIA has provided the sole basis for obtaining jurisdiction over a foreign state and its agencies and instrumentalities in a United States court.[29] The FSIA retains the initial presumption of foreign sovereign immunity in American courts. Under the FSIA, a foreign state is presumptively immune from federal courts' jurisdiction unless that state's conduct gives rise to a claim that falls within a set of exceptions codified in 28 U.S.C. §§ 1605 and 1607.[30] In other words, if the claim does not fall within one of the exceptions, federal courts lack both subject matter and personal jurisdiction over the foreign sovereign defendant, and the claim must be dismissed.[31]

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between public and private especially tricky).

25. 28 U.S.C. §§ 1602-1611 (1989).

26. *Verlinden*, 461 U.S. at 488 (quoting H.R. REP. NO. 94-1487, at 7 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604).

27. Abrams v. Societe Nationale Des Chemins De Fer Francais, 332 F.3d 173, 178 (2d Cir. 2003) [hereinafter Abrams II]. In *Abrams II*, the Second Circuit held that the record was insufficient to assess whether application of FSIA would have an impermissible retroactive effect of effectively extinguishing the plaintiffs' causes of action. *Id.* at 188.

28. *Verlinden*, 461 U.S. at 488.

29. *See* Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434 (1989) (dismissing an action by Liberian corporations against the Argentine Republic under the alien tort statute for lack of jurisdiction, and holding that only FSIA can provide jurisdiction over a foreign state).

30. These exceptions include actions in which the foreign state has explicitly or impliedly waived its immunity, actions based on commercial activities of the foreign sovereign carried on in the United States or causing a direct effect in the United States, actions in which rights in property taken in violation of international law are in issue, actions involving rights in real estate and in inherited and gift property located in the United States, actions for certain noncommercial torts within the United States, and certain actions involving maritime liens and certain counterclaims. 28 U.S.C. §§ 1605(a)(1)-(5), 1605(b), 1607 (2000).

31. Under § 1330(a), federal district courts are provided subject matter jurisdiction if a foreign state is not entitled to immunity. Personal jurisdiction extends under § 1330(b) wherever subject matter jurisdiction exists under subsection (a) and service of process has been made under § 1608. *Verlinden*, 461 U.S. at 485 n.5.

The Act contains no express provision regarding its retroactivity. There is, however, language indicating prospectivity. The Act directs that "[c]laims of foreign states to immunity should *henceforth* be decided by courts of the United States . . . in conformity with the principles set forth in this chapter."[32]

B. Recent Supreme Court Retroactivity Jurisprudence: Landgraf and Its Progeny

In 1994, the Supreme Court addressed the issue of statutory retroactivity head on.[33] In *Landgraf v. USI Film Products*, the Court reiterated the time-honored presumption against retroactivity.[34] Invoking "[e]lementary considerations of fairness," the Court reaffirmed the view that parties "should have an opportunity to know what the law is and to conform their conduct accordingly;[35] settled expectations should not be lightly disrupted."[36]

Recognizing that retroactivity provisions may serve "entirely benign and legitimate purposes,"[37] however, the Court repeated the requirement that "Congress first make its intention clear" as to an act's retroactivity.[38]

In the absence of clear intention, under the Court's analysis, a

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32. 28 U.S.C. § 1602 (emphasis added).

33. *See* Landgraf v. USI Film Prods., 511 U.S. 244, 285-86 (1994) (affirming judgment for the defendants in a Title VII action alleging sexual harassment and retaliation, and holding that provisions of the Civil Rights Act of 1991 creating right to recover compensatory and punitive damages for certain violations of Title VII, and providing for trial by jury if such damages are claimed, do not apply to a Title VII case pending on appeal when the statute was enacted).

34. *Id.* at 264. The Court recalled "the axiom that 'retroactivity is not favored in the law,' and its interpretive corollary that 'congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.'" *Id. See also* DANIEL E. TROY, RETROACTIVE LEGISLATION (1998) (presenting moral and economic arguments against retroactive legislation, arguing that the principle that the rules not be changed in the middle of the game is essential to the rule of law, and calling for political and procedural mechanisms to protect settled, investment-backed expectations in a purely domestic context).

35. *Landgraf*, 511 U.S. at 265.

36. *Id.*

37. *Id.* at 267-68. Such "benign" and "legitimate" purposes may consist of "whether to respond to emergencies, to correct mistakes, to prevent circumvention of a new statute in the interval immediately preceding its passage, or simply to give comprehensive effect to a new law Congress considers salutary." *Id.* at 268.

38. *Id.* The Court reasoned that "a requirement that Congress first make its intention clear helps ensure that Congress itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness." *Id.*

district court "must determine whether the new statute would have retroactive effect."[39] That, in turn, involves considering "whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed."[40] If a statute is found to operate retroactively, the traditional presumption holds "that it does not govern absent clear congressional intent favoring such a result."[41]

The Court further clarified the issue three years later in *Hughes Aircraft Company v. United States*.[42] Whereas *Landgraf* tacitly allowed for an exception to the anti-retroactivity presumption for "jurisdictional" statutes,[43] in *Hughes* the Court refined its analysis. The reason for the jurisdictional statute exception was the fact that a new jurisdictional rule "takes away no substantive right but simply changes the tribunal that is to hear the case."[44] Jurisdictional statutes, therefore, "speak to the power of the court rather than to the rights or obligations of the parties."[45] The statute in question in *Hughes*, although at first glance merely jurisdictional, in fact "create[d] jurisdiction where none previously existed," thus affecting the substantive rights of the concerned parties.[46] Therefore, despite its jurisdictional garb, the statute was "as much subject to [the Court's] presumption against retroactivity as any other."[47]

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39. *Id.* at 280. This is what is known as the two-step *Landgraf* test. The first step is "to determine whether Congress has expressly prescribed the statute's proper reach." *Id.* More often than not, of course, the analysis must involve the second step. *See infra* note 41.

40. *Landgraf*, 511 U.S. at 280. This is step two of the *Landgraf* analysis.

41. *Id.*

42. *See* Hughes Aircraft Co. v. United States *ex. rel.* Schumer, 520 U.S. 939, 950-51 (1997) (holding that amendment to jurisdictional provision of False Claims Act permitting *qui tam* suits based on information in government's possession did not apply retroactively to conduct occurring before its effective date).

43. *See Landgraf*, 511 U.S. at 274-75 (stating that the Court has "regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed").

44. *Id.* at 274 (quoting Hallowell v. Commons, 239 U.S. 506, 508-09 (1916)).

45. *Id.* The Court noted in a footnote that "[t]his jurisdictional rule does not affect the general principle that a statute is not to be given retroactive effect unless such construction is required by explicit language or by necessary implication." *Id.* at 274 n.27.

46. *Hughes*, 520 U.S. at 951. The Court also noted that "in permitting actions by an expanded universe of plaintiffs with different incentives, the 1986 amendment essentially creates a new cause of action, not just an increased likelihood that an existing cause of action will be pursued." *Id.* at 950.

47. *Id.* at 951.

III. JUDICIAL EXPANSION OF FSIA'S RETROACTIVE APPLICABILITY

Several circuit court decisions have recently addressed the FSIA's applicability to claims arising from World War II-era foreign sovereign conduct.[48] In all but one of these cases,[49] it was the plaintiffs who argued for the FSIA to apply retroactively to their claims, thus circumventing foreign sovereign immunity's jurisdictional bar and allowing the federal courts to rule on their cases' merits. There are significant inconsistencies[50] among those circuit courts that have addressed the issue of the FSIA's retroactive applicability, as well as some analytical confusion, which perhaps accounts for the inconsistencies. This Part will discuss these decisions, analyze the courts' reasoning, and critique the diverse outcomes as imposing undue burdens on foreign-state defendants and victim-plaintiffs alike. An argument that the uncertainty and instability generated by these inconsistent rulings are ultimately incompatible with the original purposes of the FSIA will follow.

A. Haven v. Poland: The Opening of Pandora's Box

Perhaps ironically, the first post-*Landgraf* holding that the FSIA could be applied retroactively to pre-1952 claims occurred in a case shortly thereafter dismissed for lack of subject matter jurisdiction.[51] In *Haven v. Rzeczpospolita Polska*, the Illinois district court noted that the question before it was not the usual

48. These circuits are: the Ninth in *Altmann II*, 317 F.3d at 967; the Second in *Abrams II*, 332 F.3d at 187 and *Garb II*, 72 Fed. Appx. at 854-55; and the District of Columbia in *Hwang II*, 332 F.3d at 686.

49. The one exception was *Abrams II*, 332 F.3d at 187, discussed at greater length at *infra* notes 95-110 and accompanying text.

50. Thus, the Ninth and Second Circuits currently allow for either actual or potential retroactive application of the FSIA to pre-1952 claims, while the District of Columbia Circuit rules it out. *See Altmann II*, 317 F.3d at 967, *Garb II*, 72 Fed. Appx. at 854-55. *But cf. Hwang II*, 332 F.3d at 686 (holding the FSIA's grant of jurisdiction over commercial activities not retroactively applicable).

51. *See* Haven v. Rzeczpospolita Polska (Republic of Poland), 68 F. Supp. 2d 943 (N.D. Ill. 1999) [hereinafter Haven I] (holding FSIA could be applied retroactively to claims arising before 1952). For the subsequent dismissal, see Haven v. Rzeczpospolita Polska, 68 F. Supp. 2d 947 (N.D. Ill. 1999) [hereinafter Haven II] (granting Poland's motion to dismiss and holding that Poland's entry into a 1960 treaty with the United States regarding expropriation claims by United States nationals did not waive Poland's immunity as to other types of claimants, that the plaintiffs did not establish waiver of immunity by treaty or consular employees, and that the commercial exception under FSIA was inapplicable). Although not a circuit court decision, the *Haven* holding is significant in that its post-*Landgraf* analysis provides a blueprint of sorts for subsequent circuit opinions throughout the country, though, interestingly, not in the Seventh Circuit.

one of whether a statute does or does not apply to acts preceding its enactment date, but "rather *how far back* the retroactivity stretches."[52] Ostensibly following the *Landgraf* analysis,[53] the *Haven* court in fact established the full retroactivity of the FSIA, well beyond 1952. Thus, the Court effectively ignored the well-established Second and Eleventh Circuit pre-*Landgraf* precedents.[54]

Contrary to these precedents, the *Haven* court deemed the FSIA a solely jurisdictional statute.[55] Framing the issue as a battle of (three) circuits,[56] the court sided against the pre-*Landgraf* tandem and with the D.C. Circuit, relying on its 1999 opinion in *Creighton Ltd. v. Government of the State of Qatar*[57] to find the FSIA merely jurisdictional.[58] The court admitted that the question "how far back the conduct susceptible to relief should go"[59] was "close,"[60] yet found the "District of Columbia view[61]... more

52. *Haven I*, 68 F. Supp. 2d at 945 n.4 (emphasis added). In *Haven I*, the former owners of property in Poland and the representatives of deceased landowners' estates brought action against the Republic of Poland and its agencies or instrumentalities for wrongful seizure and expropriation of real property during and shortly after World War II. *Id.* at 944.

53. *Id.* at 945-46.

54. These were, respectively, *Carl Marks & Co. v. Union of Soviet Socialist Republics*, 841 F.2d 26 (2d Cir. 1988) (per curiam), and *Jackson v. People's Republic of China*, 794 F.2d 1490 (11th Cir. 1986). In *Carl Marks*, the court dismissed an action against the Soviet Union to recover on debt instruments issued by the Russian Imperial Government in 1916, stating, inter alia:

> Such a retroactive application of the FSIA would affect adversely the USSR's settled expectation, rising "to the level of an antecedent right," of immunity from suit in American courts .... We believe, as did the district court, that "only after 1952 was it reasonable for a foreign sovereign to anticipate being sued in the United States courts on commercial transactions."

Carl Marks, 841 F.2d at 27. There is some uncertainty as to whether *Carl Marks* is still good law in the Second Circuit. *See* Abrams v. Societe Nationale Des Chemins De Fer Francais, 175 F. Supp. 2d 423, 434 (E.D.N.Y. 2001) [hereinafter Abrams I] (commenting that "*Carl Marks* may no longer be good law, or may at least be limited in its application" after *Landgraf*), *vacated by* 332 F.3d 173 (2003). The effect of the vacation order on the *Carl Marks* dictum is unclear.

55. *Haven I*, 68 F.Supp. 2d at 946.

56. The three embattled circuits were the Second and Eleventh, with their anti-retroactive applicability precedents, and the District of Columbia, with its decision in *Creighton Ltd. v. Gov't of the State of Qatar*.

57. 181 F.3d 118 (D.C. Cir. 1999). In *Creighton*, the circuit court affirmed the dismissal of an action brought by a foreign contractor with domestic offices to enforce an arbitration award obtained in a foreign tribunal against the government of Qatar. *Id.* at 128.

58. In its fondness for the *Creighton* reasoning, the *Haven* court went as far as to proclaim that the court's analysis in *Creighton* "could equally well have been written" for the case before it. *Haven I*, 68 F. Supp. 2d at 946.

59. *Id.*

60. *Id.*

persuasive."[62] It found this view articulated in *Creighton* and another post-*Landgraf* case, *Princz v. Federal Republic of Germany*.[63] Yet *Creighton*, contrary to the *Haven* court's characterization, did not involve a pre-1952 claim at all,[64] and *Princz* explicitly refused to decide whether the FSIA applies to pre-1952 events.[65] Moreover, although the *Haven* court characterized the *Princz* majority as "postulating"[66] that such application "would just remove the bar of sovereign immunity" in the plaintiff's action, the language in the *Princz* opinion was actually qualified by the additional proposition that it merely "might be argued" so.[67]

All in all, then, the authority for the *Haven* court's holding appears rather thin. An additional level of irony is provided by the fact that the same court, having allowed the general FSIA applicability to pre-1952 claims, dismissed the plaintiff's claim a little over a month later.[68] The case's history[69] leads one to conclude that the *Haven* analysis had a larger playing field in view, and was directed as much at future pre-1952 claims as it was at the parties directly before the court. If so, the strategy certainly proved effective, as the *Haven* holding soon became a fixed feature of any FSIA retroactive applicability analysis.[70]

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61. *Id.*

62. *Id.*

63. 26 F.3d 1166 (D.C. Cir. 1994). In *Princz*, the District of Columbia Circuit Court dismissed the case against the Federal Republic of Germany, brought by an American citizen who survived the Holocaust, for injuries he suffered and slave labor he performed while a prisoner in the Nazi concentration camps. *Id.* at 1168-69. After the district court denied Germany's motion to dismiss, the split panel held that, even assuming that the FSIA applied retroactively to events occurring between 1942 and 1945, no exception to the general grant of sovereign immunity in that statute applied. *Id.* at 1175. Barely postdating *Landgraf*, *Princz* was decided only a little over two months after the Supreme Court's opinion. *See Landgraf*, 511 U.S. at 244 (decided Apr. 1, 1994); *Princz*, 26 F.3d at 1166 (decided July 1, 1994).

64. The dispute in *Creighton* arose from the late 1970s. *See Creighton*, 181 F.3d at 120 (stating that "[i]n the late 1970s the Government of Qatar decided to build a new hospital in Doha"). In fact, *Creighton* did not even involve the FSIA as such, but rather was only decided on the effect of a 1988 amendment concerning the arbitration agreements. *Id.* at 121.

65. *See Princz*, 26 F.3d at 1171 (commenting that the court did not "have to decide whether the FSIA applies to pre-1952 events, however, in order to resolve this case").

66. *Haven I*, 68 F. Supp. 2d at 946.

67. *Princz*, 26 F.3d at 1171.

68. *Haven II*, 68 F. Supp. 2d at 947.

69. The dismissal (*Haven II*) was affirmed by the Seventh Circuit in *Haven v. Rzeczpospolita Polska*, 215 F.3d 727, 736-37 (7th Cir. 2000) [hereinafter Haven III].

70. In fact, the *Haven* holding is said to embody, alongside *Princz* and *Creighton*, "the modern trend" in favor of applying the FSIA to "pre-enactment activities." Appellee's Opposition Brief on Expedited Appeal at 16, Altmann v. Republic of Austria, 142 F. Supp. 2d 1187 (C.D. Cal. 2001) (No. 00-8913).

B. Altmann v. Austria: *FSIA's "Not Impermissibly Retroactive" Application*

In *Altmann v. Republic of Austria*,[71] a case recently reviewed by the Supreme Court,[72] the Ninth Circuit affirmed the lower court's holding that the FSIA applied to a taking claim arising from the Nazis' confiscation of artworks in 1938.[73] In a rather convoluted opinion, the Ninth Circuit held that the "application of the FSIA to the pre-1952 actions of the Republic of Austria is not impermissibly retroactive."[74] Adopting the reasoning of the dissenting judge in *Princz*, the court concluded that "the application of the FSIA [to this case] infringes on no right held at the time the acts at issue occurred, and thus the FSIA is not impermissibly applied to Austria in this case."[75] Even if Austria did not anticipate being sued[76] in a foreign court before 1952, such expectation would be clearly unreasonable and thus due no judicial consideration.[77]

As the Supreme Court explained in *Verlinden*, "[u]ntil 1952, the State Department ordinarily requested immunity in all actions against friendly foreign sovereigns."[78] The Ninth Circuit zeroed in on the word "friendly"[79] and reasoned that, as Nazi-occupied Austria was clearly not a "friendly" state in the context of World War II, it was entitled to no judicial deference,[80] the absolute doctrine of immunity to the contrary notwithstanding.

When stripped of its double negatives, the court's holding, by declaring the FSIA application permissibly retroactive, further confounds the FSIA retroactive applicability discussion, as it injects into it an additional layer of analysis. According to the Ninth Circuit's logic, the "application" of the FSIA can be either permissibly or impermissibly retroactive. Note the conclusory shift from "applicability" to "application."[81] By finding the

71. *Altmann II*, 317 F.3d at 954.

72. *See supra* note 15 (commenting on and providing background for the Supreme Court's decision to review the Ninth Circuit's opinion).

73. *See* Altmann v. Republic of Austria, 142 F. Supp. 2d 1187, at 1206-09 (C.D. Cal. 2001) [hereinafter Altmann I] (denying defendant's motion to dismiss and holding that the FSIA applied to events prior to 1952).

74. *Altmann II*, 317 F.3d at 967.

75. *Id.* at 966.

76. *Id.* at 967.

77. *Id.*

78. *Verlinden*, 461 U.S. at 486.

79. When the Ninth Circuit cited the *Verlinden* statement, it added emphasis on the word "friendly," thus unmistakably implying that only friendly foreign states could legitimately expect immunity from suits in American courts. *Altmann II*, 317 F.3d at 964.

80. *Id.*

81. Although the *Altmann* court labeled the pertinent part of its analysis "The Applicability of the FSIA," throughout its discussion it referred solely to the FSIA's "application" to the case before it. *Id.* at 961-67.

application of the FSIA to the case before it "not impermissibly retroactive,"[82] the court subtly shifted the emphasis from the general and *legal* consideration of the statute's applicability to pre-1952 claims to the specific and *factual* analysis of each claim.[83] Given the right set of facts, it may be permissible to retroactively apply the FSIA to pre-1952 claims.[84] According to the Ninth Circuit, then, a case-by-case factual evaluation by the courts is now required in FSIA retroactivity analysis.[85]

C. The Garb *and* Abrams *Cases: The Second Circuit Folds in on Itself*

In *Garb v. Republic of Poland*,[86] the New York district court refused to follow *Haven*[87] and *Altmann*.[88] The court reiterated the fact that "foreign states continued to enjoy virtually absolute immunity from suit"[89] in the Unites States before 1952, and stated that "the FSIA effected a change in the law of foreign sovereign immunity."[90] Reasoning that, under the Supreme Court teaching, sovereign immunity is an issue of substantive, and not merely jurisdictional law,[91] the court found that "the FSIA should not be applied retroactively to the extent that it adversely affects a foreign state's settled expectation of immunity from suit."[92]

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82. *Id.* at 967.

83. *Id.* at 964. In determining what rights Austria possessed when it acted during and after World War II, the court "look[ed] to the practice of American courts at that time, which was one of judicial deference 'to the case-by-case foreign policy determinations of the executive branch.'" Significantly, here it was the court itself that made such a determination, holding that Austria could not expect immunity before 1952 given its alleged conduct. *Id.* at 965.

84. *Id.* at 967.

85. Such case-by-case factual analysis propels the Second Circuit in both its *Abrams II* and *Garb II* decisions. *See generally Abrams II*, 332 F.3d 173; *Garb II*, 72 Fed. Appx. 850.

86. *Garb* I, 207 F. Supp. 2d 16.

87. *Haven* I, 68 F. Supp. 2d 943. Technically speaking, of course, *Haven I*, as a district court opinion, has no precedential value, although its impact on the FSIA discussion cannot be doubted. *See* Appellee's Opposition Brief at 16, Altmann v. Republic of Austria, 142 F. Supp. 2D 1187 (C.D. Cal. 2001) (No. 00-8913) (claiming that "the modern trend is very clearly in favor of application of the FSIA to pre-enactment activities").

88. *Altmann* II, 317 F.3d 954.

89. *Garb I*, 207 F. Supp. 2d at 23.

90. *Id.* at 25.

91. *Id.* at 30. The *Garb I* court looked to *Verlinden*, in which the Supreme Court stated that the FSIA "does not merely concern access to the federal courts. Rather, it governs the types of actions for which foreign sovereigns may be held liable in a court in the United States, federal or state." *Id. Accord Verlinden*, 461 U.S. at 491.

92. *Garb I*, 207 F. Supp. 2d at 29. The court thus followed the *Carl Marks* precedent, unlike the *Abrams I* judge in the same New York district court. *Abrams I*, 175 F. Supp. 2d at 434.

Abrams v. Societe Nationale des Chemins de Fer Francais[93] presented the same district court with a different dilemma.[94] Unlike all the other FSIA pre-1952 conduct actions, in *Abrams* the *plaintiffs* argued that the FSIA does *not* apply to their action.[95] Instead, presumably aware of not being able to meet any FSIA immunity exceptions, they sought to invoke federal jurisdiction under international law and the Alien Tort Claims Act,[96] pinning their strategy on the court's finding against the retroactive applicability of the FSIA. The court dismissed the action on the ground that no basis for subject matter jurisdiction other than the FSIA existed,[97] and that the plaintiffs had indeed failed to fit any FSIA exception.[98]

The Second Circuit vacated the dismissal.[99] Significantly, here it was the plaintiffs', and not the defendant's, antecedent rights and settled expectations that would be impaired by applying the FSIA retroactively.[100] The court applied the *Landgraf* analysis, considering whether the FSIA's application to the case at bar would have the "retroactive effect" under *Landgraf* and thus be barred by the general presumption against retroactivity.[101] It concluded that the record was insufficient to answer that query.[102]

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93. *Abrams I*, 175 F. Supp. 2d 423.

94. In *Abrams I*, Holocaust survivors filed suit against the French national railroad company, claiming violations of international law and the law of nations arising out of deportation of Jews and others from their homes in France to various Nazi death camps during World War II. *Id.* at 425. As summarized by the Second Circuit, "SNCF had conveyed more than 72 deportation convoys, taking to concentration camps 75,000 Jews and tens of thousands of others. Fewer than three percent of those deported survived." *Abrams II*, 332 F.3d at 175.

95. The *Abrams* plaintiffs rested their argument against the retroactive applicability of the FSIA on *Carl Marks*. *Abrams I*, 175 F. Supp. 2d at 433-34.

96. According to the plaintiffs, claims arising under customary international law are enforceable in the federal courts as federal common law under 28 U.S.C. § 1331 as well as the Alien Tort Claims Act, 28 U.S.C. § 1350. *Id.* at 433. For more on the Alien Tort Claims Act, *see supra* note 14.

97. The court relied on the Supreme Court decision in *Amerada Hess*, 488 U.S. 428. *Abrams I*, 175 F. Supp. 2d at 440-41.

98. *Id.* at 433.

99. *Abrams II*, 332 F.3d at 188.

100. *Id.* at 180. Presumably, the plaintiffs reasoned that, were the FSIA to apply retroactively to their case, their claims would not fit in any of the FSIA's immunity-stripping exceptions, thus impairing their antecedent rights and settled expectations to have the questions of jurisdiction and immunity resolved on the basis of the laws in effect in the 1940s. *Id.* Significantly, the defendant in the case, SNCF, as a corporate entity separate and distinct from the government, would not have been entitled to sovereign immunity at that time. *Id.* at 175.

101. *Id.* at 183-87.

102. The court stated that "[t]he record contains no information with respect to the State Department's position during World War II on the significance of the corporate form in foreign sovereign immunity determinations." *Id.* at 188.

The court explicitly echoed *Altmann* when it observed that the pre-1952 State Department's treatment of "friendly foreign states" is not necessarily indicative of its position with regard to "war-time crimes of an enemy."[103]

It was perhaps inevitable in the wake of *Abrams* that *Garb* would not be left undisturbed. In an unpublished summary order, the Second Circuit vacated the lower court's order,[104] resting on the *Abrams* panel's conclusion that the "general history of sovereign immunity was insufficient to support a factual determination"[105] of a particular defendant. The court's new-found emphasis on the "'prominent role' of case-by-case recommendations from the Department of State in sovereign immunity determinations prior to the passage of the FSIA"[106] compelled the court to remand the case.[107] This order accomplished two things. Unfathomably, it entirely avoided the crucial distinction between pre-1952 and post-1952 claims.[108] Even more importantly, by focusing on the "case-by-case recommendations" of the executive branch, the Second Circuit seems to have written the pre-1952 absolute theory of foreign sovereign immunity out of existence.[109]

D. Hwang Geum Joo v. Japan*: The Limits of Retroactive Applicability*

In its holding that "the commercial activity exception to the FSIA does not apply retroactively to events occurring before May 19, 1952,"[110] the D.C. Circuit Court distanced itself from its own dictum in *Princz*,[111] and invoked *Hughes* as a clarification of

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Nor did it find "any indication in the record whether the State Department would have recognized immunity in a case such as the one before" it. *Id.*

103. *Id.* at 187. The court then cited, by way of illustration, the holding in *Altmann* with regard to Austria. *Id.*

104. *Garb II*, 72 Fed. Appx. at 853.

105. *Id.* at 854.

106. *Id.* The *Garb II* panel ostensibly deferred to "this development in the law of the Circuit" (i.e., the *Abrams II* panel's remanding to "allow the District Court to undertake a factual inquiry" into the State Department's pre-FSIA position on sovereign immunity). *Id.*

107. *Id.* at 854-55.

108. Thus, it referred to the State Department's position before the enactment of the FSIA in 1976, and *not* the Tate Letter of 1952. *Id. at 854.* Similarly, the Second Circuit *Garb II* panel framed the question presented before it as one concerning "the liability of sovereign states for conduct occurring prior to the [FSIA]'s enactment," and not prior to 1952. *Id.* at 853. Yet, clearly, it is the FSIA's applicability to pre-1952 conduct that is problematic. *See Haven*, 68 F. Supp. 2d at 945 n.4 (stating that the question was "how far back the retroactivity stretches").

109. The absolute theory was officially replaced with the restrictive view precisely in 1952, thus underscoring that particular date. For more on the Tate Letter, see *supra* note 22 and accompanying text.

110. *Hwang II*, 332 F.3d at 687.

111. The court commented that its suggestion in *Princz* that "application of

Landgraf.[112] It also explicitly investigated the congressional intent to "legislate retroactively,"[113] finding no basis for altering sovereign immunity as it existed before 1952.[114] The court reasoned that by enacting the FSIA, Congress at most intended to incorporate the doctrine of restrictive immunity into federal law, "not that the doctrine be applied to events that occurred before the United States first adopted it."[115]

E. A Summary

The FSIA was intended to "free the Government from the case-by-case diplomatic pressures" and "assure litigants that . . . decisions are made on purely legal grounds and under procedures that insure due process."[116] Recent appellate FSIA jurisprudence has seriously undermined these goals, reinserting unpredictability and uncertainty into foreign sovereign immunity analysis.[117] Instead of applying transparent and consistent legal grounds,[118] the courts have gradually reverted to factual, case-by-case investigations.[119] Undoubtedly the morally and politically sensitive nature of plaintiffs' claims[120] helps account for judicial

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the FSIA to pre-1952 events might not be of 'genuinely retroactive effect'" under *Landgraf* "because the statute is jurisdictional rather than substantive in nature" was too premature. *Id.* at 684. The *Princz* panel lacked the benefit of the Supreme Court's subsequent clarification of *Landgraf* in *Hughes*, which demanded the opposite conclusion. *Id.*

112. *Id.*

113. *Id.* at 685. The court found "no clear indication that the Congress intended 28 U.S.C. § 1605(a)(2) to apply to events occurring prior to 1952." *Id.* at 685-86.

114. The court reasoned that "the decision of the Congress, concurrent with the passage of the FSIA, to delete from 28 U.S.C. § 1332 the provision for diversity jurisdiction over a suit brought by a United States citizen against a foreign government" at most suggests the intent to apply the FSIA retroactively to "events occurring between 1952 and 1976," but not before 1952. *Id.* at 686.

115. *Id.*

116. *Verlinden*, 461 U.S. at 488 (quoting H.R. REP. NO. 94-1487, at 7 (1976)).

117. The uncertainty stems, for one, from the judicial determination whether a particular foreign sovereign defendant qualified, prior to 1952, as a "friendly foreign state" or not. *See Altmann II*, 317 F.3d at 964-65 (holding that Austria could not qualify). This can be highly problematic in cases of European countries conquered and officially administered by the Nazis from 1939 to 1945, which constituted a significant portion of Europe at the time.

118. For the legislative preference for purely legal grounds, as expressed by Congress itself, see *Verlinden*, 461 U.S. at 488 (quoting the House Report concerning the FSIA).

119. This is the "trend" initiated by *Haven I*, 68 F. Supp. 2d at 946, and fully embraced by the Second Circuit in *Abrams II* and *Garb II*. *Abrams II*, 332 F.3d at 187; *Garb II*, 72 Fed. Appx. at 854-55.

120. All the cases under discussion here involve, in a more or less direct manner, either the Jewish Holocaust in Europe or the forced prostitution of women in the Far East during the years of World War II.

creativity in refusing to dismiss World War II-related actions. Yet this judicial activism is ultimately irresponsible. It potentially violates the constitutional principle of separation of powers[121] and threatens to undermine the legislative intent behind the FSIA.[122]

IV. A PROPOSED SOLUTION FOR THE SUPREME COURT

The Supreme Court's decision to review the Ninth Circuit's opinion in *Altmann* suggests that the recent inconsistencies in circuit-level FSIA jurisprudence may finally be eliminated.[123] The Court will ostensibly address only one of the three questions presented in Austria's petition for writ of certiorari, namely whether the Act's "expropriation exception . . . afford[s] jurisdiction over claims against foreign states based on conduct that occurred before the United States adopted the restrictive theory of sovereign immunity in 1952."[124] Given this language, it is clear that the Court is free to limit its holding to the narrow issue of the expropriation exception alone. Yet the Court should instead use this opportunity to reject unequivocally, and once and for all, the retroactive applicability of the FSIA to pre-1952 conduct. The growing trend to legitimize the erosion of sovereign immunity ought to be reversed by the Court as an unwarranted judicial attempt to undermine the legislative intent behind the FSIA. Because the issues involved implicate the United States' relationship with other nations at a time when building international alliances is of paramount importance for the United States government, it is particularly important that the Court cut short the judicial efforts to find jurisdiction over some of America's closest allies and strategic partners. If it chooses not to adopt this course, passing the FSIA question back to the legislative branch would certainly be a legitimate option.[125] Yet, for foreign policy and constitutional reasons, the better solution would be to simply declare the unamended FSIA not retroactively applicable to claims arising from pre-1952 events.

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121. The Second Circuit *Garb II* panel itself calls for "appropriate attention to separation-of-powers concerns, inasmuch as the conduct of foreign relations is delegated to the political branches." *Garb II*, 72 Fed. Appx. at 855 n.1.

122. *Verlinden*, 461 U.S. at 488.

123. For details of the case's procedural history, see the United States Supreme Court's website at http://www.supremecourtus.gov/docket/03-13.htm (last visited July 1, 2004).

124. *Id.* Brief for the Republic of Austria at i, Republic of Austria v. Altmann, 124 S. Ct. 2240 (2004) (No. 03-13).

125. *See, e.g.*, Malvina Halberstam, *The Application of the Foreign Sovereign Immunities Act to an Action Against the French Railroad for Transporting Thousands of Jews and Others to Their Deaths:* Abrams v. SNCF, 15 N.Y. INT'L L. REV. 1, 6 (2002) (discussing in detail the *Abrams* case and calling for FSIA to be amended to deny sovereign immunity for violations of specific human rights treaties, "provided that the state has ratified the treaty").

A. *The Expansion of Its Retroactive Applicability Violates the FSIA's Objective*

When Congress decided to codify the restrictive theory of sovereign immunity, it did so chiefly to "take the question of immunity *vel non* out of the hands of the Department of State and put it in the hands of the judiciary."[126] The move was intended both to free the government's political branches of the diplomatic pressures from foreign states sued in American courts, and to guarantee the foreign states, by applying to their cases purely legal standards instead of ad hoc, non-transparent and often politically motivated criteria, a degree of predictability and certainty. The recent developments in FSIA jurisprudence run counter to both of these principles.

First, by reverting to factual investigations, the courts increasingly necessitate the involvement of the State Department, the very problem the passage of the FSIA sought to avoid. The burden on the State Department is both unnecessary and counterproductive, as it tends to divert its limited resources from the tasks of the day. In 1976, the legislative branch acted to relieve the executive branch from involvement in the foreign sovereign immunity adjudication by handing the matter to the judiciary. Instead of clarity, the judiciary has produced inconsistency and confusion, and in effect has begun the process of turning back to the executive, blatantly disregarding the legislative purpose behind the 1976 Act. The Supreme Court should now provide the clarity hoped for by Congress when it enacted the FSIA in the first place.

The Court's clarification will also benefit the foreign sovereigns entangled in litigation before American courts. The Ninth Circuit's characterization of World War II-era Austria as "unfriendly" is at best arbitrary, and at worst exceeds the judicial mandate. In fact, the characterization was directly contradicted by the executive branch in its amicus brief.[127] Before 1952, the United States adhered to the absolute sovereign immunity doctrine, which held that no foreign state could be effectively sued in American courts at all.[128] Allowing the courts to decide today whether a particular foreign government was friendly or not to the United States before 1952 is thus both problematic and irrelevant. It is problematic because courts are hardly qualified to decide such matters. It is, or at least should be, irrelevant, because, prior to the Tate Letter, *no* foreign government, regardless of its label as "friendly" or otherwise, was amenable to suit in the United States

126. Dorsey, *supra* note 21, at 261.

127. Brief for Austria at 14-15, Republic of Austria v. Altmann, 124 S. Ct. 2240 (2004) (No. 03-13).

128. *See supra* notes 18-23 and accompanying text.

courts.

B. Applying FSIA Retroactively Threatens to Violate Separation of Powers

In vacating *Garb*, the Second Circuit directed the district courts to "invite the participation of the Department of State in developing a record to support" the courts' determinations.[129] It qualified this "invitation" with a footnote recognizing the precariousness of the separation-of-powers conundrum.[130]

On the one hand, the conduct of foreign relations is delegated to the political branches, and any adjudication of claims against foreign sovereigns risks significant interference with foreign relations policy, and thus raises justiciability concerns. On the other, avoiding a bright line rule against applying the FSIA to pre-1952 conduct necessarily involves such "invitations" to the very branches that in effect turned them down when Congress enacted the FSIA in 1976. Courts face the dilemma of either encroaching on the other branches' terrain themselves, or unduly burdening the executive branch by encouraging it to participate in adjudication.[131] There is a way out, however. The Supreme Court should simply eliminate the problem by adjudging the FSIA not applicable to pre-1952 conduct.

C. Why Amending the FSIA Is Not Worth the Trouble

There is, of course, the possibility that Congress itself may

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129. *Garb II*, 72 Fed. Appx. at 855.

130. In its entirety, the footnote reads:

> We caution the District Courts that the necessary factual inquiry should be conducted with appropriate attention to separation-of-powers concerns, inasmuch as the conduct of foreign relations is delegated to the political branches (citation omitted), and the adjudication of claims that risk significant interference with foreign relations policy may raise justiciability concerns.

Id. at 855 n.1 (citation omitted).

131. After the terrorist attacks of September 11, 2001, perennial rivalries and conflicts of interest between the judiciary and the executive branches of the government have become only more acute. *See, e.g.*, Smith *ex rel.* Estate of Smith v. Fed. Reserve Bank of N.Y., 346 F.3d 264 (2d Cir. 2003) (affirming summary judgment for the defendants in a declaratory action by relatives of World Trade Center victims against the Federal Reserve Bank and the Secretary of Treasury seeking to satisfy their judgment of $63 million against the Republic of Iraq by attaching Iraqi assets held by the Bank, and holding that the assets became property of the United States pursuant to the President's Executive Order). In its order, the District Court stated that "one wonders whether American families who lost loved ones as a result of terrorism here and abroad ought not be compensated first." Smith *ex rel.* Estate of Smith v. Fed. Reserve Bank of N.Y., 280 F. Supp. 2d 314, 324 (S.D.N.Y. 2003). It nonetheless granted the defendant's motion. *Id.* In *Smith*, the court had to contend with the fact that it was the executive's decision that placed the assets beyond the scope of a pertinent statute. *Id.*

amend the FSIA so that it purports to apply to pre-1952 conduct.[132] Although the distance between the present and World War II increases with each passing year, it is still easy to understand why certain constituencies would continue being greatly interested in such an amendment. Yet such an amendment would itself not escape the problems outlined above. In addition, after *Landgraf*, it too would be most likely found unconstitutional.[133] Congress has no more power to legislate retroactively than the courts do to apply one of its acts to remote, pre-enactment events.

V. CONCLUSION

There is no doubt that the comfort women's grievances deserve an answer from the government of Japan.[134] Similarly, the property rights of European Jewry should be, and in fact in many cases already have been, addressed by the governments of various European states which at one point violated those rights.[135] Yet the United States federal courts are not the right forum for addressing these claims. The FSIA, as a statute affecting substantive rights of foreign sovereigns, is subject to the Supreme Court's strong presumption against retroactivity. Because foreign states could not have been sued in American courts before the

132. The FSIA has been amended several times since its passage in 1976, most notably in 1988, providing for the enforcement of international arbitration agreements and execution of foreign arbitral awards, and again in 1996, when the so-called Flatow Amendment provided a cause of action to victims of state-sponsored terrorism, relied on by the plaintiffs in *Smith*. An Act to Implement The Inter-American Convention on International Commercial Arbitration of 1988, Pub. L. No. 100-669, 102 Stat. 3969 (1988); Pub. L. No. 104-208, 110 Stat. 3009-172 (1996).

133. *See, e.g.*, E. Enters. v. Apfel, 524 U.S. 498, 534 (1998) (holding the Coal Industry Retiree Health Benefit Act of 1992 unconstitutional in part because Congress made it retroactive to 1950, and stating that "[t]he distance into the past that the Act reaches back to impose a liability . . . and the magnitude of that liability raise substantial questions of fairness").

134. A legislative bill to hasten the resolution of issues relating to comfort women was debated but not enacted by the House of Councilors, the upper chamber of Japan's National Diet in 2002, and was again postponed in 2003 "due to lack of time." It is expected to be debated again in 2004. Yumi Wijers-Hasegawa, *Former Sex Slaves Say There Is Not Much Time Left for Japan to Atone*, JAPAN TIMES, Aug. 8, 2003, http://www.japantimes.co.jp/cgi-bin/getarticle.pl5?nn20030808a3.htm.

135. There is a wealth of recent literature on the topic. For a good overview, *see* STUART EIZENSTAT, IMPERFECT JUSTICE: LOOTED ASSETS, SLAVE LABOR, AND THE UNFINISHED BUSINESS OF WORLD WAR II (2003) (chronicling the author's participation as the U.S. President's special envoy for property restitution in complex negotiations between Holocaust survivor groups and several Swiss banks, culminating in a settlement for more than a billion dollars). Poland remains the last Central European state without private property restitution legislation, but as it is set to join the European Union on May 1, 2004, one can expect appropriate legislation to follow suit soon.

American adoption of the restrictive theory of foreign sovereign immunity in 1952, they should not be now exposed to liability arising from their pre-1952 conduct. The Supreme Court should extend its retroactivity jurisprudence to the FSIA, and reverse the judicial trend of allowing the narrow statutory immunity exceptions to apply to World War II-related claims. The past is another country,[136] and other countries' past conduct should not be adjudicated in American courts today.

136. L.P. HARTLEY, THE GO-BETWEEN (1953).